

Quietis publicae perturbatio: Revolts in the Political and Legal Treatises of the sixteenth and seventeenth Centuries

FABRIZIO DAL VERA

1. CRIMINALIZATION OF THE COLLECTIVE VIOLENCE: AN OVERVIEW

The evolution of penal law during the early modern age in Europe shows that from the beginning of the sixteenth century there was an extensive use of *crimen laesae maiestatis* in order to punish and repress many kinds of crime.¹ Even minor crimes, previously not seen as a problem by the authorities, began to be considered as an offence against the State and a threat to political order. As has been clearly proven by legal historians, there was a shift in the penal relevance of actions from the level of damage to the level of disobedience. In this way, the repressive procedure of political crimes was used to deal with any kind of penal infraction perceived as a danger to public order.²

Revolts and insurrections became the focus of attention for jurists concerned with problems of public order and with the legal instruments to defend inner stability and repress any form of criticism of authority. There was increased interest in collective episodes of violation of *maiestas*, which were punished by *crimen seditionis* and understood as a concrete manifestation of the broader *crimen maiestatis*.

1 For an analysis of the development of political crimes in the early modern age see: Mario Sbriccoli, *Crimen laesae maiestatis. Il problema del reato politico alle soglie della scienza penalistica moderna* (Milano, 1974).

2 See Mario Sbriccoli, “Giustizia criminale”, in *Lo Stato moderno in Europa. Istituzioni e diritto*, ed. Maurizio Fioravanti (Roma, 2002) 178-182.

The use of *crimen seditionis* to cope with all episodes of collective violence must to be understood as a reaction to the increase in peasant insurrections, characterising the beginning of the sixteenth century. Peter Blickle underlined that “in the late medieval society peasant resistance was accepted. This can be seen in the fifteenth and early sixteenth centuries, on the one hand, in the increasingly numerous refusals to pay homage and, on the other, in the many agreements reached in territories and principalities to settle peasant complaints”.³ The ongoing rise of peasant protests during the first quarter of the sixteenth century produced a general and uninterrupted situation of conflict, with a consequent destabilization of the political orders. The epidemic of peasant resistance spread and its increasingly focused demands led to the revolution of the common man of 1525.⁴ In reaction to that uncontrolled movement of uprisings, the authorities changed their strategy. Where they had formerly searched for compromise with the protesting peasants, they now shifted to vigorous repression and criminalization. This change led to the penal ordinance of 1532 of Emperor Charles V (the *Constitutio Criminalis Carolina*), which stated in article 127: “Whoever incites dangerous, illegal, and malicious rebellion of the common people against authorities in a territory or city shall, according to the circumstances of his misdoings, be punished with decapitation or flogging and shall, in all cases, be exiled from the territory or city in which he incited rebellion”.⁵

2. LEGAL SOURCES:

TRACTATI, DISSERTATIONES, DISPUTATIONES

This process of criminalization is reflected in the development of penal doctrine. By analysing the legal understanding of the term *seditio* – the way in which the crime was defined – it is possible to reconstruct the development of the legal argumentations, which led the jurists to legitimate severe repression of peasant protests. During the late Middle Ages the problem of political crime, namely the theory of *crimen maiestatis*, had been continuously analysed by glossators, commentators and jurists heavily involved in the praxis. Carlo Ghisalberti

3 Peter Blickle, “The Criminalization of Peasant Resistance in the Holy Roman Empire: Toward a History of the Emergence of High Treason in Germany”, *Journal of Modern History* 58, suppl. (1986), 88-89.

4 See Horst Buszello et al., ed., *Der Deutsche Bauernkrieg* (Paderborn, 1995); Peter Blickle, *Die Revolution von 1525* (München, 2004).

