

Right of Resistance – A European Democratic Notion

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Creon:

“And thou didst indeed dare to transgress that law?”

Antigone:

“... , nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth.”

Sophocles (c. 495-406 B.C.)

1 Introduction

On 11 September 2001 two of the world’s tallest skyscrapers collapsed as a result of a targeted terrorist act.

An “attack on humanity” as the EU joint declaration read. The cost of human lives was later calculated at 3,000 innocent victims. Before long, the question was raised whether the western, including the European, legal culture would also fall victim to the subsequent “fight against terror”. This article discusses whether the changes of legal regulation resulting from this century’s terrorist surprise attack may have led to a – so far undiscovered – constitutional gain in terms of legal culture in Denmark.

By *legal culture* I understand a set of value-based notions of importance to the understanding of legal phenomena, which are reflected in legal argumentation. In this context: how do Danish constitutional authorities advocate the right of resistance concept – and on what value concepts is the legal argumentation based?

The definition is inspired by Pierre Legrand: “The essential key for an appreciation of a legal culture lies in an unravelling of the cognitive structure that characterises that culture. The aim must be to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and why it thinks about the law in the way it does. The comparatist must, therefore, focus on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure. It is this epistemological substratum which best epitomises what I wish to refer to as the legal *mentalité* (the collective mental programme) ...”. And he goes on to state, “To focus on *mentalité* is to insist, within the *spatium historicum*, on *longue durée* ...”.¹ This study of the Danish right of resistance covers the period from 1320 up to the present time.

The article, which is not chronological, is based on the following lines of argumentation: The right of resistance as a legal concept presupposes legal acknowledgment of certain societal values. The concrete validity of the individual’s right of resistance is to be measured against the unlawful violation of these values by the system. The current Danish acknowledgement of the right of resistance – as a clear exception to the concept of terrorism as defined in the new version of section 114 of the Danish Criminal Code – forms part of the

¹ See his article, *European legal systems are not converging*, *International and Comparative Law Quarterly* (1996) vol. 45, p. 60 and p. 63.

common EU regulation and its values. Hence, the Danish legal position can only be understood when we have put the legal European building blocks in place. This analysis requires an intertextual comparison of EU documents, and between EU documents and Danish documents, which is being done by means of a number of commented quotation clips (sections 2-4). After this prelude the Danish legal position is inserted into a European context of legal philosophy and legal history (sections 5-6).

2 The Value Basis in EU Law

The 14 September was designated an official day of mourning in the member states of The European Union. A joint declaration was issued by the heads of state and government of the 15 member states, The President of the European Parliament, The President of the European Commission and The High Representative for the Common Foreign and Security Policy, which read, "... these terrible terrorist attacks were also directed against us all, against open, democratic, multicultural and tolerant societies. We call on all countries that share these universal ideals and values to join together in the battle against terrorist acts perpetrated by faceless killers who claim the lives of innocent victims. Nothing can justify the utter disregard for ethical values and human rights. ...".²

Thereby the European democracies committed themselves to the fight for values and human rights as the way to "a better world".

The joint declaration mentions two basic factors that should be emphasised in the course of this analysis of a specific example of what is required "When legal cultures meet" in a European context. On the one hand, the divergence is emphasised: the fact that European societies are multicultural – a concept that also covers different legal cultures. On the other hand, the convergence is demonstrated: the fact that we share the same values and legal principles.

The convergence and the divergence are included in the provisions of the *Treaty of Amsterdam* on The European Union. It is stated in art. 6(3), "The Union shall respect the national identities of its Member States", but in art. 6(1) the common foundation is already established: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

This asymmetrical mirror image – the construction that the European treaty basis contains similarities as well as differences between the member states – has been further unravelled with the *Treaty establishing a Constitution for Europe* of 29 October 2004.³ The European Convent, which prepared a draft in 2003, was set up at the Laeken European Council in December 2001 and began work on 28 February 2002. As is well-known, the constitution was put on

2 *Joint Declaration* (unofficial translation) of 14 September 2001 posted on the homepage of the Danish Prime Minister's Office, "www.statsministeriet.dk".

3 Official Journal of the European Union, C 310, 16 December 2004.

standby for one year following the rejection by referendum in France as well as in the Netherlands in spring 2005. This time for reflection has now been prolonged by another year.

On the one hand, Art. I-43 of the Treaty established a solidarity clause (musketeers oath) for the purpose of terrorist attacks etc., providing: “The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to: (a) prevent the terrorist threat in the territory of the Member States; protect democratic institutions and the civilian population from any terrorist attack; assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack ...”.

On the other hand, Member States’ specific, individual identities are reinforced by Art. I-5, which is set out in a separate section. Para 1 reads:

“The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government ...”

In EU jargon, this basic principle is called “the Christoffersen clause”, because the Danish Prime Minister’s personal representative in the presidium of the European Convent, former Foreign Minister Henning Christoffersen, made a significant contribution to the drafting and inclusion of this particular principle in the draft treaty.

The principal provision of Art. I-5 is supplemented by Art. I-3, para 3, reading “[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”.

In other words, The European Union collectively respects political, constitutional, linguistic and cultural diversity – as is so jocularly phrased in the proposed motto of the Union: “United in diversity” (Art. I-8) – but naturally within the scope of the fundamental principles of the Union. We do not reflect each other, but we mirror ourselves in each other.

With the Treaty establishing a Constitution for Europe, the universal principles of the Treaty of Amsterdam referred to above have undergone what is not only a quantitative expansion, however. The semantic content has also undergone a qualitative expansion. Thus, the terminology has changed from principles to values. With this altered lexical designation of the semantic content, the social objectives denoting values are given additional emphasis. A principle is a comparatively neutral term, whereas value is a more positive term – with emotional connotations. This change enhances the meaning, thus reinforcing the word power. But it is not merely a terminological nicety.⁴ It is substantiated by the fact that the promotion of the values is so fundamental that

4 Carsten Henrichsen: *Offentlige værdier under forandring*, Tidsskrift for Rettsvitenskap 2003 points out, at p. 164 et seq. that value concepts in the legal order are unfamiliar to (Nordic) lawyers. But see Kirsten Ketscher: *Retsvidenskaben set gennem kvinderettens prisme* in Bjarte Askeland and Jan Fridthjof Bernt (eds.): *Erkjennelse og engasjement – Minneseminar for David Roland Doublet (1954-2000)*, Fagbokforlaget, Bergen 2002, p. 57-71.

For values in environmental law, see e.g. John Alder: *Fundamental Environmental Values and Public Law*, in Kim Economides et al. (eds.): *Fundamental Values*, Hart Publishing, Oxford 2000, p. 211-233.

they have to be realised and secured, not only by means of the political institutions, but also by way of the case law of the legal institutions, including the European Court of Justice, cf. Articles I-3 and I-19. The concept of value in the Treaty has been adopted from the preamble of the EU Charter of Fundamental Rights, which has only been politically binding since the negotiations in connection with the Treaty of Nice in 2000.

In the Treaty establishing a Constitution for Europe these values, which are now declared to be legally binding, are described as follows:

“Article I-2: The Union’s values

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

Formally we have not got this far in the European development yet, however; but see section 4. At the time of the apocalyptic terror the common framework consisted of The Treaty on the European Union, as amended by the Treaty of Amsterdam and the Treaty of Nice, and the political “rights” solemnly declared through the Charter.

The political declaration of the EU in connection with 11 September was soon to be superseded by legally binding instruments.

3 Regulatory Measures Under EU Law

Due to the seriousness of these problems, i.e. terrorism and its defeat, swift action was required on the part of the member states. In addition, by Security Council resolution no. 1373 of 28 September 2001 by virtue of Chapter VII of the Pact, the United Nations had ordered its members to draft national legislation designed to defeat terrorism.

Now, the EU made use of the new legal instrument, the Council of Ministers Framework Decision, which has been incorporated in the Treaty on the European Union since the Treaty of Amsterdam, Title VI, concerning the provisions on police and judicial cooperation in criminal matters. In pursuance of Art. 29 the Union’s objective is to provide citizens with “a high level of safety”. Para 2 provides: “That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism ...”. The Council of Ministers may adopt a so-called framework decision, subject to unanimity, for the purpose of achieving this type of specific objective.

