

## Constituent resistance and constituted terrorism: theoretical and juridical framework within Hamas

*Resistência constituinte e terrorismo constituído: enquadramento teórico e jurídico no Hamas*

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**ABSTRACT:** The paper analyses the theoretical and juridical framework in the context of the Middle Eastern reality of Hamas; it has a focus on the organization duality, playing the roles of both a constituent and constituted power. The dichotomy between resistance and terrorism has to be taken into account considering how Hamas transitioned from an extra-legal entity challenging existing political orders (constituent power) to a governing authority administering Gaza (constituted power). The difficult condition of Hamas as a constituted power lays on its very essence, being it a terroristic organization. To define Hamas as a terroristic organization, the paper examines the various definitions of what terrorism is in the eyes of different actors, both State and non-state institutions. The paper objective is to differentiate resistance from terrorism, considering the peculiarity of the dichotomy of constituent and constituted power.

**Keywords:** Resistance; Constituent and constituted powers; Terrorismo; Middle east; Juridical framework.

**RESUMO:** O artigo analisa a estrutura teórica e jurídica no contexto da realidade do Hamas no Oriente Médio; o foco é a dualidade da organização, que desempenha os papéis de poder constituinte e constituído. A dicotomia entre resistência e terrorismo deve ser levada em conta, considerando como o Hamas passou de uma entidade extra-legal que desafiava as ordens políticas existentes (poder constituinte) para uma autoridade governamental que administra Gaza (poder constituído). A difícil condição do Hamas como um poder constituído está em sua própria essência, sendo uma organização terrorista. Para definir o Hamas como uma organização terrorista, o artigo examina as várias definições do que é terrorismo aos olhos de diferentes atores, tanto instituições estatais quanto não estatais. O objetivo do artigo é diferenciar resistência de terrorismo, considerando a peculiaridade da dicotomia entre poder constituinte e constituído.

**Palavras-chave:** Resistência; Poder constituinte e poder constituído; Terrorismo; Médio Oriente; Quadro jurídico.

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## **1. INTRODUCTION**

The dual nature of Hamas as both a terroristic organization and a governing authority presents a complex and peculiar case study in the interplay between constituent and constituted power. As a constituent power, Hamas positions itself as an extra-legal force that aims at keeping its power in the Gaza, employing violent tactics that have led to its designation as a terrorist organization by many states. Conversely, as the de facto governing authority in Gaza since 2007, Hamas exercises constituted power by administering public services and maintaining bureaucratic control. This duality creates a tension between its constituent identity and aspirations and its responsibilities as a governing body, raising questions about its legitimacy, identity, and role within both local and international frameworks. The analysis tries to comprehend the dichotomy proper to the Hamas case study of its being a constituted power with a past of revolutionary ambitions, still maintaining its status of terroristic entity. To do so, the article delves into philosophical themes rooted in the history of political thought, taking into consideration important authors from Kant to Bodin, Negri to Rawls. Moreover, the second part focuses on the juridical framework of international law to properly define what is and what is not resistance, leading to the actual association of Hamas to the terroristic domain.

## **2. THE DICHOTOMY OF POWER: FROM CONSTITUENT TO CONSTITUTED**

Considering the characteristics of Hamas as the power that took over the Gaza Strip and its relations with proxies, even with certain reservations it can be considered as the constituted power in the area, being the tool of change from their role of constituent to constituted. The issue concerning the constituted and the constituent power is part of a dichotomy that could be substantiated and materialised in the differentiation between the role of the State as power and constituted institution in a relation that, therefore, resists the very consideration of the State as an institution of sovereign power; the important thing to emphasise concerning the common conception of the term is the presence of subjectivity resistant to power, hence in the 'revolutionary becoming', the creation of the phenomenon of this kind. The constituent power is to be considered as the highest, all-powerful and expansive source that produces the constitutional norms of every

legal system, just as it is the subject of this same production, it is an equally omnipotent and expansive activity. Within the constituent power, it is possible to find, up to a certain extent, the concept of politics itself; as a concept, it tends towards a resemblance to democratic society, though with different limits.

First of all, it is fundamental to consider various aspects of the issue concerning Hamas, the State as govern and its prerogatives of being a terroristic organization or, as they would appear under the lenses of politics, a constituted form of State created by their emergence as a constituent rebellious entity. Then it seems important to make some considerations; before building a link between what would be the tyrant-state characterised by terroristic implants and its counter aspect as the revolutionary condition in the constituent form, it is necessary to understand what is meant by constituent and constituted powers. The perceived assonance between constituent and constitutionalisation turns out to be somewhat misleading since constituent power resists precisely the process of the process of constitutionalizing as an act.

Considering the case of Hamas, the concepts of constituent and constituted power provide a framework to analyse its position within the resistance-terrorism dichotomy. Constituent power, as an extra-legal authority to enact fundamental constitutional change, is positioned in contrast with constituted power, which operates within established legal structures (Barcentewicz, 2021). Hamas, designated as terrorist organization by multiple states, appears to exercise a form of constituent power by challenging Israel's legal and political order through armed forces. Its role as an actor could definitely be divisive since it poses itself as a transformative force for Palestinian self-determination. However, its tactics – such as attacks on civilians and hostage-taking – are widely condemned as terrorism, reflecting a tension between its aspirational constituent role and its rejection of constituted legal norms. Conversely, as Gaza's existing governing authority since 2007, Hamas also wields constituted power through administrative control, yet this coexists with its extra-legal terroristic activities. This duality underscores the ambiguity in classifying Hamas: its portrayal as a resistance movement hinges on claims to constituent legitimacy, echoing the roots of older fights for Palestinians, mostly related to anti-colonial ideals, while its terrorism designation stems from violations of international law and constituted frameworks governing armed conflict (Grimm, 2016). The interplay highlights how constituent power theories can rationalize resistance, yet its exercise through violence blurs lines between legitimate constitutional reordering and unlawful terrorism.