5 “Die peinliche Gerichtsordnung Kaiser Karls V. Contitutio Criminalis Carolina”, in *Die Caroline und ihre Vorgängerinnen*, ed. Josef Kohler, vol. 1 (Halle, 1900), 65.

underlined that this process of interpretation came to a close in the fifteenth and sixteenth centuries, when a series of treatises entitled *de crimine laesae maiestatis* and *de seditionis* was published.⁶ These treatises, later collected and published together in the eleventh volume, first part, of the *Tractatus Universi Iuris*,⁷ represent the first attempt to offer a systematic analysis of the doctrine on crimes against the security of the State. In this volume we find two treatises on sedition, the *Tractatus de seditiosis* by Nicolas Bohier⁸ (1469-1539) and the treatise *De seditionibus libri sex* by Konrad Braun⁹ (ca. 1495-1563), which became a common reference in the following legal debate.

The treatises published in the *Tractatus Universi Iuris* brought order to the problem of political crimes, but the legal and political analysis on sedition kept evolving for more than a century. The two treatises already mentioned were followed by the treatise *De seditiosis. Liber singularis* by Claude Mondain¹⁰ (d. 1594), the *Tractatus de seditione* by Andreas Dalner¹¹ (d. 1618), *De Seditionibus, Seu Discordiis domesticis* by Martin Schoock¹² (1614-1669) and *Tractatus iuridico-politicus de rebuspublicis turbidis in tranquillum statum reducendis* by Philipp Andreas Oldenburger¹³ (d. 1678).

In addition to these works, there are other sources which must be considered in order to follow the legal debate on sedition. The problem of collective political

6 See Carlo Ghisalberti, "Sulla teoria dei delitti di lesa maestà nel diritto commune", in *Archivio giuridico* 149 (1955), 100-177, 101.

7 *Tractatus Universi Iuris*, XI, pars I (Venetiis, 1584).

8 Nicolas Bohier, "Praeclarus et elegans tractatus de seditionis omnibus civitatum villarum vel castrorum dominis scabinis seu consulibus ac ceteris reipublicae administratoribus utilis, quotidianus ac necessarius", in *Rerum Criminalium praxes, et tractatus omnium nobiliorum qui ad hunc diem exiverunt iureconsultorum, in quibus processus publicorum iudiciorum, maleficiorumque et suppliciorum omnium, quae in usum cadere possunt, ratio non minus succincte quam docte traditur* (Francofurti, 1588), 1. ed. 1515, 104-133.

9 Konrad Braun, *De seditionibus libri sex, rationibus et exemplis ex omni doctrinarum et autorum* (Moguntiae, 1550).

10 Claude Mondain, *De seditiosis. Liber singularis, ad interpretationem Iuris* (Lutetiae, 1567).

11 Andreas Dalner, *Tractatus de seditione cum ex sacra et profana historia, tum ex iure, eiusque interpretibus desumptus* (Viennae Austriae, 1599).

12 Martin Schoock, *De Seditionibus, Seu Discordiis domesticis: Libri Tres; Quibus omnia, huc pertinentia, distincte proponuntur: non modo per praecepta, verum etiam exempla; tum antiqua, tum recentia* (Groningæ, 1664).

13 Philipp Andreas Oldenburger, *Tractatus iuridico-politicus de rebuspublicis turbidis in tranquillum statum reducendis, in eoque conservandis* (Genevae, 1678).

crimes was also analysed in general works on penal law, like the treatises written by Tiberio Deciani and Pierre Gregoire¹⁴. Moreover, from the beginning of the seventeenth century, within the literature analysing the *Politica* by Aristotle, it is possible to find chapters dedicated to the problem of the *mutatio reipublicae*, where the reasons for sedition are analysed in different constitutional contexts¹⁵. Lastly, this topic is also addressed by several *dissertationes* and *disputationes* on this topic, which are short works produced in German universities in order to achieve the doctoral title.¹⁶ This kind of source is particularly relevant for the study of the debate's development: their authors had to prove they knew the legal debate on the topic, but at the same time they also had the chance to contribute to debate by integrating new perspectives offered by contemporary political theory.¹⁷

Focusing on treatises, *dissertationes* and *disputationes* in order to study the development of legal and political wisdom on sedition is justified by the fact that these texts aimed, as aforementioned, to summarize the former doctrinal tradition

14 See Tiberio Deciani, *Tractatus criminalis*, Tomus Primus, liber 7, cap. 7 (Francofurti, 1613), 143-147 and Pierre Gregoire, *Syntagmatis iuris universi*, Pars Tertia, liber 35, cap. 6 (Venetiis, 1593), 362-364.