In pursuance of Art. 34, para 2 (b), framework decisions deal with “approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.” In other words, this is a particular form of

international EU cooperation – not supranational cooperation.⁵ Under Danish constitutional law ministers' acceptance is subject to consent from the Danish Parliament (*Folketinget*), cf. section 19 of the Danish Constitution.

The proposal for a Framework Decision on combating terrorism was finally adopted by the Council of Ministers on 6 December 2001, subject to ratification by certain member states (Denmark, Sweden and Ireland), and was published in June 2002.⁶

I will only be looking at the definition of acts of terrorism as set out in the framework decision, which corresponds to the amended section 114 the Danish Criminal Code, see section 4 below.

Art. 1 states that each Member State is to take the necessary measures to ensure that a number of offences which are intentionally committed, will be punishable as terrorist offences if they are “committed with the aim of”:

- “– seriously intimidating a population, or
 - unduly compelling a Government or international organisation to perform or abstain from performing any act, or
 - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,
- ...
- (a) attacks upon a person's life which may cause death;
 - (b) attacks upon the physical integrity of a person;
 - (c) kidnapping or hostage taking;
 - (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
 - (e) seizure of ... means of public or goods transport ...;
 - (f) manufacture, possession, acquisition, transport, supply or use of weapons, ...;

5 For the legislative history (since 1995) of the framework decision on a European arrest warrant, which brought about an amendment of the Danish extradition act, see Jørn Vestergaard: *Udlevering til strafforfølgning m.v.* in Peter Garde et al. (eds.): *Festskrift til Hans Gammeltoft-Hansen, Jurist- og Økonomforbundets Forlag, København 2004*, p. 632-633. See Jonas Christoffersen: *Domstolsprøvelse i terrorsager m.v.*, as to the matter of the relationship between the new authority to undertake an administrative security assessment in the course of expulsion/deportation etc. and the European Convention on Human Rights. *Ugeskrift for Retsvæsen 2004 B p. 97 et seq.*

6 The Official Journal of the European Communities L 164 of 13 June, published on 22 June 2002, p. 3 et seq.

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power ...;

(i) threatening to commit any of the acts listed in (a) to (h)”.

A Draft Council Statement⁷ was attached to this proposal, stating ”The Council states that the Framework Decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded. *It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered as “terrorist”acts. ...*” (my emphasis).

Quotations from the Council Statement are set out in the explanatory notes on the Danish bill, see immediately below, stating: “The proposed provision in section 114 ... is to be interpreted in the light of this council statement”.⁸ As will be seen later, the concept of the right of resistance is hidden behind this cryptic phrase, which is apparently retrospective only.

4 Implementation in National law – and its Assumptions in Terms of EU Law

As mentioned above, the EU draft of 3 December was appended to the draft bill from the Minister of Justice to amend the Danish Criminal Code with a view to implementing the framework decision. The bill was introduced in the Danish Parliament (*Folketinget*) on 13 December 2001 – it was passed on 31 May 2002 in much the same form as the bill and came into force that summer. Section 114 of the Danish Criminal Code faithfully adhered to the definitions of terrorism provided for by the framework decision, and the new provision reads as follows:

“Any person who, intentionally and with the aim of seriously intimidating the population or unlawfully compelling Danish or foreign public authorities or an international organisation to perform or refrain from performing any act or to destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation, commits one or more of the following acts of terrorism shall be liable to a penalty of up to life imprisonment, provided that the act is likely to cause serious damage to a country or an organisation by virtue of its character or the context in which it is committed ...”.

7 Council of the European Union, Proposal, document no. 14845/1/01 of 7 December 2001, p. 15. This declaration was also reproduced and included in the schedules to the Danish bill. See *Official Report of Parliamentary Proceedings in Denmark, Supplement A*, 2001-02 (2nd session), Appendix 3, p. 914.

8 *Official Report of Parliamentary Proceedings in Denmark, op.cit. (Supplement A)*, p. 844.

followed by a list of offences set out at the end of section 3, paragraphs (a)-(i).

Apart from a substantially different definition of the concept of terrorism, a word which does not exist in the former section 114, the innovative element inherent in the rephrased text consists in the fact that the interests protected under this section is no longer limited to Danish social affairs, meaning that acts of terrorism committed outside Denmark may also be liable to punishment under the Danish Criminal Code.⁹

On 30 January 2002, the day before the first reading in the Danish parliament, the legal affairs committee arranged a hearing about the Government's "Counter-Terrorism Package". During the hearing, politicians repeatedly raised the question of whether it was possible to distinguish between legitimate and illegitimate terrorist organisations, e.g. how to assess ANC's violent struggle against apartheid in South Africa.¹⁰

The criminal law experts attending the hearing naturally covered that question – with reference to the explanatory notes to the bill, but only when the civil servant who represented the Ministry of Justice procured a copy of the final text of the framework decision during the lunch break, at my request, was it possible to achieve a satisfactory clarification of the issue of legitimate and illegitimate support for the struggle against subversive regimes.¹¹

For the final text contains a preamble in which the concept of terrorism is defined in relation to the principles applying to the legitimate state.

The second whereas-clause states that

“Terrorism constitutes one of the most serious violations of those principles. ...”

Which principles, one might now ask.

The principles involved are the principles and values on which The European Union is founded – and thereby also the Member States. Thus, immediately above the definition of terrorism, the preamble states:

“(1) The European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental

9 Gorm Toftegaard Nielsen: *Retssikkerhed – herunder kampen mod terrorisme* in Claus Bryld and Søren Hein Rasmussen: *Demokrati mellem fortid og fremtid*, Tiderne Skifter 2003, p. 257-262.

10 Thus Sandy Brinck (S), Line Barfod (EL) and Anne Baastrup (SF) in *Bekæmpelse af terrorisme* – summary and edited transcript of a public hearing about the Government's counter-terrorism legislation, Folketingets Retsudvalg 2002, p. 26, 27 and 30. The consultation report is based on transcripts of tapes which have not been presented to the speakers for approval; the language used is therefore typically oral language.

11 See the consultation report, p. 87, cf. *Official Report of Parliamentary Proceedings in Denmark*, Proceedings 2001-02, 2nd session, 3rd reading, p. 7752. The document reproduced in the bill (Supplement A, Appendix 3, p. 910 et seq.) was a proposal dated 3 December. The final text of 6 December was assigned file number 14845/1/01 rev. 1 and is dated 7 December. It should have been reproduced in the bill which was introduced on 13 December.

freedoms. It is based on the principle of democracy and the principle of the rule of law, principles which are common to the Member States”.

In other words, terrorism is *not* political violence against any legal order. It is only political violence against an order that satisfies certain legal criteria: special values and principles, thereby constituting a *legal* order of a certain content. The European democracies are being qualified through substantive criteria. The Council Statement, see the end of section 3, mentions the overall concept of “*democratic values*”. This is a clear indication that conduct aimed at preserving or restoring such values cannot be deemed to constitute “terrorist acts” – a case in point is the resistance during World War II.¹² Such acts, however, would be covered by the right of resistance, see section 6.

If we consider these criteria in more detail, we recognise them from Art. 6(1) of the Treaty of Amsterdam, initially see section 2 above. But not all of them. “Human dignity”, “equality” and “solidarity” are not included in the Treaty of Amsterdam. On the other hand, they are mentioned in the preamble of the EU Charter of fundamental rights and freedoms, stating e.g.:

“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. ...”

Unlike the text itself, the preamble is generally not binding; but it may become binding if a court applies the content of the preamble in the interpretation of the individual articles.

In this case, we see that the terminology (values) and the specification of the conceptual content (e.g. solidarity), which supplement the wording of the applicable treaty (Treaty of Amsterdam), have wandered from the preamble of a merely politically binding document (the Nice Charter) into the preamble of a legally binding document (the Framework Decision), which by definition is binding as to the ends of combating terrorism – unlike the means.