### 3. A THEORETICAL ISSUE: FRAMING HAMAS

The complex and dual role of Hamas as both a constituent and constituted power stems from its simultaneous identity as an armed movement challenging existing political order and a governing authority administering territory under its control. As a constituent power, Hamas positions itself as an extra-legal force seeking to fundamentally alter the political status quo through armed struggle against Israel both government and territory. This aligns with theories of constituent power that emphasize grassroots mobilization to overturn established systems, particularly in contexts of perceived oppression against a certain actor (Margolin, Zelin, 2024). As a constituted power, Hamas has administrated public services, security forces, and bureaucratic institutions. This role requires adherence to pragmatic governance norms, such as negotiating ceasefires or managing international aid, which implicitly acknowledges existing legal and diplomatic frameworks. For example, its participation in the 2006 Palestinian elections – though later marred by a violent takeover of Gaza – demonstrated initial engagement with constituted political processes. The tension between these roles arises from Hamas's ideological refusal to recognize Israel while simultaneously operating as a de facto state-like entity, participating in a dual dynamic of being constituent and constituted. Its governance activities, practically the constituted power, provide a veil of legitimacy and practical control, yet its commitment to the commonly known "armed resistance", and its activities as constituent power perpetuate cycles of violence that undermine its capacity to consolidate stable institutions. Their identity is bifrontal, it reflects itself in a duality that is further complicated by internal divisions: from political bureau interests imprinted in prioritizing the governance compromises to military actions of armed violence.

As a matter of fact, in this context, Hamas's hybrid existence illustrates how non-state actors can simultaneously embody revolutionary and institutional roles, terroristic and somehow legitimized identities, though this duality often leads to contradictions that destabilize both its governance efficacy and the eventual resistance credibility.

To further the analysis of Hamas in the constituted and constituent framework, it is therefore interesting to investigate the definition of constituent power in space since it is difficult to distinguish the conditions that characterise the real nature of Hamas. It is difficult to classify the

organization as terroristic per se when it has won the elections, but at the same time, it would be controversial to assimilate it as a state-like entity when it poses itself as a constituted power actor involved in terroristic activities. Then it should be analysed how and if the democratic factors have anything to do with Hamas as a non-state actor, considering the obvious tension and crisis that is produced by its inevitable relationship with democracy. The concept of constituent power travels on dimensions of radicality of its foundation that coexist in the extension of its effects. Democracy and sovereignty collide in the broader sense of politics and state, what is and what potentially could be, so between power and power in the crisis situations in which it finds itself in relation to democracy. From a philosophical perspective, the problem of searching for the proper elements of democracy and, in this sense, to also understand what prevents the very realisation of a democratic reality. Studies have specifically considered factors endogenous and exogenous to societies, cultural variables and specific wills of the subjects concerned. It is with the Kantian theory that it is possible to investigate the issue. According to the philosopher, there are discriminating criteria for different types and modes of regime to be established and thus as we might anachronistically acknowledge, form the source of the constituent power. Indeed, Kant argues that men, unlike other living beings that organise themselves into herds and flocks, are not destined to be part of a herd, but if one wants to sustain the juxtaposition to the animal world, it is more likely that his social construction is more akin to that of a beehive (Kant, 1980). The only possible solution and less “artificial” in this beehive is to have one guide to control the whole, even though the different beehives fight each other – so war occur. (Kant, 1980, p. 753). This, in fact, corresponds to the symbolic referent of the civil society of which the human being must be a member by necessity. Precisely, regarding this juxtaposition, Kant states that civil society must have a connection within a balanced relationship between law and freedom. These two elements constitute the two poles around which the civil legislation revolve around. Previously, in the same book, Kant expressed his opinion on the origin of the instinct of fighting living in men. According to his point of view, every man has to fight and struggle in order to pursue justice or, at least, what he considers the best for him. The man has to follow the principle of good in order to contrast that of the negative one. This struggle can be the only possible way to guarantee the best advantage for himself that is, simply, being free. Freedom is the most positive and desirable outcome that can be pursued out of the struggle. Still, the man in this peculiar battle continues to be exposed to risks and attacks from the negative principle, the “bad principle” and if he intends to protect and

preserve his own freedom, continuously threatened, he has to be constantly armed and ready to fight (Kant, 1980, p. 419).

On the issue of violence, it's essential to distance ourselves from the appealing lure of the apparent "subjective" violence, a specific kind of violence that is carried out by an easily recognized agent. The contours of the background that cause these outbursts must be perceived. It is possible to observe the violence phenomenon under a broader perspective, taking a step back, and analysing the underpinned efforts to combat violence through tolerance. Subjective violence is the most obvious part of a triad that contains two objective forms of violence. Firstly, language and its forms embody a "symbolic" violence; indeed, there is a more basic kind of violence that involves language itself, the imposition of a particular universe of meaning. The problem is that subjective violence is experienced as such against the backdrop of a non-violent zero level, making it impossible to view subjective and objective violence from the same perspective. People perceive it as a disruption of the so called "normal," usual state of affairs. But the violence that is inherent in this "normal" condition falls down under the umbrella of objective violence. The definition of objective violence keeps a very low bar in judging and controlling what constitutes subjective violence, that is, by definition, invisible. Thus, systemic violence is comparable to the infamous "dark matter of physics", which is the opposite of an all too obvious subjective violence. Even though it is invisible, it must be considered to explain what would otherwise appear to be "irrational" outbreak of subjective violence (Zizek, 2008, pp. 1-2).