15 See Frideric Tilemann, *De eversionibus rerum publicarum politica dissertatio* (Wittenberg, 1597); Henning Arnisaeus, *Doctrina politica in genuinam methodum, quae est Aristotelis, reducta* (Lugduni Batavorum, 1606); Bartholomaeus Keckermann, *Systema disciplinae politicae publicis praelectionibus anno MDCVI. propositum in gymnasio Dantiscano [...]. Seorsim accessit Synopsis disciplinae oeconomicae, dispositionem eius breviter adumbrans [...]* (Hanoviae, 1608); Bernhardus Zieritz, *Dissertatio de conversionibus et eversionibus rerumpublicarum* (Lipsiae, 1609); Hermann Conring, *Disputatio politica de Mutationibus Rerumpublicarum* (Helmstadt, 1635); Hermann Conring, *Dissertatio politica de morbis ac mutationibus rerumpublicarum* (Helmstadt, 1640).

16 See Christianus Taubmann, *Disputationem hanc inauguralem de turbatoribus pacis publicae, ex iure publico & practico observationibus desumptam [...]*, (Wittebergae, 1640); Georgius Gulielmus Zapf, *De origine, progressu ac remediis seditionum* (Ienae, 1659); Georg Friedrich Glandorff, *Dissertationem historico-politicam de rebellibus* (Wittenberg, 1675); Johann Balthasar Mylius, *Disputatio juridica de seditione* (Leipzig, 1682); Achilles August von Lersner, *Disputatio politico-juridica de seditionibus, occasione tit. 30 lib. 9 C. de seditiosis* (Basiliae, 1688); Johann Christian Schmids, *Dissertatio politico-juridica De tumultibus* (Jena, 1714); Georg Heinrich Ayser, *De multitudine seditiosa* (Gottingae, 1747).

17 On legal *dissertationes* in the early modern time see Karl Härter, "Ius publicum und Reichsrecht in den juristischen Dissertationen mitteleuropäischer Universitäten der Frühen Neuzeit", in *Juristische Zeitschriften in Europa*, ed. Michael Stolleis and Thomas Simon (Frankfurt/Main, 2006), 485-528.

and to bring order into the understanding of the phenomenon. The jurists involved in this debate were educated in the system of common-law (*ius commune*) and naturally looked back to that tradition in order to find legal concepts to describe the collective protests they witnessed and, at the same time, to control and repress them.

The treatises mentioned, and the other shorter works produced within the universities, can be considered as a homogeneous *corpus* of sources, not only because of their topic, but also because of the way in which the topic was analysed. Indeed, it is also possible to look at the development of political thought by analysing the form of the political languages used, namely how the themes and problems are grouped, systematized and communicated. Moreover, the context of production should be considered, as well as the use and circulation of the sources. Who were the authors? Where were they working and for whom were they writing?¹⁸ While acting in different countries, the jurists were part of the same ‘community of discourse’ that investigated collective forms of protest. This community was clearly the result of the common-law tradition as a shared background; nevertheless, these jurists were also personally connected because almost all of them were working at university and facing, in different times and in different contexts, the same problems related to the control of public order: their works were well-known within their circle and later authors quoted their predecessors extensively, often without regard to confessional borders.

As aforementioned, the *ius commune* was a shared background that ensured a cross-border diffusion of treatises. The jurists referred to the same legal tradition and therefore used the same language and the same concepts. Investigating episodes of collective revolts they were interested in collecting historical examples mostly from ancient history, but also from contemporary chronicles. Indeed, all the treatises refer to revolts that affected communities and cities of the whole European continent.