It goes without saying that, in practice, the word used in the Framework Decision: “terrorist offence” (Art. 1) will not be interpreted without a semantic connection with the word “terrorism” as stated in the preamble, which is indeed established by way of the appended Council Statement, which may be seen as part of the legislative material for the Framework Decision.

Thus, the Council Statement becomes part of the Danish legislative material, by way of the official notes to our bill and will thereby ultimately influence the specific interpretation of section 114 of the Criminal Code.

Accordingly, terrorism cannot be understood as defined by section 114 – as already mentioned, this provision applies on a global scale - without a commitment to the values of the legitimate state, since political violence against an illegitimate state is not terrorism. The defence of the values of the legitimate state is thus irreversibly linked to the notion of legitimate violence in the name of democracy.

With the adoption of the criminal law amendments the concepts of terrorism, right of resistance and the legitimate state (see sections 5 and 6), which were

¹² *Official Report of Parliamentary Proceedings in Denmark*, Supplement A, 2001-02, 2nd session, p. 914.

based on common value concepts in the European environment and were to gain acceptance in Denmark, were converted from the political to the legal sphere, and they have therefore undergone a transformation from the international to a national level in terms of legal culture by means of explicit acceptance from a large majority of the Danish Parliament, as will now be proved.

6 parties (the Liberal Party (V), the Social Democrats (S), the Conservative People's Party (KF), the Socialist People's Party (SF), the Social-Liberal Party (RV) and the Unity List (EL)) representing 148 of the 179 members of the Danish Parliament (*Folketing*) wanted the preamble to the EU Framework Decision to be included in the Legal Affairs Committee report dated 21 May 2002.

These parties also wanted to include a number of "Specifications concerning the initiatives against terrorism in terms of criminal law".¹³

The specifications mainly refer to section 114. It is stated:

"S, V, KF, SF, RV and EL wish to emphasise that the concept of terrorism is defined in relation to the legitimate state, which is based on the universal values of human dignity, freedom, equality and solidarity, respect for human rights and fundamental freedoms. The legitimate state is based on the principles of democracy and the rule of law. Terrorism is a threat to democracy, free exercise of human rights, and economic and social development.

S, V, KF, SF, RV and EL emphasise that the proposed provision of section 114 is to be interpreted in the light of the declaration agreed by the EU member states at the time of the EU Framework Decision on combating terrorism. (Here the text of the declaration is quoted) ..."

S, V, KF, SF, RV and EL also wish to emphasise the restricted scope of section 114, which is expressed in the preamble to the EU Framework Decision. In the course of the preamble it is stated that "this Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on the European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate. ...".

Then this substantial parliamentary majority concludes that on the above background they wish to emphasise

"that the provision of section 114 should be read with the necessary limitations. For the purpose of a specific assessment of whether a given act is covered by the proposed provision of section 114, an overall assessment of all aspects of the

13 See Report on bill to amend the Criminal Code etc., issued by the Legal Affairs Committee on 21 May 2002, *Official Report of Parliamentary Proceedings in Denmark*, Supplement B, 2001-02, 2nd, p. 1466 et seq.

case must therefore be made. In the light of the mentioned Council declaration and the preamble of the framework decision, an element of the overall assessment must be whether an act is aimed at powers of occupation etc. In this connection, the position of the international community to the country in question may also be considered, e.g. through UN resolutions”.

It can hardly be expressed more clearly. The Danish Parliament accepts an unwritten legal principle of the right of resistance (“whether an act is aimed at powers of occupation etc.”) with reference to an EU Council Statement as well as to an EU Framework Decision with preamble.¹⁴

The term right of resistance is not used in the report, however.

In reply to the question raised by the Legal Affairs Committee (no. 99)¹⁵ about the constitutional principle of a “right of resistance” the Ministry of Justice answered, “The Danish Constitution does not provide for such a ‘right of resistance’, and the views and statements about that right in constitutional literature are - ... - highly theoretical. Partly on those grounds, it is the view of the Ministry of Justice that the concept of a right of resistance in itself is not likely to provide a suitable interpretative aid towards the delimitation of the scope of the proposed provision of section 114 of the Criminal Code”.

The Ministry of Justice refers to Alf Ross’s (1980) and Henrik Zahle’s (1997) textbooks on constitutional law, for a possible right of resistance during the Middle Ages and the German Occupation respectively, see section 6 below, but does not take up a position here on the subject of the contemporary use of the concept of a right of resistance.¹⁶

On the other hand, this is made very clear by the Ministry in the Legislative Department’s review of the legislation as enacted, in the Danish legal periodical “Juristen”. Here the Ministry’s relevant heads of division comment on the new provisions of the Criminal Code etc.

They state: “When the bill was being considered by the Danish Parliament, one very important theme was to preclude sentencing under the new provision in section 114(1) for acts committed in a struggle to preserve or restore democratic values etc., which should therefore not be deemed to represent acts of terrorism”.¹⁷

In support of this statement, the above statement by the majority of the Legal Affairs Committee is quoted first, explicitly linking terrorism, the legitimate state and its values. Then it is specified that a *restrictive* interpretation of section

14 The bill was recommended for adoption, but without the votes of the Socialist People’s Party and the Unity List. On the other hand, it was supported by the Christian Democrats, who did not endorse the quoted specifications of the meaning of section 114, which was also the case for the Danish People’s Party.

15 The question was: ”The Minister is requested to send the committee a description of ‘the right of resistance’ as mentioned by professor Henning Koch during the hearing on the bill on 30 January 2002, as a constitutional principle”.

16 *FT, Tillæg B*, 2001-02, 2nd session, p. 1490-1491.

17 Ole Hasselgaard and Anne Kristine Axelsson: *Strafferetlige initiativer mod terrorisme mv.*, Juristen 2003, p. 137.

114 is to be applied in view of the EU preamble and the EU declaration, and excerpts of both documents are quoted as by the Legal Affairs Committee.

On this background, the Ministry of Justice concludes that in deciding whether an act is covered by the terrorism provision, it will “be relevant to consider whether the act was aimed at a democracy such as Denmark or whether it was instead aimed at, say, a dictatorship or an occupying power”.

The concept of a right of resistance cannot be recognised more clearly – without mentioning the word itself.

And the staff of the Ministry of Justice go on to state “This implies that the assessment will incorporate circumstances of a political character, especially in the sense that an act which may be covered by section 114(1), may be committed on a certain political background. An assessment of whether an act has been committed by persons whose aim must be to threaten *democratic values*, will consequently be an assessment containing clear elements of a political nature”¹⁸ (my emphasis). The overall and final assessment of the criminality of an act, including legal considerations of necessity and proportionality, will be for the courts to make, as properly pointed out by the Ministry.

Similarly, it may be said that in this part of the quotation – although by way of various adjustments – the Ministry specifies the criterion of the meaning of the legitimate state for the understanding of the right of resistance, the same state that the legal affairs committee is defining precisely by means of a specification of the relevant values.

Thus, the legislative and executive powers agree on the concepts of right of resistance and the legitimate state.

5 The Legitimate State

In other words, illegitimate terrorism and the legitimate right of resistance cannot be assessed in law out of context to the state concept at which the rebellion and violence are directed.

This state concept is not a concept of a state in the formal sense only. If a legitimate state is by definition any state whose decisions are being made in pursuance of the state’s own norms of competence, laying down rules determining who is authorised to make decisions, in which way and in which form – and where the fundamental decisions are made by a popular assembly elected through free, equal and secret elections, and the government’s decisions are in accordance with the majority of the assembly – regardless of the content of such decisions, the right of resistance dissolves into a fight against windmills. The legal justification of the right of resistance is that the administration of the

18 Hasselgaard og Axelsson, op. cit., p. 138. The quotation is a reproduction of the essential content of the Ministry’s answer to the Legal Affairs Committee’s question no. 119 printed in *FT, Tillæg B*, 2001-02, 2nd session, p. 1495. This answer is a clear modification of the answer to committee question no. 100, which – interestingly – is not reproduced in the report, but is to be found in the original material as Appendix no. 79.

state (or any forces actively interfering with it) first violates some fundamental values above or beyond its substantive jurisdiction.