#### **4. WHAT IS A CONSTITUTED ENTITY? KANT AND POWER IN A STATE**

Concerning the mixture of power, strength and violence: it is fundamental to reinterpret the Kantian approach to politics. On a higher level, the condition that guarantees the supremacy of law cannot be fulfilled if it lacks the element considered as *medius terminus*, the fundamentally medium, which is none other than power (Kant, 1980, p. 754). It is in this specific perspective that the four possible situations might occur, arising from the relationship between power, freedom and law. Considering these factors allows for a brief outline of the conditions arising from the coexistence of different elements. To each condition in which man is placed and with respect to his relationship with the three constituent elements of equilibrium, as argued by Kant, there are different results. One case provides a coexistence of law and freedom, which is the situation that



builds the condition of anarchy, where it has to be considered that “In the synthesis of individual and collective freedom of anarchism, the world is a space of exodus for anarchist propaganda” (Mazzone, 2018, p. 19). On the other hand, there is a dual conception of freedom between the individual and the collective within a space which freedom holds sway as the main element. The second case combines law and power, without freedom, representing despotism as the bad principle prevail. Another hypothesis envisages that without power or law there is only barbarism. The condition where all three elements are included is the case that Kant calls a republic, considering this a representative democracy. This provides the maximum expression of a hierarchy of power and, within a certain limit, the subordination of man to law, thus a limitation explained in constituent power. In the last case studied by Kant, one sees not so much a republic, as the form of civil state tout court, the only formula that can guarantee the possibility of a civil constitution. It should be underlined that for Kant, and other distinguished scholars, the prerequisites for the realisation of different regimes may well coexist, but on the other hand, a fifth hypothesis cannot be followed. The fifth hypothesis, i.e. the subsistence of freedom and power without law, for Kant does not exist. The two elements cannot coexist together to the exclusion of law, because in it resides and it is even conceived as the measure of freedom. On the other hand, Deleuze insists on how the law cannot, by itself, be a source of obligation, because the obligation of law presupposes a utility that belongs to the institution. It, the institution, does not define itself in a limitation like the law, but rather: ‘a pattern of actions of an actual enterprise, an artificial system, a positive invention of positive means indirect means’ (Deleuze, 2012, p. 64). What the law limits in the institution is the nexus created between need and institution; therefore, it does not involve that of law and needed law. Utility consists in this relationship in the sense that the institution is a general rule created by the imagination, i.e. by reflex tendency and not by instinct (Mazzone, 2004, p. 43). The French jurist Jean Bodin produced an indispensable bulwark in the construction of the State. Only through law it is possible to live in a condition of peace (Bodin, 1988). Jean Bodin based his theories on comparative historical research to address the problem of the foundation of sovereignty and the State. He stands in opposition to the utopianism of Thomas More; the latter, influenced by Plato's conception of the Republic, considers the State purely ideal and abstract, a space in which ideals of commonality of goods are introduced, of equality between men and women and the supreme value of wisdom in government (Moro, 2012). Bodin's criticism also included Machiavelli, whose realism he criticised as being “in great vogue among the parasites of tyrants” (Bodin, 1988,

p. 136). The State is considered “the just government exercised with sovereign power over different families and over all that they have in common between them” (Bodin, 1988, p. 159). Such sovereignty, that is to be considered as absolute, and perpetual is the power of the State that consists in establishing the laws and the act of governing; its government subjects the people of State. Sovereignty has as its limits, from a constitutive point of view divine law and natural law, *ius divinum* and *ius naturæ*, while from an operational point of view, it is established by contracts concluded with the citizens or with other states to limit sovereignty itself. There is the need to consider the terms *politiques* and *police*. Defining the term *police*, we trace it back to the French term that dates from the 16th century Europe. This was “intended to capture primarily the institutional state aspect of politics, i.e. the set of interventions of regulation and order entrusted to the governing apparatus of the sovereign prince [...]. sovereign prince [...] hence the legitimacy in defining that specific age as ‘absolutism’” (Schiera, 2021, p. 79). The constituent force, which is omnipotent, must be restricted temporarily to balance its overpower. The time that is proper of constituent power is endowed with a certain formidable capacity for acceleration. This has to do with the impossibility to restrain the generalization of singularity, it cannot be reduced in legal categories and cannot be restricted in the administrative routine. The French Revolution is an obvious example of how fundamental constituent power was contextualised and situate it in time. The French Revolution has been considered as the very first example through which resistance was assimilated to terrorism. This sort of parallelism cannot be considered as nothing but undermining the political thought of Montesquieu. The imperative was to transform the constituent power into an extraordinary power, put into practice and exclusively concentrated in the events that required its formation. Constituent power as omnipotent power is in fact the revolution itself. It was, indeed, Napoleon who asserted that constituent power was finite and limited, turning out to be a pure logical nonsense. But constituent power is not only omnipotent, but it is also expansive, its limitlessness is as much temporal as it is spatial. From a purely objective point of view, constituent power must therefore be reduced to the production of a rule of law in which it is possible to see a definite legal armoury covering and distorting constituent power. Otherwise, considering a perspective of subjective law, the crisis factor becomes more pronounced and evident. This results in the question arising from the legal sciences that resolves with a diversification of ideological sophistry with logical scissors: the paradigm is distinguished into an original constituent power and, in opposition to the same, a constituent power in its proper sense.