Moreover, the genre *tractatus* follows a formal pattern, a shared and accepted model to organize the content and present argumentations. First of all, these sources on sedition are concerned with the problem of the legal understanding of the phenomenon, namely with the definition of the *crimen seditionis* according to the tradition of *ius commune*. The jurists used a very rich lexicon to describe the different forms of collective rebellion. *Seditio*, *congregatio armatorum*, *concitatio*

18 See Merio Scattola, *Dalla virtù alla scienza. La fondazione e la trasformazione della disciplina politica nell'età moderna* (Roma, 2003); id., “Zur einer europäischen Wissenschaftsgeschichte der Politik”, in *Werkstatt Politische Kommunikation. Netzwerke, Orte und Sprachen des Politischen*, ed. Christina Antenhofer et al. (Göttingen, 2010), 23-54.

populi, tumultus, factiones, partialitates, facinus, rixa were the concepts borrowed from Roman law and from medieval glosses and commentaries.¹⁹ Secondly, they analysed the causes of insurrections and used historical knowledge extensively to investigate past incidents of unrest. All the treatises quoted a multitude of sources, from the Bible to secular chronicles, in order to provide examples of the various factors provoking inner discord and consequently producing violent and organized protests against the authorities. Finally, the investigation of the causes of inner discord was always used to elaborate political strategies in order to repress or to intervene preventively. The jurists were indeed trying to provide public officers with adequate knowledge to avoid conflicts within society or at least to control all the situations characterised by diffuse discord (*discordia civilis*). All the treatises considered are characterised by this recursive structure, with no particular variations.

The opportunity to consider these sources as a *corpus* also depends on the fact that the jurists were moved by concrete problems related to the maintenance of public order. They had to face questions such as: how to repress insurrections? How to legitimize the use of violence in repressing them? How to prevent inner discord? How to act within the political community in order to control political commotions? The increase of social and political conflict from the end of the fifteenth century forced the authorities to elaborate the necessary political concepts to cope with unquiet political situations. In writing these treatises the jurists moved from their immediate experience of conflict to conceiving political strategies of intervention to deal with the development of protests and uprisings. They focused on concrete instruments to repress ongoing rebellions by force and, at the same time, on the elaboration of preventive policies to avoid the formation of discord and dissent. As Winfried Schulze has pointed out, the authorities' reaction to peasant resistance and subsequent criminalization gave rise to the substantial literature on the problem, which is characterised by a practical approach to social conflicts. Schulze suggests that these treatises should be considered as a "praktisch orientierte Politikwissenschaft"²⁰: they concentrated on the definition of the crime, namely on the legal concepts used to repress uprisings, but at the same time they also

19 See Sbriccoli, *Crimen laesae maiestatis*, 283-305.

20 Winfried Schulze, "Die veränderte Bedeutung sozialer Konflikte im 16. und 17. Jahrhundert", in *Europäische Bauernrevolten der frühen Neuzeit*, ed. id. (Frankfurt/Main, 1982), 287; see also id., "Geben Aufruhr und Aufstand Anlass zu neuen heilsamen Gesetzen. Beobachtungen über die Wirkungen bäuerlichen Widerstands in der Frühen Neuzeit", in *Aufstände, Revolten, Prozesse. Beiträge zu bäuerlichen Widerstandsbewegungen im frühneuzeitlichen Europa*, ed. id. (Stuttgart, 1983), 261-285.

elaborated strategies to prevent and control such crime, producing what can be labelled as a doctrine of prevention.

These developments in the doctrine on sedition can be studied by analysing how different categories of crime were applied to different forms of protest and how these attributions changed over time. Following the methodological approach of conceptual history, as it has been defined and applied by Reinhart Koselleck, the term *seditio* can be considered as a central concept, dense in social and political meaning. First of all, it is necessary to analyse how the term has been defined and used within a specific context, by jurists working in a concrete troubled situation. Therefore, the treatises will be analysed using the method of historical and lexical semantics: the semantic field of the concept of *seditio* will be studied in order to understand the relationship between the changes in the doctrine, based on the historical interpretation of the legal tradition, and the broader social context. Then, the changes within the crimes will be compared over a broader period of time in order to trace the development of the processes of criminalization.²¹