The right of resistance presupposes a conception of the state in a substantive sense,¹⁹ in modern times as a substantive democracy in addition to the procedural or institutional democracy, see immediately below for more particulars.

This now raises the question of which substantive content deserves protection as legitimate; or rather, which does not – and will thus in the final resort be liable to fall victim to the lawful power of the people.

As we have seen in section 2 above, the member states of the European Union are already committed to a perception relating to the existence of certain, common European values, as formulated in the applicable treaty basis as well as in the non-ratified Treaty establishing a Constitution for Europe.²⁰ The existing core of values has now resulted in specific legal effects in connection with the terrorism laws as demonstrated in section 4.

The development towards a recognition of a substantive democracy concept has become increasingly obvious in Europe throughout the 1990s,²¹ as reflected in the case law of the European Court of Human Rights in Strasbourg.²²

On 13 February 2003, The European Court of Human Rights (ECHR) ruled, in a very clear, unanimous decision, sitting as The Grand Chamber (17 judges), on the meaning of the substantive, European democracy – albeit with two “concurring opinions”.

The case involved the Turkish Welfare Party (*Refah Partisi and Others v. Turkey*, Hudoc REF00004090). In the 1995 elections, the party won 22 % of the votes, which made it the largest party in Turkey with 158 seats out of 450 members of the National Assembly. In 1996 it formed the government. In 1998, the Turkish Constitutional Court banned the party, the reason being that the various spokesmen for the party had advocated three types of social changes: a dual-law system (with different legal norms applying to persons of different religious beliefs), introduction of sharia and a call for jihad, which contained spiteful remarks (“fighting words” or “hate speech”) about the infidels.²³

Citing *United Communist Party of Turkey and Others v. Turkey*²⁴, para. 86 states:

19 Peter Høilund: *Den forbudte retsfølelse – om lov og moral*, Munksgaard, København 1992, p. 238-243, cf. p. 175-181.

20 According to Article I-29, the European Union’s current conception of law, as laid down by the Court of Justice, is based not only on “law” (in a formal sense), but also on “justice” (in a substantive sense). Compare law, recht, diritto, derecho, etc.

21 Henning Koch: *Grundretlige værdiers prøvelse*, in Peter Blume (ed.): *Grundrettigheder*, Jurist- og Økonomforbundets Forlag, København 2000, p. 152-155.

22 Jens Teilberg Søndergaard: *Ret, demokrati og globalisering – om kosmopolitanisme og empirisme*, Jurist- og Økonomforbundets Forlag, København 2003, p. 213-217.

23 Henning Koch: *Niddingsord – om hadefulde ytringer i komparativ belysning*, i *Festskrift til Hans Gammeltoft-Hansen*, Jurist- og Økonomforbundets Forlag, København 2004, p. 362-363.

24 Judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, p. 21-22, § 45.

“Democracy is without doubt a fundamental feature of the 'European public order'... That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society... In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it”.

By way of the following observation in para. 96: “... the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system”, certain legal means *and* ends are listed in para. 98:

“... the Court considers that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection ...”

Finally it is established in para. 99:

“In view of the very clear link between the Convention and democracy ..., no-one must be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society. *Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole*” (my emphasis).

Against the background of this judgment, a material democracy (in the legal sense) may be defined as a social arrangement in which the political democracy subject to judicial review (1) is to be restricted by respect for certain moral/political values²⁵ and (2) is to exercise its powers with a view to realising

25 Critique by Søndergaard, op.cit., p. 225-228 and p. 293-297. Stig Jørgensen: *Demokrati – i fortid, nutid og fremtid*, Fremad, København 2001, talks about “the moral state”, p. 76-80.

those values.²⁶ The latter objective has been clearly codified in the Treaty establishing a Constitution for Europe, Articles I-3, I-9 og I-19.

In its judgment from 2001 about the criminality of the killings by the East German border guard, the European Court of Human Rights, sitting as a Grand Chamber, established, though indirectly, that “acts which flagrantly infringe all humanity and the core of human rights”²⁷ are not protected by Art. 7 of the Convention prohibiting the retrospective application of criminal laws. In the last resort, the rule of law principle about foreseeability must yield to substantive justice. In reality, this represents an endorsement of the German legal philosopher Gustav Radbruch’s formula, which implies that even positive, but extremely unfair norms cannot be recognised as valid legal norms.²⁸

In other words, a statute may be unlawful, cf. section 6 about Danish reformatory (Lutheran) law. This is why the Strasbourg court as well as the Luxembourg court, see Treaty on the European Community (Amsterdam) Art. 220 (former Art. 164) and Treaty establishing a Constitution for Europe Art. I-29, make their decisions on the basis of an overall interpretation of statutes *and* the law.

Another way of expressing this would be to say that in Europe after World War II, a notion of a *qualitative value state* was established. It means that the legitimacy of the state is no longer to be assessed on formal criteria alone, based on the monopoly of popular sovereignty, and is limited to procedural and structural means (equal voting rights, secret elections, several candidates, etc.) for the achievement of non-defined objectives, but legitimacy is now tied to specified ends in terms of content by way of value care and promotion, such as through the establishment of fundamental and human rights, but also by identifying prioritised considerations of the social use, e.g. solidarity and tolerance. Formal legitimacy is being expanded by material legitimacy.

This conception of the state is at variance with the liberal, libertarian European view of the 1800’s of the *neutral governance state* that is characteristic of parliamentary democracy in its unadulterated form, exemplified by the Weimar republic, where the administration of the state is defined objectively through norms of competence.

This constitutional outlook towards “a rationally regulated cooperative engagement” based on “a benign conception of the state”²⁹ is highly European in its manifestation. The American Richard Kay has no address to the member

26 See also Synne Sæther Mæhle: *Grenser for rettsanvendelsesskjønn*, Gyldendal Norsk forlag, Oslo 2004, p. 261-263 and p. 303-308.

27 In Jens Elo Rytter: *Om at straffe med tilbagevirkende kraft – sagen om Tysklands retsforfølgning af en østtysk grænsevagt*, Juristen 2003, p. 105 in his analysis of the decisions from the Strasbourg court (K.-H.W. v. Germany, Appl. No. 37201/97, judgment dated 22 March 2001, Grand Chamber: 14 judges against 3) and the Karlsruhe court (Case: Mauernschutz dated 24 October 1996, Entscheidungen des Bundesverfassungsgerichts, Vol. 95, 1997, p. 96-143).

28 Rytter, op.cit., p. 98.

29 Michael Oakeshott as quoted by Richard S. Kay: *American Constitutionalism* in Larry Alexander (ed.): *Constitutionalism – Philosophical foundations*, Cambridge Studies in Philosophy and Law, Cambridge University Press 1998, p. 20.

states of the European Union, but severely criticises the part of the theoretical discourse in the U.S.A. that seeks to view constitutional law as a tool “for facilitating a mode of political discourse in which the good is sought in collective decision-making and political”. And he goes on to state, “Contemporary exponents of this “republican” outlook do not, to be sure, suggest that the interests of individuals are to be submerged in the interests of the state. Indeed, they embrace a picture of constitutional restraint not unlike that inferable from liberal premises. But they understand such restraint on state behavior not as a prerequisite to personal self-determination, but as necessary for authentic public deliberation and decision”.³⁰

In my view, this more than anything else probably underlines that the Convent drafting the American Constitution was in Mars, and the Brussels Convent that prepared the draft Treaty establishing a Constitution for Europe is solidly based in Venus.

In Robert Kagan’s famous post-9/11 essay: “Power and Weakness”, which is introduced by these provocative words: “It is time to stop pretending that Europeans and Americans share a common view of the world, or even that they occupy the same world”, he quotes the British diplomat, Robert Cooper, for the following observation: “... Europe today lives in a “postmodern system” that does not rest on a balance of power but on “the rejection of force” and on “self-enforced rules of behavior”. In the “postmodern world,” writes Cooper, “raison d’état and the amorality of Machiavelli’s theories of statecraft ... have been replaced by a moral consciousness in international affairs”.

