The Roots of Resistance: Medieval Contractualism

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The roots of the modern concept of resistance are very ancient, starting with the Jewish idea of a pact between God and his people, whose basic rules were to be observed in order to realize peace among the parties; this basic agreement took on a precise political and civil side in the history of Greece and Rome. Here the idea which placed the obligations of the rulers before those of the citizens was so spread that it created the image of the tyrant well present in early modern history – as Mario Turchetti's book has clearly shown[1].

Do subjects or citizens as a whole, as estates, or as individuals have some rights which the state must respect? If so, which ones and when, if they conflict with other interests?

The Middle Ages start with the crisis of the Roman Empire, and some Germanic kingdoms coming up – it is told – from a tradition in which the leader was considered a 'primus inter pares' by the other free men of the community. Therefore they could easily challenge him. The contract gave him significant power during wartime as long as and insofar as he was a good leader. This contract fits with the usual representation of the tribal culture of the original Germanic peoples which in some way survived into the early Middle ages.

On the contrary, should the tyrannical and bureaucratic late Roman Empire ask only obedience? Be careful of oversimplifications! Even Justinian's Code, realized under the eastern despotism of the Byzantine Empire accepted norms against illegal actions taken by public officers. As was later studied in European Medieval universities, Roman law left a space to resist in those cases.

Even if not conceptualized as a practice, the contractualism of the early Middle Ages was widespread, especially if we consider things such as offices, spoils, or fiefs which relied upon some form of consent between the ruler and the governed. If lay or ecclesiastical leaders were proven unfit for their job, the failure of one's government could prove to be fatal. This was particularly true if one was elected in which case rulers were frequently and often violently deposed from office.

But successful military enterprises were very good foundations for the respect of political contracts, while also providing rulers with a way to avoid them entirely. Charlemagne's fifty-three military campaigns were the best base of his authority. But his dynasty got the throne with papal consent by staging a *coup d'etat* against the Merovingians, when they were proven unable to fulfill the obligations of good government.

But the lay consideration of the public power, based on the *Herrschaftsvertraege*, had already for a long time been darkened by the new sacred monarchy.

[1] Paper discussed during the seminar "The right of Resistance", promoted to Filippo del Lucchese at the Brunel University of London (February 8-9, 2012). The article is devoid of notes because the reports of the convention will not be published and for this I decided to publish this paper, as presented during the seminar.

The anointed lord was put on a higher level, closer to God: he was no more a regular human being. Still, the consent of both the magnates of the Church and of the army was nevertheless always necessary: hence the rich literature of the *Specula principum*. The intellectuals, mainly clerics, provided the king's defense of his half-divine nature. They argued that the *rex* should *regere* according to precise Christian rules. He was above the law, sure, but above the human law, the positive law, not above the divine and natural laws and the sacred rules; professors at medieval universities would spend their time discussing and debating the minutiae, as Ken Pennington and many others tell us.

The *reges* were in the center of any intellectual attention during the Middle Ages just because of their blessed nature; however, it is clear that their divine claims did not give them full powers. For instance, in the coronation oath, the prince swore respect for the basic obligations, ensuring the rights of his realm, of the Church, and of the commonwealth of his people, widows and orphans above all, as in the Justinianic tradition. More precise obligations were undertaken with those directly below him on the political and social hierarchy, the noble vassals. These obligations made clear that in addition to his responsibility to God, he was also responsible to his magnates, both laymen and clerics, comprising those vassals bound to him by a specific oath of fidelity and obedience.

And so began a period of permanent tension among two principles of government: contractualism and divine right. In the long run, the tension was a positive one because it promoted profound speculation on the nature of public power and on the limits and procedures of its exercise.

Coronatus a Deo: the coronation on Christmas Day of the year 800 CE was proclaimed, but the contract, the *Vertrag,* soon became evident. At the time of Charles the Bald there had been in place the agreement made at Coulaines in 843, when he gave precise legal guarantees to the magnates offering protection of their goods and *honores*; the second act of this drama continued in 858 when the king himself had to again swear those legal guarantees. And then more than a decade later, Charles repeated them again on the occasion of his coronation at Metz in 869. This contractual practice contributed to the preservation of the kingdom's unity up to the twelfth century (Moeglin).