Finally, the constituent power opposes both, entering the machinery of representation, one of the founding features of contemporary democracy. The original limitlessness of the constituent essence bends to the conditions of existence proper to representation, such as suffrage or assembly rules. In the moment of its effectiveness, delimited in the condition of dictatorship, the idea of constituent power is legally pre-constituted in the moment when it was supposed to evolve into law: absorbed into the idea of political representation where it was intended to legitimise this concept. The theoretical conception results in a certain contradiction revealed by the vicious circle created in the perpetual contrast between the different positions, that of constituent power and legal order, the separation between the omnipotent and expansive effectiveness of the source and the system of positive law, then the one of constituted normativity. It is therefore vital, for the system to work, that constituent power is maintained by extrapolating and erasing the very meaning of the legal system and the derived democratic landscape and relationship from it. The existence of constituent power in a legal system is to be faced as the problem exhausted as the irreducibility of the constituent factor, hence of its effects and the values it expresses. According to Negri's thought, three different solutions can be pursued from one perspective and constituent power is transcendent with respect to the system of constituent power, consequently its dynamic is imposed on the system from outside; a different current of thought of jurists considers that power as immanent, its presence is intimate and makes its essence a fundamental act; a third group of jurists, finally, consider the source constituent power neither transcendent nor immanent, but a third hypothesis sees it as integrated, co-extensive, and synchronous with the positive constitutional system. Considering the possibility that the source of constituent power is therefore transcendent, it is possible to witness its assumption as a factor prior to the constitutional order which, at the same time, opposes it by externalising itself while it can only qualify itself through the constituted power. In this sense contradiction is avoided through a subordination of the levels within the one that "actively act": the autonomy of the constituted legal order is absolute.

## **5. THE LIMITATIONS AND LIMITEDNESS OF DEMOCRACY IN A CONSTITUTED CONTEXTO**

Between the 19th and the 20th century, the German school of public law supported the point of view that constituent power is exogenous to the constitution: its origin therefore lies on

experience because it is an empirical-factual normative production (Jellinek, 2018). In order to preserve and safeguard its own existence, this normative production is limited as it tends to limit itself; considering the empirical-factual dimension, the historical and ethical reality that limits the extension of the principle external to law has to be viewed under the Kantian lenses. At this point it is possible to state that constituent power, for what concerns law and constitution, substantiates itself in regulation and thus tends naturally to the self-limitation of its own force.

Considering Spinoza's thought, the law/power equation is decisive for understanding the roots of democracy. According to Spinoza, law and power are central to the elaboration of an absolutely democratic reality, where absolute means materialistically constituent, outside the logic of the abstract civil society/state dialectic and of representation. It cannot be the case for the middle east area considered for the paper. Taking into consideration ancient times the Athenian democracy is the example that would be interesting to analyse. As a matter of fact, all the above cannot be related to the Athenian democracy. This specific kind of democracy is mentioned by Spinoza and by Hume as a false democracy because of its characteristics of being *ad escludendum*, yet “autonomy and the possibility of submitting to laws, to which – whether actually or fictitiously – consented to, certainly cannot be given to that order any connotation that respects the philosophical idea of democracy” (Mazzone, 2004, p. 47). Law is not intended as the power involved in the submission to justice, because being voluntarily dominated by this element is not necessarily related to a specific government that would guarantee peace and security as the result of an immanent process of social subjugation of freedom (Mazzone, 2004, p. 65). Therefore, Hume's constituent democracy finds its primary category in the political force of opinion, defining the cooperative harmony of the governed an expression of their greater strength. The principle of authority in politics is measured by opinion, i.e. the legitimacy of men and governments, on whose principle the political obligation itself is based. The vision of sovereignty is one that stands in opposition to the transcendence of democracy and constituent power, which in turn in transcendence finds its negation. In this regard, one cannot fail to consider the theory of John Rawls with respect to the law of peoples. Rawls develops his theory in the context of the philosophical debate of rationalist, between Kant and Rosseau. What he first distances himself from the previous descriptions and clarifications with respect to constituent power and the broader convention of the state is that Rawls speaks precisely of peoples and not of states. It is clear that to cancel the state dimension in favour of the people dimension, turns into preferring the pure

reason of the peoples over the reason of state. The peoples can, to some extent, sacrifice the limitation and definition of state power to safeguard the moral values that should be guaranteed to the peoples. This society is, precisely, made up of peoples who themselves observe peoples' law; this is composed of a minimum catalogue of fundamental human rights that ground international relations based on a realistic utopia within a panorama that sees the concretisation of social perspectives devised by Rawls: ideal theory and non-ideal theory. With respect to constituent power in its totality, John Rawls considers constituent power within a circle or sequence in which the principle itself is placed on different levels or stages; there is thus the first original stage in which lays the realisation of the contractual agreement on the principles of justice, while at the antipodes there are the third and fourth stages of bodies of legislative hierarchies in which the realisation of the execution of the law occur. It is in this stage that constituent power falls within, being completely reabsorbed, among the parameters of constituted law. This, therefore, is the result of several stages that come into contact and contrast with each other, ultimately depriving constituent power of creative originality. Political justice, i.e. the justice of the constitution, is therefore produced by constituent power; political consensus and its consequent organisation are in any case permeated by a relative indeterminacy. Constituent power expresses itself, from the practical point of view of its very existence, also through an ethical-political limit overdetermined, an echo of a Kantian condition that addresses the transcendental constitution (Rawls, 1971).