Kagan goes on to state: “The transmission of the European miracle to the rest of the world has become Europe’s new *mission civilisatrice*. Just as Americans have always believed that they had discovered the secret to human happiness and wished to export it to the rest of the world, so the Europeans have a new mission born of their own discovery of perpetual peace. Thus we arrive at what may be the most important reason for the divergence in views between Europe and the United States. America’s power, and its willingness to exercise that power – unilaterally if necessary – represents a threat to Europe’s new sense of mission.”

And he draws this bitter-sweet conclusion: “Americans have no experience that would lead them to embrace fully the ideals and principles that now animate Europe. ... Americans are idealists, but they have no experience of promoting ideals successfully without power”.³¹

Ironically, the European project is nevertheless originally an invention of American security policy.³²

One can only hope that Europe’s establishment of Kant’s “eternal peace” that Kagan envies us, somewhat scornfully, will be possible without a state of eternal

30 Kay, op.cit., p. 20.

31 Robert Kagan: *Power and Weakness*, Foreign Policy, July 2002, internet edition p. 1, 11, 12 and 18.

32 Kagan, op.cit., p. 15 og Koch: *Det Europæiske Statsfællesskab – et trojansk næbdyr* in Thomas Pedersen (ed.): *Europa for folket? – EU og det danske demokrati*, Magtudredningen, Aarhus Universitetsforlag 2002, p. 68-82.

strife with the world outside Europe at the same time. In any event, an internal community of values – and a self-defence of such a community, see section 2 above – does not seem invariably to have to be accompanied by an enforced external community of values.

Having defined the legitimate state of today in a European context, we will now turn to a definition of the concept of the right of resistance.

6 The Right of Resistance

Why has the right of resistance not been in existence under Danish constitutional law so far?³³ Indeed, it has – hundreds of years ago.

In his memoirs, Jørgen Kieler, member of the Danish resistance movement during the German Occupation, writes: “Participation in the resistance was primarily a personal initiative, which is only understandable if you appreciate that the Resistance Movement was first and foremost an ethical rebellion that did not respect traditional social and political dividing lines, apart from the ones that separated traitors from the rest of the population, and that did not allow itself to be confused by the illusion of neutrality which was shrouding Danish politicians to an ever increasing extent”.

From this moral right he deduces a *jus resistendi* - referring to the English Magna Carta of 1215 as well as to the later French concept of *résistance* – a right for citizens to rebel if a ruler exceeds his powers. As far as Denmark is concerned, he refers to the first proclamation by the Danish Freedom Council (*Danmarks Frihedsråd*) on 18 September 1943, which includes phrases like “the people’s will to resist” and “the Danish struggle for freedom”. He goes on to state, “Due to the policy of appeasement pursued by our governments and our Parliament, these activities were necessarily conducted contrary to the emergency legislation imposed by the foreign powers”.³⁴

However, this conception of an actual right of resistance seems to be at variance with the ideas behind the draft bill to supplement the Criminal Code pertaining to treason and other subversive activities, which was drawn up by the legal committee of the Danish Freedom Council and which was to become the main foundation of the judicial purge. About this particular subject, Ditlev Tamm writes: “They did not wish to go as far as to consider the Government of the period from 9.4.1940 to 29.8.1943 as illegitimate, which indeed would not have complied with the attitude of the Danish Freedom Council as expressed in their pamphlet ‘Naar Danmark atter er frit’”.³⁵

33 On p. 2 of its consultation response to a “Counter-Terrorism Package” proposed by the Ministry of Justice, dated 23 November 2001, The Danish Center for Human Rights refers to the principle of a possible recourse to rebellion as set out in the Preamble to the UN’s Universal Declaration of Human Rights of 1948.

34 Jørgen Kieler: *Hvorfor gjorde I det?*, vol. 1, Gyldendal, København 2001, p. 94-96. It was hardly a coincidence that Jean Anouilh, the French playwright, rewrote Sophocles’ tragedy “Antigone” in 1942, some time after the Germans had occupied Paris.

35 Ditlev Tamm: *Retsopgøret efter besættelsen*, Jurist- og Økonomforbundets Forlag, København 1984, p. 77-78.

In his constitutional law, Henrik Zahle writes: “During the German Occupation from 1940-45, the resistance movement committed many criminal offences, the legitimacy – and impunity after 1945 – of which is discussed on the basis of considerations of self-defence and acts of war, but which may also be seen in the light of the right of resistance”.³⁶

There are no legal decisions, however, that recognise the actions of the Resistance Movement as being justified by a right of resistance, which of course would require a decision holding that the Danish government during the German Occupation was illegitimate; on the contrary, rather, an unreported decision from the Eastern High Court in 1948 (without a trial on its merits) actually takes account of a Supreme Court decision (UfR 1941.1070 H), regarding the internments under the Communist laws as not unconstitutional.³⁷

In his textbook on 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 state of the Middle Ages”.³⁸

This notion was a consequence of the *lex naturalis*, but also of statute law as embodied in old statutory provisions and legal principles as expressed in the coronation charters.

The Danish legal historian, Poul Johs. Jørgensen, describes the legal position as follows: “As an emergency measure in the last resort against a king who acted unlawfully, however, recourse could be had to the right of armed resistance against him. The people owed the king allegiance and obedience, but only as long as he observed his duties as a king. If he failed to do so, his subjects might shed their allegiance and offer resistance, and if the king did not come out as the stronger, the result might – and usually would – be his removal and the election of another king. Even in the view of the church, the king could forfeit his right to the throne. ... The people’s right to take arms and offer resistance was probably vested in the Constitution from former times, but it only appears clearly towards the end of the Middle Ages, which is probably due to the influence from contemporaneous foreign theories of the state ...”.³⁹

The British ambassador Molesworth expressed his nostalgic enthusiasm for this older legal position as follows: “But if, after an election, one felt cheated by a cruel, bad, tyrannical and spendthrift king, it happened that he was gotten rid

36 Henrik Zahle: *Dansk Forfatningsret*, 3rd ed., vol. 3, Christian Ejlers Forlag 2003, København p. 283.

37 Henning Koch: *Demokrati - slå til! Statslig nødret, ordenspoliti og frihedsrettigheder 1932-1945*, Gyldendal, København 1994, p. 318 and p. 413-414.

38 Alf Ross: *Dansk Statsforfatningsret*, 2nd ed., vol. I, Nyt Nordisk Forlag – Arnold Busck, København 1966, p. 78.

39 Poul Johs. Jørgensen: *Dansk Retshistorie*, G.E.C. Gads Forlag, København 1969, p. 317. For the legal position under Jydske Lov of 1241, see Ditlev Tamm: *Dansk retshistorie*, 2nd ed., Jurist- og Økonomforbundets Forlag, København 1996, p. 28-29.

of, either by outlawing or murder”.⁴⁰ This book, which was highly critical of absolute monarchy, was actually used to advocate the American independence.

The right of resistance was first codified in an addendum to the Coronation Charter of 1320 (the “Old King’s Law”) and was last explicitly included in the Coronation Charter 1523 section 76.⁴¹

But in Christian III’s Coronation Charter of 1536 the right of resistance – as a popular right – had disappeared.

The political explanation could be that the Danish realm had recently witnessed rebellions, leading to the removal of Christian II, and had since 1533 been ravaged by a bloody civil war, referred to as “Grevens fejde”. But this is not the constitutional explanation.

With the introduction of the Reformation in 1536, Luther’s teachings on a “two-regime” structure were firmly established: God rules the world through secular as well as clerical authorities, both exercising their powers under responsibility to God, even though the functions of church and state are formally separate. Give to the Emperor what belongs to the Emperor, but give to God what belongs to God. “The royal power and authority were supported vigorously by the teachings of Luther”,⁴² which had been created in an obvious theoretical showdown with peasant “swarmers” who were rebelling against the German princes.⁴³ Luther’s treatise from 1523 “Temporal Authority: To What Extent Should It Be Obeyed?” abolished the legitimacy of the right of resistance. Unfair laws must also be obeyed.⁴⁴

Now, what was Luther’s intention more specifically? Preaching is to replace rebellion, preaching to the Christian prince. Luther threatens princes with God’s punishment instead: “In the long term, they will not, cannot, do not wish to suffer your tyranny and lechery. Dear princes and masters, this you need to live by: God will no longer tolerate it. Those days are over when you hunted and persecuted people; therefore stop your violence and tyranny and think that you have to act in accordance with law and order, and allow God’s word to act freely as it must and will, without preventing it”.⁴⁵

Svend Andersen writes: “It has often been argued that if Christians were subjects, he/she would not be entitled to show any form of disobedience to the political ruler”. He varies this, first of all by pointing out that rulers are not

40 Robert Molesworth: *En beskrivelse af Danmark som det var i året 1692*, the chapter on the Constitution, Wormianum, København 1977, p. 45.