In the eastern half of Carolingian Europe, this practice was not as explicit; in their place were agreements of *amicitia* between the king and his magnates. But the idea of the king as Christ on earth coupled with the growing clericalization of public power, pushed contractualism into the shadows. This idea was strengthened only *later*, with the development of the *Wahlkapitulationen* which became common in the Holy Roman Empire from the late thirteenth century onwards, when the electing princes began to be limited in number. The election of the Emperor Charles V, often considered the last medieval emperor, was in fact the first official agreement involving all estates of the Empire – because earlier agreements had been with the individual electors.

An analogous development took place within the papacy. Following the triumph of the pontifical absolutism with Innocent III and Innocent IV during the thirteenth century, the crisis with France and *la captivité d'Avignon* had the effect of strengthening the power of the cardinals. They imposed stipulations on the candidates; the first episodes appear around the middle of the fourteenth century but later they became normal. The constitution of the Church established during the great councils held in Constance and Basel established that the government of the Church was based on consent and representation. But that great season of religious debates and institutional thought was over with Eugene IV and Pius II by the middle of the fifteenth century.

It was a time of tyrants in some parts of Italy, and therefore a time of many conspiracies, as in Florence and Rome, also inspired by classical models. While the monarchical and seigniorial structures at that time in Europe regularly worked with parliaments as places of representation for the estates, the papacy went against the main stream after the great fear of conciliarism. The collected surveys found in the book recently edited by François Foronda have underlined the fourteenth and fifteenth-century cases of contractualism in low Bayern, Prussia and many towns in modern-day Germany, the Low Countries and Belgium which provide interesting cases of legal resistance (even armed) to the payment of unjustified taxes. These late medieval acts of resistance were often assisted by the learned jurists and their formulations. These jurists were ever more involved in the public life in Germany, well studied by Insenmann and Walther.

By the fifteenth century, the great contest among the papacy and the empire was over. During the eleventh century the Investiture Controversy and its existential questions about the nature of power had filled the chronicles and stimulated the works of theologians and jurists, improving, during the twelfth century, the quality of the universities and the learned laws, both canon and Roman law.

Medieval theologians and jurists advanced the legal debate on the nature and structures of government, both ecclesiastical and lay. Beyond the local laws, with their very different features, European universities and ecclesiastical culture helped foster a basic uniform set of expectations for European public institutions. Surely, it would be questionable if the pope claimed a space in lay political relations or if a lay ruler claimed power in the religious sphere. The claimed *potestas a Deo* never eliminated the idea that rulers had a responsibility as public officers that was more or less contractual, because the concept of popular legitimacy as a basis for power was never destroyed.

Even in an age where rulers claimed divine mandate, theologians and scholars voiced strong opinions against tyrants and spoke even of tyrannicide. They asked: when should one owe obedience and when should a lawful rebellion be permitted? Medieval writers on this topic have been well known for almost a century thanks to the work of Fritz Kern and others. These medieval writers include John of Salisbury, Saint Thomas, and Bartolus among others, as well as Peter of John Olivi, now known for his

contractualism thanks to Alain Boureau. What is to be remembered, probably, is the well known maxim 'necessitas non habet legem', which could be used in a number of different contexts; for instance, it left open the legal possibility that one could steal in cases of severe hunger because 'omnia necessitatis tempore sunt communia'.

The thoughts on this subject became frequent beginning in the thirteenth century because of several important texts, particularly the *Magna Carta* for its inclusion of famous article 61, which describes the *securitas* given by the king; another is the Hungarian goldenbulle and the *Libri feudorum*, the result of a learned consideration on feudal ties of loyalty – as Walter Ullman and others described long ago, and as Magnus Ryan (De Benedictis) has reconsidered more recently.

This contractualism is the major and the better known side of the story. But there is another one. A less known and discussed contractualism is indeed to be found in the multifarious story of major and minor communities, from the great cities to much smaller groups, such as the colleges of cathedral canons who had the right to elect local bishops. This scattered world of *universitates* is less well known because these communities were extremely heterogeneous and were, thus, more difficult to theorize about. Susan Reynolds's general European overview exempts us from having to spend too many words on the general framework of *chartae libertatis*, *paces, convenientiae* and so on. Her *Kingdoms and Communities* starts around the year 900, that is, in the post-Carolingian era. Everywhere, then, earlier or later, the unstable public structures left room for local control, as local communities made practical decisions about walls, bridges and roads, as well as about common rights on forests and rivers.

Let me concentrate, now, on Italy, less considered by Reynolds. There, a diverse contractualism started during the two centuries before the communal age and was of great importance precisely because it gave cities and minor centers the consciousness of their unique identity. Kings, lords and bishops were forced to adopt the practice of granting specific privileges to local elites, privileges which varied widely according to the needs of the period and of the place. Local elites became accustomed to managing public affairs by using the privileges granted to them and in some cases abusing them.