The peculiarity of the middle eastern condition where non-state actors take control and somehow incarnate the substitute of what the State would be – or other recognized institutions – obviously raises the questions about their legitimacy and their own nature. The concepts of constituent/constituted power relate to the idea of resistance specifically in the context of Hamas: while it exercises is constituted power in the Gaza Strip, the very terroristic nature of the organization embodies a complex duality.

## 6. THE DEFINITIONAL ISSUE: “TERRORISMO”

By extension and analogy, it is possible to use the dichotomous and dualistic relationship of constituent and constituted to analyse, in the context of Hamas, framing it within the broader and more complex Israeli-Palestinian conflict, the relationship between terrorism and resistance.

The concept of terrorism does not yet have, and probably never will have, a universally accepted definition; each individual state or international organisation adopts its own definition. Different definitions arise from different approaches, cultural backgrounds, different legal systems or different political perspectives and postures. However, it is possible to narrow down the definitions and find the common ground between the different approaches to the subject of terrorism in order to reach a defining core to read contemporary phenomena. It is therefore necessary to observe and analyse the different definitions offered by states and international organisations to find common intersectionality and convergences. Beginning with a linguistic definition, the Oxford Dictionary, (Oxford, 2025) defines terrorism as the illegitimate use of violence and intimidation, especially against civilians, acted and aimed at achieving political ends.

The United Nations (UN), for instance, does not offer any shared definition of the phenomenon of terrorism because of the different definitions in the legal systems of its member states or because of issues relating to the different foreign policies of individual states. However, Resolution 1566 of 2004 defines it from a criminological point of view, i.e. as: crimes intended to cause death or serious bodily injury to civilians or non-combatants, with the aim of intimidating a population or compelling a government or international organisation to perform or abstain from performing an act (United Nations, 2004).

NATO defines terrorism as the unlawful use of force or violence against individuals or property, including infrastructure and physical locations, in order to intimidate governments, individuals or groups of individuals, and society itself (NATO, 2009). In its definition, the Atlantic Alliance identifies three main purposes for acts of terrorism: political, religious or ideological. This differentiation, which became necessary during the years of the post-9/11 War on Terror, can however be simplified by reducing the political one as the only end, in view of the fact that ideological and religious motivations are subcategories of the political world (Pomarède, 2021). It should be recalled that it was precisely in the aftermath of the 9/11 attacks that NATO's mutual defence mechanism was activated for the first time. The perspective of the European Union, as expressed in particular in the 2002 Framework Decision on Combating Terrorism (European Union, 2002), is peculiar in two particular aspects. The first is to consider terrorism on the basis of damage to a country or an international organisation, without specifying the type of damage (European Union, 2002). Leaving this part of the definition open-ended and without specifying it implicitly refers to physical harm, against individuals, economic, image, psychological and social

damage. It also focuses on intimidation towards the population and destabilisation of the political, economic and social structures of the country targeted by the terrorist acts (European Union, 2004).

Interpol adopts a broad definition that focuses on the psychological aspect: any criminal act intended to cause terror in a population or to coerce a government or organisation to perform or avoid an action. (Beckman 2007). Despite Interpol's purely criminological approach, the emphasis is on the population as the target of terrorism and of provoking terror in the population and generating pressure on the government.

In the United Kingdom's legal perspective, it is not necessary for the act to be of a violent, kinetic nature to be considered terrorism. The United Kingdom's Terrorism Act (United Kingdom, 2000) refers to different ways in which to attack, such as cyberterrorism, the civilian population, organisations, or the state itself. For the United Kingdom, even the threat of violent action aimed at influencing a government or the public can fall under the umbrella definition of terrorism, provided there is a political matrix (United Kingdom, 2000). The peculiarity of this definition lies in not limiting terrorism to physical and kinetic violence, expanding the concept to any act that can generate trauma and fear in a group. The French legal system in its Criminal Code (Code pénal, Art. 421-1, 2016) also focuses on intentional acts that use intimidation, terror to seriously disrupt public order.

The United States defines terrorism in the Federal Code in Title 22, Section 2656f as acts of 'premeditated violence, political in nature, perpetrated against non-combatants by subnational groups or clandestine agents' (U.S. Congress, 2024). For the US legal system, premeditation and targeting of non-combatants, civilians, is at the heart of the definition.

Italy, which legislates on the subject in Article 270-bis of the Criminal Code, emphasises the possibility that acts of terrorism may cause serious damage to a country or an international organisation and are intended to intimidate the population or destabilise its institutions (Codice penale, Art. 270-bis). Very similar is the posture of Russia, which in its 2006 anti-terrorism law defines terrorism as the use of violence to intimidate the population to influence government decisions (Aleshin, 2020).

The analysis of the different legal and operational definitions adopted by states and international organisations could be endless. Differences in definitions often depend on the geopolitical interests of each country or organisation, its cultural background and legal system,



along with the first-hand historical experience of the people of each individual state. While some definitions focus on violence against civilians, others include political intimidation or destabilisation of governments. The absence of an unambiguous definition makes international cooperation in the fight against terrorism complicated.