41 P. J. Jørgensen, op.cit., p. 318, cf. p. 70.

42 Martin Schwarz Lausten: *Danmarks kirkehistorie*, 2nd ed., Gyldendal, København 1987, p. 128-131.

43 Tamm, op.cit., p. 92.

44 Peter Høilund: *Luthers retslære og moderne retspositivisme* in Lisbet Christoffersen (ed.): *Samfundsvidenskabelige syn på det religiøse*, Jurist- og Økonomforbundets Forlag, København 2001, p. 199-205.

45 *Luthers Skrifter i Udvalg (Verdslig øvrighed – i hvor høj grad man er den lydighed skyldig)*, vol. IV, Gads Forlag 1964, p. 188, as quoted and commented on by Torben Bramming: *Hvad er et folk? – overvejelser over folkets danske og europæiske identitet*, Vindrose, København 2002, p. 69.

entitled to exercise powers of compulsion, which is under God's exclusive jurisdiction or competence, but in the event of any encroachments the subject can and must offer only passive, verbal resistance. Secondly, he emphasises that obedience in the political arena is subject to a limit *vis-à-vis* the unjust war. Here, the subject can and must show disobedience - in this political area within a very limited scope: state of war. A just war, on the other hand, is a defensive war, as compared to an equilibrium of power where negotiation is no longer possible.

Not all doors are therefore closed between the houses of the two regimes: law and ethics may open up for contact between the temporal and the clerical. But Luther does not include a justified – or even required – violent disobedience against the tyrant prince. Can a tyrant never be deposed according to Luther. The answer is: Yes! But only on condition that the prince is insane. “Tyranny in itself, however, is not sufficient cause for deposing a prince. Here Luther inserts an important prerequisite: removing a prince may be tantamount to disrupting the political order itself,” Andersen concludes.⁴⁶

Torben Bramming writes about Luther's treatise referred to above that in his view “... it is obvious that this entire treatise is not a discussion of theories of the state, but preaching of the relationship between king, clergy and people as reflected in the words of the Bible”.⁴⁷ To this can be said, however: But it was to become such a discussion!

Ludvig Holberg (1684-1754), who often imported foreign law into a Danish context, often word by word,⁴⁸ writes directly based on Samuel Pufendorf (1632-1694) in his textbook:⁴⁹ “A King's Person must be sacred. – Subject therefore should not disobey lawful orders, nor grumble over them, even if they are somewhat harsh, but must endure them with patience like pious children have to endure much from their parents, and if a prince pursues a subject on his life, he is not to defend himself as he would against another citizen, although he may be innocent, nor raise his gun against the Father of the Realm, but try and save his own life, either by flight or by his shield”.⁵⁰

46 Svend Andersen: *Etik, ret og samfund* in Christoffersen, op.cit., p. 235-241.

47 Bramming, op.cit., p. 70. This could easily be the reason why neither the Christian Democrats nor The Danish People's Party agreed to the observations by the legal affairs committee on the right of resistance, see note 14.

48 See also the article by Hanne Petersen: *Holberg – den store formidler af europæisk retskultur* in Henning Koch and Anne Lise Kjær (ed.): *Europæisk retskultur – på dansk*, Thomson, København 2004.

49 Ludvig Holberg: *Moralske Kjerne eller Introduction til Naturens og Folkerettens Kundskab, uddragen af de fornemste Juristers, besynderlig Grotius's, Pufendorfs og Thomasius's Skrifter* (1716). The book was published in 6 editions, the latest one posthumously in 1763. This was the only legal textbook in Danish for almost 40 years. The degree in law was introduced in 1736. “The major part was copied from Pufendorf's oeuvre on natural law from 1672” (De jure naturae et gentium I-VII, Lund), as stated by Ditlev Tamm in *Holberg og naturretten*, in Klaus Neiiendam's and Tamm's: *Holberg og juristerne*, Jurist- og Økonomforbundets Forlag, København 1984, p. 46.

50 Quoted from Kåre Foss: *Ludvig Holbergs naturrett – på idéhistorisk bakgrunn* which is compared to Pufendorf's original text, Gyldendal Norsk Forlag, Oslo 1934, p. 434.

Hugo Grotius (1583-1645) and Christian Thomasius (1655-1728), two other persons who served as Holberg's models and whose teachings on the state were predominantly monarchical, clearly rejected the right of resistance⁵¹ – as Thomas Hobbes (1588-1679) had fervently done.⁵² Pufendorf might not be quite as consistent in his rejection of the right of rebellion, but he is very brief concerning a possible reservation – in the words of Kåre Foss: “princes who issue laws or orders at variance with natural justice are either mad or so evil that they are going to destroy their own states”.⁵³ But a right of resistance is in any event restricted to a minimum, similar to Luther's narrow reservations as to its legitimacy referred to above.

Holberg, on the other hand, is uncompromising. Foss writes: “Formally, the moral core does not leave subjects a shred of right against the Sovereign. The Sovereign naturally has to observe natural justice, but is only accountable to God”.⁵⁴

This is confirmed by the Danish historian, Edvard Holm: “Such a strong emphasis on the authority of the State and of discipline *vis-à-vis* the executive authorities as the one advocated by Holberg might be combined with Republicanism as provided by the Antiquity, but at the time of Holberg it was best suited for the Absolute Monarchy. However much he may have distanced himself from the old Lutheran teachers of state jurisprudence by his opinions of the origin of States and Constitutions, he is still a strong advocate of the absolute monarchy, and he considers any opposition to princes to be inadmissible under any conditions whatsoever”.⁵⁵ Holberg was a keen opponent of the British constitution, and his weakness for the Revolution of 1688 was only due to his undivided pleasure in the victory of Protestantism over Catholicism.

Holberg was not only an ardent supporter of the absolute monarchy and Luther's two-regime teachings, he was also an almost fanatical opponent of the two-head structure of the Catholic Church: the fact that the Church is an independent, alternative authority that is a state within the state, and that may threaten the prince.⁵⁶ “For”, as he says, “the same religion curtails the powers of Kings as well as other authorities and results in all government becoming biceps, or two-headed, as one of the most important estates may in some cases flee to the jurisdiction of a foreign Sovereign and appeal to the Pope in Rome”.⁵⁷ For that reason, too, the right of resistance was dangerous to the power of the state.

51 Edvard Holm: *Holbergs statsretlige og politiske synsmaade* – Festskrift i anledning af Universitetets Firehundredaarsfest juni 1879, Gyldendalske Boghandel, København 1879 (Reprographic reissue and publication by Selskabet for Udgivelse af Kilder til Dansk Historie, 1975), p. 4-5.

52 Foss, op.cit., p. 435, cf. p. 419.

53 Foss, op.cit., p. 436.

54 Foss, op.cit., s. 437.

55 Holm, op.cit., p. 28. On the other hand, he could accept a coup d'état if a usurper defeated democracy for the benefit of monarchy, provided the sovereign ruled the republic with piety and prudence, Foss, op.cit., p. 426.

56 Lars Roar Langslet: *Den store ensomme*, cf. p. 218, Gyldendal, København 2002, p. 304.

57 Holm, op.cit., p. 58.

But Holberg's project did not seem to be only religious and legal – he probably also feared anarchy and chaos.⁵⁸

The teachings that Holberg endorsed involved a rational natural law, meaning that abstract reason becomes the absolute basis of the law, from which the norms may be deduced: “a natural justice”.⁵⁹

However, his libertarian outlook in the areas of freedom of religion and freedom of expression eventually got the better of his pronounced dislike of Catholicism,⁶⁰ which acknowledges Thomas Aquinas' (ca. 1225-1274) interpretation of the right of resistance in terms of natural justice.