Sedition is indeed an inherently political offence, encompassing all behaviour threatening the government or political authorities in general. In the early modern period *crimen seditionis* was aimed at punishing a wide range of unlawful actions. It was therefore flexible and open to extensive interpretations. Following an underlying interpretative hypothesis to explain development and changes in the doctrine of sedition, I assume that there is a direct interdependence between the definition of *crimen seditionis* and the broader political context that needs to be explained for each treatise. An overview of the development of the doctrine reveals that in times of endemic conflict and political crisis the jurists were interested in harshly repressing any acts directed at overthrowing the established order. Due to this will to react strongly to dissent, they tended to extend offences against *maiestas* to include any episodes of violence, even against minor magistrates. This extensive definition of the crime provided legal resources for inflicting capital punishment even for minor unrest. This interpretative development of the doctrine was characteristic of the sixteenth century and is particularly salient in the treatises written by jurists directly involved in rebellions – not as participants, of course, but as witnesses or persecutors.

The doctrine developed partially in a different way during the seventeenth century, when jurists were no longer working in a “state of emergency” – although

21 See Reinhart Koselleck, “Begriffsgeschichte und Sozialgeschichte”, in *Vergangene Zukunft: zur Semantik geschichtlicher Zeiten*, ed. id. (Frankfurt/Main, 1995), 107-129. For an example of the application of lexical semantics to the study of the political languages see Pietro Costa, *Iurisdicatio: semantica del potere politico nella pubblicistica medievale: 1100-1433* (Milano, 1969).

incidents of unrest remained highly problematic. The doctrine of sedition reached a new stage at the beginning of the seventeenth century, when jurists dealing with the problem were all working at university and writing for an academic audience. They therefore had the possibility to reconsider previous doctrine – with less pressure coming from the external political situation – in order to define a sharper conceptual instrument that was able to differentiate between various forms of collective violence.

3. THE FOUNDATION OF *CRIMEN SEDITIONIS* IN THE ROMAN LEGAL TRADITION

In its more general meaning and without further connotations, the idea of sedition in the early modern period was used to describe a general perturbation of the public order, which meant an infraction of public peace (*quietis publicae perturbatio*) and a subsequent state of confusion. As Mario Sbriccoli clearly summarises, the notion of *seditio* defined a collective revolt, which usually arose in an urban setting, but could also occur in other contexts, wherever there was a concentration of people. Generally it was preceded by a minimum of preparation and organization and led to a series of lootings and devastation that sometimes culminated in murders and massacres.²² Since this first attempt to define the crime, we can see that sedition was a very flexible concept that could refer to a variety of acts, ranging from the first steps of the perturbation of public order to much more dangerous and serious behaviours, which could also lead to a veritable civil war.²³

The term *seditio* emerged in the Roman republic and developed well into the Roman Principate.²⁴ In the early modern age it was rediscovered by jurists looking for a legal understanding of endemic violent movements against the authorities. In the context of *ius commune*, the description of what can be considered as sedition started from the reference to the *Codex Iustiniani* (promulgated for the first time in 529), according to which *seditio* was indeed defined as general perturbation of the public peace.²⁵

22 Sbriccoli, *Crimen laesae maiestatis*, 274.

23 See Reinhart Koselleck, “Revolution. Rebellion, Aufruhr, Bürgerkrieg”, in *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, ed. Otto Brunner et al., vol. 5 (Stuttgart, 1984), 653-685.

24 See Gerard Osthoff, “Tumultus – Seditio. Untersuchungen zum römischen Staatsrecht und zur politischen Terminologie der Römer” (Ph.D. diss., Universität Köln, 1953), 102-150. This study is unfortunately not available in print.

25 C. 9. 30: De seditiosi et his qui plebem audent contra publicam quietem colligere.

In Roman law, namely in the *lex Iulia maiestatis* (about 48 B.C.) one can identify “the historical and legal foundation of the dogmatic construction of *crimen laesae maiestatis*”,²⁶ which remained in use for all the centuries of *ius commune*. Consequently, the *lex Iulia* represents the doctrinal and theoretical model for the definition of the concept of *seditio*.²⁷ However, the Roman legal tradition took two approaches to criminalising episodes of public violence. Resisting authorities with recourse to violence could thus be punished either as *crimen laesae maiestatis* or as *crimen vis*.