However, it is possible to find the intersectionality between the different definitions, common points that allow for an all-encompassing reading of the phenomenon, by referring to categories that are easy to observe and unequivocally identify. Terrorism as a phenomenon, and not merely as a tactic, has at its existential core the objective of achieving a political end, through a status of terror in the civilian population, which consequently rises as terrorizing the organs of the state. In summarising the convergences of the various definitions of terrorism, the common points that stand out are, in addition to the political end, the use of violence as the main means, the indiscriminate targeting of the civilian population directly (through violence towards defenceless civilians, for example) and indirectly through terror resulting from violent acts of terrorism.

Terrorism is not just a phenomenon, it is not just a violent act circumscribed in the legislator's definitions. Terrorism can, and indeed must, also be read as a tactic, as a tool, as a component of the way conflicts are conducted. In the branch of security studies and strategic studies, terrorism is a tactic that Hoffman (2018) describes as the deliberate use of violence - or the threat of its use - by individuals or non-state groups to achieve political, religious or ideological goals through intimidation, coercion or the instilling of fear. The tactic of terrorism is therefore a tool, with its own peculiarities, a path that is taken depending on the decision of the group using it (Hoffman, 2018). Taking the concept to another level is Kilcullen (2010) who highlights the nature of terrorism as a component of irregular or asymmetrical warfare. For Kilcullen (2009), terrorism is not an end in itself, but a tactic used by insurgent groups to achieve political objectives through fear and intimidation. Terrorism is framed within the dynamics of irregular warfare, emphasising that it is often only one part of a broader strategy that includes propaganda, conventional warfare and psychological operations (Kilcullen 2010). Although his analyses mainly focus on contemporary insurgencies, such as those in Afghanistan and Iraq, where terrorism is used as a complement to other forms of conflict, they can be applied to any asymmetrical conflict context, including the Israeli-Palestinian conflict.

## 7. THE DEFINITIONAL PROBLEM: “RESISTANCE”

To sum up, the definitions of terrorism, understood both as a phenomenon and, as a tactic, one finds the need for a political end to be achieved, the nearly total preference for targeting civilian, defenceless or indiscriminate targets with violent modes of execution and arousing terror in the population and, consequently, in public opinion.

The concept of resistance is similarly characterised by definitions that are not entirely linear and commonly recognised. The various definitions in the literature focus heavily on the perception of political legitimacy, e.g. liberation from an oppressive regime or military occupation.

Resistance, also seen as a phenomenon, makes use of both acts of violence and armed struggle as well as non-violent and political actions. The violent and armed component of a form of resistance is mainly aimed at striking the enemy directly at its nerve points, avoiding the indiscriminate use of violence precisely to maintain popular legitimacy.

Popular legitimacy is fundamental to any resistance movement, forms of resistance acquire from the civilian population not only legitimacy but also concrete aid such as: logistical support, cover for their operations, shelter, and protection. The experience in the Algerian wars of the French officer David Galula led to the development of theories, still valid today and used as the theoretical foundation of polemology. In his book *Counterinsurgency Warfare: Theory and Practice*, a cornerstone of the literature on asymmetrical conflicts published in 1964, the tactics and strategies used by resistance movements and insurgents are analysed, emphasising how crucial the support of the civilian population is (Galula, 2006).

The methodology that most forms of resistance use therefore focuses on specific military or governmental targets that are part of or directly related to the institution or power being resisted. Forms of resistance are, by definition, directed against an enemy representing the established power, often a state actor. This delineates the need and motivation behind the choice of targets to strike, which are military or institution-related targets. The intent behind the choice of targets is strategic: the weakening of established power and its ramifications and representations and expressions on the ground. Resistance as a phenomenon can enjoy international legitimacy and external support and is configured as the struggle of a part of the population that takes up arms

against the established power. Resistance is therefore, within the dynamics of conflict, a constituent force that clashes in the dialectic of arms with the dominant constituted power within a given territory.

In defining resistance, it has to be excluded conventional, state vs. state conflicts, where the concept of resistance translates to the state level, e.g. the Ukrainian resistance to the Russian invasion in February 2022. Apart from the use of the term resistance just mentioned, resistance generally has as its main actor one or more groups that are not in control of the disputed territory and move underground, obstructed by a regime. It is the constituted power that has control of the territory, *de jure* or *de facto*, and it is the constituent power that clashes, resisting. There are countless historical examples of forms of resistance clashing against constituted power: the partisan resistance against Nazi-fascist forces in World War II, the Warsaw ghetto uprising in 1943, the Hungarian revolution of 1956, the Sandinista revolution in Nicaragua from 1961 to 1979, to name but a few (Detti, Gozzini, 2002).

For Arendt, resistance can also manifest itself in non-violent ways and forms. The philosopher emphasises the extent to which authentic and real power derives from forms of collective consent (Arendt, 1971). Violence, on the other hand, emerges with power in decline. When constituted power is in decline, vulnerable, the collective action of resistance can oppose and rise up (Arendt, 1971). Similarly, when constituted power is in decline and lashes out at civilian, indiscriminate targets against the population, it does so with forms of terrorism, and in ways that tend to generate a state of fear and terror in order to maintain power. Resistance, on the other hand, is the necessary way to re-establish genuine power through collective action. Observing the dynamics of power, Michel Foucault indicates resistance as intrinsic in power relations, emerging as a response to the social control mechanisms of constituted power (Foucault 2014).