The right of resistance was not a Catholic specialty, however. John Locke (1632-1704), the theorist of the English revolution, included the individual's right to rebel if the monarch exceeded his powers as a major part of his work, *Two Treatises of Government* (1690).

It is highly interesting to note that, for Swedish law, Locke's theory – substantiated by the French “encyclopaedists” – came to play a direct part, as the right of resistance from the *Form of Government* of 1720 and until 1809 remained an acknowledged constitutional principle.⁶¹

But Locke's philosophy first and foremost had a decisive impact on the American War of Independence from the monarchy of the British Empire. The Declaration of Independence dated 4 July 1776 states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. - ... - That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. ... But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. ...”.⁶²

As will be seen, the individual American enjoys not only a right of resistance, but also a *duty* of resistance *vis-à-vis* the tyrant. This is due to the fact that the inviolable rights are granted to the individual as the Creator's work, by God's will.

The right, but not the duty, of resistance, is also an integral part of French constitutional law. Art. 2 of the 1789 Declaration of Human and Civil Rights

58 Langslet, op.cit., p. 217.

59 Langslet, op.cit., p. 214 and p. 220.

60 Holm, op.cit., p. 54-61.

61 Stig Jägerskiöld: *Tyrannmord och motståndsrätt 1792-1809*, Skandia (Tidskrift för historisk forskning), Vol. 28, 1962, p. 128-131, cf. p. 123, and p. 159-166. Also the description by the Swiss lawyer de Lolmes of the English right of resistance in „*Constitution de l'Angleterre*“ (1770), Jägerskiöld p. 124, becomes very important.

62 U.S. National Archives & Records Administration, November 17, 2003 – “www.archives.gov”. p. 1. See also the constitutional document, the Virginia Bill of Rights dated 12 June 1776, Art. 3.

lists Man's natural and inalienable rights: "Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression". The last right thus refers to: resistance to oppression. In its preamble, the Constitution for the Fifth Republic from 1958 refers to this declaration.⁶³

In German constitutional law, the German Constitutional Court recognised "verfassungsimmanentes Widerstandsrecht" after World War II, which has since 1968 been codified in Art. 20(4) of the Constitution, providing: "Gegen jeden, der es unternimmt, diese Ordnung zu beseitigen, haben alle Deutschen das Recht zum Widerstand, wenn andere Abhilfe nicht möglich ist". Its justification is a struggle for a fight to uphold and restore the existing order value and legal order based on individual freedoms – and in that sense constitutes a conservative guarantee.

The party undertaking the legitimate defensive act, which is not mandatory, is anyone – whether acting alone or in concert with others – and whether it is a matter of upheaval from above (*coup d'état*) or from below (rebellion). The attack that triggers the right of resistance may also be a mere attempt, but it must represent a real and actual danger to the social order by means of active violent or aggressive conduct.⁶⁴

Similar constitutional provisions exist in Portugal and Greece,⁶⁵ and as already mentioned, an English right of resistance is provided for in the Magna Carta, which is one of the few written constitutional documents of Great Britain.

Partly inspired by German law, which acknowledged the mutiny against Hitler on 20 July 1944, as a legitimate act,⁶⁶ after World War II, the Norwegian jurist Frede Castberg acknowledged the existence of a right of rebellion. He states that experience from World War II must have taught us that in the last resort, formal law may infringe a set of fundamental values ranking higher than positive law. He denies that this theoretical position is supposedly an expression of natural law – in the sense of God's norms or norms which in their absolute form are issued by nature itself. He further states: "The term 'naturrett' is also in the history of ideas connected with the idea of a complete system of real, unchangeable rules and thereby just as compromised and strained as the idea of a 'natural state of affairs'. The terms 'natural law' and 'droit naturel' are really better formulae than 'Naturrecht' and 'naturrett'. *What we have in mind is actually normative statements that we consider as 'natural', in the sense of rational, reasonable*" (my emphasis).⁶⁷

These norms will be based on assessments of the values served by the social order as well as on considerations of justice; aims we might never realise in full. Castberg therefore refers to them as a reflection of "idealrett".⁶⁸

63 La Constitution – Introduite et commentée par Guy Carcassonne, Éditions du Seuil, Paris 1996 p. 336-337.

64 Rolf Gröschner in Horst Dreier (hrsgb.): Grundgesetz Kommentar, Vol. II, Mohr Siebeck, Tübingen 1998, p.215-218.

65 Gröschner, op.cit., p. 214.

66 Frede Castberg: *Rett og revolusjon i Norge*, Universitetsforlaget, Oslo 1974, p. 116.

67 Frede Castberg: *Naturrett og menneskerettigheter*, Universitetsforlaget, Oslo 1967, p. 52.

68 Castberg, op.cit. (1967), p. 67-68.

Castberg finally states that section 112 of the Norwegian Constitution, providing that constitutional amendments may never be implemented against the “spirit and principles” of the Constitution, which has so far been considered as largely devoid of any content in constitutional theory, may at least justify that conception of supra-statutory law.⁶⁹

In their textbook on philosophy for lawyers, Bernt and Doublet write: “*Basically, the law must be obeyed. That is also the presumption in natural law. The rule should be that only in extreme situations where a tyrant or a criminal regime has usurped the legislative power, may an appeal to principles of natural law serve as justification of a fight for a fair social order, involving the overthrow of the tyrant and the replacement of the old legal order by another one. Freedom to disregard specific norms based on a personal opinion of whether the norm is acceptable from a natural law point-of-view, may be acceptable in certain extreme situations. Only if the executive loses its moral and political legitimacy will active resistance, maybe even rebellion, be an option if the executive loses its moral and political legitimacy.*”⁷⁰

After 11 September, and in a European context – *the right of resistance* may be defined, on the basis of the analyses of this section, as follows:

The right of individual citizens or groups of citizens to apply violence in defence of current democratic values, as against heads of state/politicians/public servants as well as against fellow citizens who are engaged in a *coup d'état* or a rebellion, as the case may be, where no other defensive measures are possible or sufficient, and where the means applied are reasonably proportional to the achievement of this legitimate aim.

7 Conclusion

We have seen that a – for a considerable period (1536-2002) – discarded concept of foreign law, the right of resistance, has been rediscovered/reincorporated in Danish legal culture, at first by way of acceptance from the Danish Government in the EU Council of Ministers, followed by the Danish Parliament’s consent to ratification, and since then by virtue of the adoption – by a significant majority of the votes - by the Danish Parliament on the basis of a bill proposed by the Government, and finally explicitly confirmed by way of a clarifying interpretation by the legislative department of the Ministry of Justice on the basis of particularly detailed committee considerations – without any significant resistance anywhere.

In this way, the executive and the legislative power have clearly announced the introduction of this new legal concept, which may be characterised as a

69 Frede Castberg: *Forelesninger over rettsfilosofi*, Universitetsforlaget, Oslo 1965, p. 141-143. Per Helset and Bjørn Stordrange: *Norsk statsforfatningsrett*, (Ad notam Gyldendal, Oslo 1998), p. 40-42, discuss the rights of rebellion and resistance generally and historically, but do not take up a position about Norwegian law. See also Mæhle, *op.cit.*, p. 183-185 and p. 307-308.

70 Jan Fridthjof Bernt og David Doublet: *Vitenskapsfilosofi for jurister – En innføring*, Fagbokforlaget, Bergen 1998, p. 114.

“legal transplant”,⁷¹ - however, without any formal “intakes” in the statutory text.

Legrand writes about the difficult work of the comparatist in this connection: “The comparatist must, therefore, re-present a legal culture in ways which have greater interpretive power than is offered by the traditional rule-based model. The idea for the comparatist is to refuse to take experience as a given and to try to see how it is conditioned and shaped, how patterns of consciousness evolve. Legal experience is immersed in a cultural context: it is modulated. It is, indeed, the legal culture – a notion which makes specific reference to the subculture that is constituted amongst law specialists, especially as regards the repository of those elements that partake in the stable, general, and unconscious – that provides the “internal logic” of the law. Although groups and identities are necessarily fluid, the legal culture remains the cement that binds normality and normativity, that accounts, through the positive law, for a “government *mentalité*” ...”.⁷² I hope that my efforts in this regard have succeeded.