The result was the development of local officials with the experience and skill required to face public problems locally without the help of a superior or centralized power. Traditional institutions came to be viewed, paradoxically, as useless, expensive, and disruptive to the public peace. Communes operated before this concept was fully developed under the cover of the privileges granted which for them became *consuetudines*, i.e. well rooted rights, untouchable because they were soon considered traditional. Any attempt to modify the acquired positions was viewed as a violent and illegal act, worthy of a tyrant.

The new era was announced by many urban rebellions – including in the two traditional capital towns of Rome and Pavia – and in the feudal world by the disputes which forced the emperor Conrad in 1037 to grant legal status to minor vassals with the *edictum de beneficiis*.

A grant in name, but in fact a true contract, was the foundation of the Lombard feudal system. In the meantime, the tacit consent of the Empire fostered the growth of the communal system of power. When Frederick Barbarossa tried to restore the imperial central authority, it was too late. He was painted as a tyrant, and it became lawful, perfectly authorized, to resist him. The Peace of Constance of 1183, which can be called the Magna Carta of the Italian Communes, was not really a grant (as it was officially presented); instead it provided a way for Barbarossa to broker a peace after his defeat. As a result of the Peace, the citizenship of the Empire receded into the background. In its place, the inhabitants of the urban communes became citizens of their cities, and these cities began to subscribe new contracts outside the city between equal powers; this was true whether it was contracts between city-states, or as sovereign powers when contracting with defeated cities or lords, minor castles and villages. Communal contractualism was normal with external powers, from the Empire to other communes and to the Church.

But in domestic affairs one needed only to obey to the winning party and to pay taxes for using the civil services in order to avoid exclusion from the community, i.e. the exile. The city council was not an assembly of formal estates, but a 'modern' assembly, representative of more or less privileged citizens, the many or the few ones owning political rights. Therefore in the 'popular' Communes, based on the formal discrimination of the nobles, two different councils were established. The first – *Consilium generale* or something similar – represented all the citizens, magnates included, with weak powers; the second one, representing the winning party, the Council of the People, was, on the contrary, omnipotent.

University thinkers could speak of *universitas civium* for saying the whole citizens, but no contract was ever signed for the establishment of such an association – except sometime of the very beginning of the communal movement, as happened in Genoa (with the oaths of the *compagne*).

With the established Communes, you were born in that city and in that family having never given your consent to the status of magnate or Ghibelline or Guelph or any other status that you had acquired with your birth, such as with baptism and its religious citizenship.

The only living contract inside the city was *negative*, and meant the common, widespread and approved idea that urban citizenship was *not* to be shared with people living outside the walls or outside the *civitas*. People outside and inside could share a political, cultural and economic destiny, and a heavy military

tribute, but they were almost foreigners to each other, like visiting members of another political system or people coming from outside the state.

Leagues of Italian cities sometimes signed military contracts among themselves for fighting against the Empire or against other common enemies. Yet federalism in strict sense was unknown in medieval Italy, and therefore to speak of Florentine or Venetian territory or wherever else is really misleading. The rule was very simple: 1) the big fish would eat the smaller ones, and, 2) the latter would lose their political rights. Defeated cities generally could only receive a 'contract' granting them inclusion within the sphere of the winning city, and they sometimes had to rebel just to receive this respect.

Obviously, the contract could be revised when the dominant city was weak, but it often lasted a long time without any formal changes. However, it normally gave origin to a dialectic relationship among the parties, because the original conditions of both parties changed over time. Thus, the contract fed a permanent tension which forbade a true friendship among the parties. Within the same state, the parties were often suspicious of one another because the contract made clear their different status and interests.

This lasting practice of contractualism introduced some important features into the Italian history. It hindered the political unification of the territory and the growth of a shared politics with a perspective that expanded beyond the urban polity. Both parties, the dominant city and the subject ones, looked more for their particular interests than for the common good of the whole. Moreover, contractualism introduced a permanent trend aimed at forcing the dominant power to respect certain rights and to focus the local people's skills and energies inward instead of focusing on cooperation with other powers in a wider perspective. It is what recently Sabino Cassese meant in an essay on contemporary Italy: this, also, helps to explain the difficulties Italian historians have in approaching the Middle ages without contemporary prejudices.

The origins of the lack of national spirit, or of a strong state, or civil society are to be found in the Middle Ages and are seriously tied up with the contractualism we have discussed.