In security and strategic studies, the perspective on definitions of resistance is stark and overlapping. Kilcullen (2009) addresses the topic by describing the modes of resistance as a set of actions and tactics, mainly irregular, that are taken by groups or the population itself to oppose an occupation, a government perceived as illegitimate, or foreign influence. Thus, the concept of constituent force opposing constituted force is also present in Kilcullen (2010). Moreover, whether the resistance is insurgent, guerrilla, or passive nonviolent resistance, the targets of actions are not targeted at civilians but at groups, organs, and individuals that are expressions of constituted power (Breccia, 2020).

Kilcullen admits some difficulty in distinguishing the two concepts, resistance and terrorism, due to the phenomenon of hybridization. Insurgent groups, for example, may use guerrilla tactics against military targets and, at the same time, adopt terrorist tactics by deliberately striking civilian targets (Kilcullen, 2009). Kilcullen points out that resistance, especially in irregular warfare contexts, is often hybrid, combining guerrilla actions with political and psychological actions to achieve objectives. Resistance is thus not only a military issue but a social and cultural one, rooted in the support of the local population. David Kilcullen distinguishes resistance and terrorism based on the strategic objectives, tactics used, and relationship with the population.

Summarizing and taking into consideration the authors cited so far, resistance opposes established power to achieve change on the political level or self-determination, while terrorism uses violence to generate fear, confusion and coercion, with a broader ideological goal. The relationship between both phenomena to the population is divergent: forms of resistance need the support of the internal and external civilian population, while terrorism often ignores the consent of the population or targets it to spread terror and influence political decisions.

From a purely tactical and methodological point of view, resistance includes tools of guerrilla warfare, insurgency, sabotage, and political acts of civil disobedience, while terrorism moves with indiscriminate attacks on civilians, suicide bombings, and other forms of deliberate violence.

Taking the two recent conflicts in Iraq and Afghanistan, both of which are connoted by asymmetric warfare, one can observe a form of resistance in fighting Western occupation, a condition that changes due to the influence of transnational jihadist groups, until it finally veers into purely terrorist forms (Kilcullen, 2009). The use of indiscriminate violence, in both conflicts, separated local civil society from the combatants, thwarting even initial efforts to oppose the Western presence. Even for Hoffman (1998), the distinction between terrorism and resistance is sharp and differs in: main objectives, targets and mode of action, relationship with the population, strategy and tactics.

The definition of resistance is also linked to political subjectivity. A group can also call itself "liberation" and be labelled by its opponents as a terrorist. This occurs not only at the local level; international politics often plays a role in catalysing subjectification. At the international level, the classification of some groups as terrorists has legal relevance; reference is made, for example, to the lists of international terrorist groups of the EU, the U.S. State Department and some of the

individual states. The Arab-Israeli conflict is an emblematic case of the subjectification of the conflict, the subjectification of the judgment and classification of the actors on the ground and the politicization that clouds the overall view of the conflict itself. Considering, for example, Fatah, which has historically defined itself as a resistance movement and has enjoyed, as political conditions and the group's actions have changed, political legitimacy as an interlocutor in the dialectic with Israel. The same group has also, for periods, been designated by various governments and international organizations as a terrorist group, often in conjunction with changing targets being targeted. This is unlike Hamas, Hezbollah and other smaller militias that have always mixed elements of guerrilla warfare and insurgency with Israeli military targets with acts of pure terrorism and deliberate and indiscriminate violence against the civilian population.

The very case of Hamas can become instrumental in explaining the difference between terrorism and resistance and the dialectic between constituent and constituted power. Hamas, an acronym for Harakat al-Muqawamah al-Islamiyya, "Islamic Resistance Movement," was founded during the First Intifada in 1987 and is a Palestinian political-military organization. The history and birth of Hamas is inextricably linked to the Muslim Brotherhood group. Originally the group had a political wing and a military wing, the al-Qassam Brigades. Hamas rejected and rejected the 1993 Oslo Accords, taking an extremist stance. This stance will damage the already extremely complex and delicate relations between Israel and the PLO. Following the failure of the peace process, with the Second Intifada, from 2000 to 2005, a growth in the popularity of Hamas is observed: the duality of its activities, paramilitaries and social increases its acceptance in the Gaza Strip. In 2006, Hamas participated in Palestinian elections for the first time, gaining a majority and beating Fatah politically. The two groups go into a clash that turns bloody, a true internal Palestinian conflict. Hamas manages to prevail militarily and takes military and political control of the Gaza Strip, while the West Bank remains under the control of the Palestinian National Authority. From then on, the Palestinian world can be seen as split in two, politically and territorially, the Gaza Strip becomes a sub-state, not internationally recognized, totally under the control of Hamas, which is its regime and oppressor, with the false dialectic of liberation. Hamas is the de facto regime that controls the Gaza Strip, the established power, order and law imposed on the local population.

With the bloody rise of Hamas to power in the Gaza Strip, it becomes difficult to speak of resistance, itself representing absolute power in the region. This, of course, does not zero out forms



of Palestinian political resistance to the Israeli state, especially those that have been prominent in the region's recent past.

The exclusion of Fatah from the political life of the Gaza Strip, and the seizure of power by Hamas, irreparably severs the link to any form of resistance. It would be impossible for Hamas to resist the oppressor, when the organization itself is the form of constituted power and, therefore, the oppressor of the Strip. Hamas in the Gaza Strip is thus a hybrid actor. Although in the traditional sense, it remains a non-state actor, it is de facto regime: political, governing and military within the Gaza Strip, thus already representing constituted power in the local territory.