Probably because of our own historical background, dating back to the Middle Ages, our legal system has not (yet) rejected the transplant of the right of resistance.⁷³ It may, of course, be feasible that the legal reception is merely a result of the spontaneous reaction by politicians because they are facing an immediate worst-case scenario; and are therefore ready to “buy” anything as soon as possible. But it may also be because the grasping of the full scope of the relationship between law, power and violence – adapted to a European interpretive community – is only now being orchestrated in a Danish context. In that case, it might be due to the existence of an intuitive sense of justice that will be resuscitated – in the light of the global terrorist threat – at the moment when we are being forced to stand together and to commit ourselves to a certain social value basis. For it would feel unjust to punish a rebellion against an illegitimate government.

The right of resistance may be cited as an example from the legal level which the Finnish legal philosopher Kaarlo Tuori refers to as the law’s “deep structure”: “The deep structure of modern law is defined by basic categories such as ‘legal subjectivity’ and ‘subjective right’ and by fundamental principles such as human rights as general normative ideas”.⁷⁴

Such an unwritten principle of law, which logically also assigns a right of resistance to the Danish population, and which may in the last resort some day in the future pull away the carpet under the notion of Denmark as a legitimate state, with the result that the institutional provisions on the executive in the Constitution may be suspended or repealed, must be given the status as an extra-

71 See Alan Watson: *Legal Transplants*, 2nd edition, University of Georgia 1993.

72 Pierre Legrand: *Public Law, Europeanisation, and Convergence: Can Comparatists Contribute?* in Paul Beaumont, Carole Lyons and Neil Walker (eds.): *Convergence and Divergence in European Public Law*, Hart Publishing, Oxford 2002, p. 242.

73 Günther Teubner: *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, *Modern Law Review* (1998), vol. 61, p. 11-32.

74 Kaarlo Tuori: *Critical Legal Positivism, Applied Legal Philosophy*, Ashgate 2002, p. 192, cf. p. 183-191.

or supra-constitutional concept in order to gain effect. Constitutional principles of this type are well-known in this country as well, e.g. for the period from 1940-1953 the parliamentary principle which might only with considerable good-will be said to be substantiated by a very liberal interpretation of a specific constitutional provision,⁷⁵ and the principle of necessity which legitimised the restrictions of citizens' freedoms, the freedom of association as well as personal freedom, from 1940 to 1943 contrary to the letter of the Constitution.⁷⁶

The right of resistance – as this concept must be understood with European inspiration in Danish law in 2004 – provides the free citizen with a corrective “right of rebellion”, if the executive were to violate the core values of democracy, abusing the right to put “the good of the nation” above the rights of the individual and the popular community.

The ultimate canonising of this extensive resistance concept will be for the judicial power to effect, ultimately the Danish Supreme Court. It goes without saying that the content of such a decision cannot be predicted with any certainty, but the Supreme Court can hardly disregard the conception of constitutional law which involves “a difficult and politically sensitive delimitation between terrorism and legitimate political activity”⁷⁷ manifested by both the EU and the Danish Government and Parliament after 11 September 2001 – and repeated at the meeting of heads of state and government in Brussels on 25 March 2004, where they appointed a person responsible for counter-terrorism, reporting directly to the Council of Ministers, to coordinate the joint efforts by Member States, as a direct consequence of the terrorist acts in Madrid on 11 March.

The only certain thing is that the Danish Supreme Court will not grant any exemption from contraventions of section 114 of the Criminal Code – to a Danish or foreign citizen, who may be prosecuted on Danish soil after a violent assault on a foreign state, e.g. North Korea, which would not be found legitimate, since it does not satisfy the EU criteria – without at the same time considering that such a citizen might with impunity launch a similar attack on the Danish state, should our legal order some day develop in an illegitimate direction. Section 114 presupposes, by definition, the recognition of a right of resistance.

The Supreme Court's understanding of the concepts of the legitimate state and the right of resistance will be determined by means of case law as developed by other national supreme courts and constitutional courts in the EU member states, by the European Court of Human Rights in Strasbourg and by the European Court of Justice (ECJ).

In this respect, the specific implication by the ECJ of the concepts of values already available in the Treaty of Nice as currently in force, but which are elaborated upon in the draft Treaty establishing a Constitution for Europe will have major precedential value, since, in principle, the ECJ enjoys a monopoly

75 Henning Koch: *Retssædvane eller statskik – kampen om parlamentarismen siden 1901*, Juristen 1990, p. 64-79.

76 Koch, op.cit. (1994), p. 407-414.

77 Niels Pontoppidan: *Omsorg for retfærdighed* (review), Ugeskrift for Retsvæsen 2004 B p. 112.

position in respect of interpretation of EU law, which takes precedence. This monopoly should not develop into a monologue, however. An exchange of interpretations concerning the substantive concept of democracy and the popular right of resistance between the national, transnational and supranational levels should be open as part of a European, constitutional dialogue about the content of democracy⁷⁸, in which also national politicians should take part and accept their responsibilities.

This possible dialogue is not a consequence of the fact that after 11 September a uniform legal terminology now exists, defining the meaning of the textual concept of a right of resistance in a common European framework decision, with an identical picture in the minds of all Europeans, but is rather a consequence of the fact that through national, parallel value platforms, conceptual, analogøe creations are opening up for a legal interpretive discourse which constitutes the community of understanding between the legal actors⁷⁹ - and in the last resort between lawyers, politicians and population.⁸⁰

Only in that way will it be possible to create a pluralist, interactive and dynamic European legal system with sufficient political legitimacy.⁸¹

The highest degree of legal, national authority can only be achieved through a written basic authority, i.e. a constitutional section embedding in the Danish Constitution the substantive value targets as well as the ancillary right of resistance: the establishment of a Danish value platform.

Embedding a section in such terms in our own Constitution, the interpretation of which is subject to the exclusive jurisdiction of the Supreme Court, will enable us to secure the national approach of the reciprocal constitutional conversation – and protect us against legal dictates from supra-national courts.

In the words of Scharpf, a “bipolar constitutional order” may thereby be created, resulting in a “mutual conformity of norms.”⁸²

The stage for such a development clearly seems to be set, by way of the adopted Treaty establishing a Constitution for Europe (Art. I-5, Para 1) reading,

78 Carol Harlow: *Voices of Difference in a Plural Community*, in Beaumont, et.al, op.cit. p. 208-212 and p. 223-224.

79 Anne Lise Kjær: *A Common Legal Language in Europe?* in Mark van Hoecke (ed.): *Epistemology and Methodology of Comparative Law*, Hart Publishing, Oxford 2004, p. 396-398.

80 See also Kaarlo Tuori: *The Many Senses of European Citizenship*, p. 82-83, in Kimmo Nuotio (ed.): *Europe in Search of Meaning and Purpose*, Publications of the Faculty of Law, University of Helsinki 2004. Here Tuori reviews various theories of demos (people) in ”a thin and a thick sense”, p. 62-76. For the historical development of the concepts of people and population and the theories of a ”European demos”, see also Ove Korsgaard: *Kampen om folket. Et dannelseperspektiv på dansk historie gennem 500 år*, Gyldendal, København 2004, p. 482-487 and p. 555-565. For ”a thin form of constituency” in the human rights field, see Grainne de Búrca: *Convergence and Divergence in European Public Law: The Case of Human Rights*, in Beaumont et al. (op.cit.), p. 147-150.

81 For ius humanitatis, see Ian Ward: *Europe in Search of Meaning and Purpose*, in Nuotio (ed.), op.cit., p. 15-19.

82 Fritz W. Scharpf: *Community and autonomy: multi-level policy-making in the European Union*, *Journal of European Public Policy* (1994), vol. 1:2, p. 225.

“The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional ...”⁸³

⁸³ After the rejection by the French and the Dutch by referendum in spring 2005, the ratification process has been suspended until further notice.

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