## **8. OVERALL ANALYSIS**

The Israeli-Palestinian conflict has a very long history, a conflict that has remained open for decades, with phases of varying intensity alternating with attempts at appeasement. Today it is an even more complex conflict with multiple de facto non-state actors with external influences (proxies) facing off against the classic example of a state actor. Terrorism and resistance are "categories" buzzwords in use in the contemporary narrative, dominating the debate and polarizing it. The use of two generalizing categories risks removing fragments to the overall picture, simplifying and reducing the complexity of events both in the analysis of the local situation and the international scenario. In this complex scenario, the dialectic between constituted power and constituent power enters powerfully. Questions have been raised about the appropriateness of using the categories terrorism and resistance in this conflict. They are, certainly, categories pertaining to the taxonomy of conflicts that are still valid today, as long as they are used with respect to a multidisciplinary theoretical framework, embracing the fields: of legal, philosophical, historical and polemological studies. Although the category of terrorism lacks unambiguous or universally accepted definitions, whether technical or legal in nature, it still proves to be a valid category in the analysis of the Israeli-Palestinian conflict. The attacks on the civilian population on Oct. 7 carried out by Hamas and affiliated militias, along with, for example, the firing of rockets on Israeli civilian areas and other incidents of indiscriminate violence targeting civilians: fall squarely within the definitions of acts of terrorism and exclude the hypothesis of resistance. In fact, the concept of resistance, at least as it is understood in the literature, cannot be an adequate category for the analysis of the Israeli-Palestinian conflict; one cannot label Hamas as a form of resistance.

This, particularly because of the indiscriminate use of the tactic of terrorism against the civilian population. To this must be added that Hamas has de facto political and military control of the territories of the Gaza Strip in which Hamas is already regime.

While the category of "terrorism" as a conflict tactic remains valid for the analysis of one part of the Israeli-Palestinian conflict, the concept of resistance is not applicable. This does not mean that there are no forms of Palestinian resistance. But in the current conflict, Hamas cannot fully fit in as a form of resistance, and it would perhaps be more appropriate to speak of asymmetrical forms of conflict that take into account external influences, the tactics used, and the ways in which the terrorist instrument is used. However, a resistance operated by a force representing the form of constituted power that governs those territories to be "liberated" seems impossible. Acts of brutal and barbaric indiscriminate violence do not take into account the impact on the civilian population, both Israeli and, above all, Palestinian, oppressed and crushed in the grip of a terrorist group that represents the absolute state in the Gaza Strip strip of land.

Moreover, it would be useful and functional to proceed to a more comprehensive and inclusive analysis of the components of this conflict, e.g., Iran's proxy war against Israel, in which Hamas, Hezbollah and other militias play a leading role and, in part, subordinate to another form of constituted power, that of the Iranian dictatorship. The one being fought by Israel is a true counterinsurgency, having to go up against terrorist and paramilitary groups that enjoy international support and target state targets, military facilities and, especially in the recent period, the unarmed civilian population.

Thus, in the narratives and analysis of conflicts in general, and in particular of today's conflict pitting Hamas against Israel, it would be more appropriate to make use of categories and taxonomies of the forms of conflict that take greater account, with distinctive character, of the types of actions undertaken on the ground, the consequent implications the nature of the actors involved, without losing sight of the dialectic between constituent and constituted. In the latter view, the guise Hamas seeks to wear with the tools of propaganda is that of constituent power, when it is constituted, regime, regional absolutism.

It is not possible to summarize or simplify such a complex conflict, which sees different modalities, different forms and types of warfare overlapping simultaneously, using categories that risk over-simplification in a scenario dominated by complexity.

Constituent power often arises from a subjectivity resistant to established power, a "revolutionary becoming." Hamas, through its history of resistance against external forces, initially manifested this constituent power. However, upon assuming governance, it transitioned into a constituted power, facing the inherent challenges and limitations that come with it. Then, if we consider Hamas a constituted form of power in the area, the governing entity, Hamas must engage in constitutionalization and establish a legal order, potentially suppressing the very revolutionary spirit that brought it to power. There comes the tension between what constituent power's limitless nature has to offer and the finite, regulatory nature of constituted power. This creates a paradox: the force born as resistance, now is a constituted power, risking of becoming the authority against which new forms of constituent power (resistance) may arise. The ideal of a republic, where law, power, and freedom are balanced, stands in contrast to scenarios like despotism (law and power without freedom) or barbarism (absence of law and power). Whether Hamas can maintain a balance that accommodates the aspirations of its constituency while navigating the complexities of governance remains a critical question.

## **9. CONCLUSION**

The methodology adopted in this study is based on a theoretical-legal analysis of the dynamics between constituent resistance and constituted terrorism, with particular reference to the case of Hamas. Through a linear approach, the work integrated legal, political, and philosophical perspectives, examining and using normative sources, academic literature and terrorism documents and reports. This study is rooted in a wide theoretical framework of philosophical studies, analysing the main authors who have addressed power dynamics and the relationship between constituent and constituted in their work. From a legal perspective, we focused on the analysis of definitions, comparing and finding the common ground between terrorism legal systems and between the legal systems of the main international organisations involved with issues of resistance and terrorism. The perspective of security and defence studies was analysed using the main authors who have created the theoretical foundation for the analysis of contemporary conflicts. The use of a qualitative analysis made it possible to highlight the conceptual nuances and legal ambiguities that characterise the distinction between resistance and terrorism, thus offering a critical and contextualised key to interpreting the phenomenon.

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