Since the titles in the *Codex Theodosiani* (promulgated in 439) and later in the *Codex Iustiniani*, the behaviour disturbing the public order of the political community was always related to the *crimen laesae maiestatis*. This becomes evident from the commentaries of the titles of the *Codex* concerning attacks against the *maiestas*. Indeed, the criminal behaviour punished on the basis of *crimen maiestatis* referred to any action designed to provoke inner discord and civil wars, namely to all behaviour relating to the idea of sedition. According to the definition of the *crimen* offered by the Roman jurist Ulpianus (170-228) and lately collected in the Justinian’s Digest (promulgated in 533):

D. 48. 4. 1pr. (Ulp. 7 de off. proc.): Proximum sacrilegio crimen est, quod maiestatis dicitur. § 1 Maiestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem eius committitur. Quo tenetur is, cuius opera dolo malo consilium inicum erit, quo obsides iniussu principis interciderent: quo armati homines cum telis lapidibusve in urbe sint convenientve adversus rem publicam, locave occupentur vel templa, quove coetus conventusve fiat hominesve ad seditionem convocentur: cuiusve opera consilio malo consilium inicum erit, quo quis magistratus populi Romani quive imperium potestatemve habet occidatur: quove quis contra rem publicam arma ferat: quive hostibus populi Romani nuntium litterasve miserit signumve dederit feceritve dolo malo, quo hostes populi Romani consilio iuventur adversus rem publicam: quive milites sollicitaverit concitaveritve, quo seditio tumultusve adversus rem publicam fiat.²⁸

26 Ghisalberti, Sulla teoria dei delitti di lesa maestà nel diritto comune, 146. For the history of the development of the title *Ad legem Iuliam Maiestatis* see Richard A. Bauman, *The Crimen Maiestatis in the Roman Republic and Augustian Principate* (Johannesburg, 1970), 266-292.

27 See Theodor Mommsen, *Römisches Strafrecht* (Leipzig, 1899), 562-565.

28 “The crime of lese majesty may closely resemble that of sacrilege. § 1 The crime of lese majesty is committed against the Roman people, or against their safety, and he is guilty of it by whose agency measures are maliciously taken for the death of hostages, without the order of the Emperor; or when men armed with weapons or stones appear in the city, or are assembled against the State, and occupy public places or temples; or where assem-

This broad definition provided all the basic elements of the concept of *seditio*, which were used in early modern doctrine to discipline the use of collective violence. Indeed, the *crimen maiestatis* was meant to punish all the behaviour and actions against the *populus romanus*²⁹ and its security; among those actions Ulpianus also included the congregation of armed men, moved by the conscious will to fight against the *res publica* and the common good. Killing a public officer (*magistratus*), carrying arms in order to occupy public spaces, encouraging sedition or tumult and inciting violence were all actions that could be punished by the *crimen maiestatis*. Such a commentary made available a legal argument to sustain that the infraction of the public order represented an attack against the security of the Roman people: all forms of collective violence were potentially perceived as a threat to the stability and continuity of the political community and, for this reason, they could be criminalized as *crimen maiestas* and consequently punished with death.

As has been mentioned before, Roman law also provided a more general *crimen vis* to punish the unlawful use of violence in public spaces. The *lex Iulia de vi publica* (17 B.C.)³⁰ was used to repress violent acts against public officers, anything disturbing their political functions, or, more generally, any action aiming to interrupt the normal course of political life. Although the kind of behaviour criminalized by the *crimen vis* could be recognised as a form of perturbation of public peace, it was not stigmatised as a politically structured attack against the Roman people and, therefore, not perceived as a threat to the entire political community. Consequently, the punishment for this crime consisted of the confiscation of goods and forced exile. As can easily be seen, the Roman law offered different ways of reacting to public violence, according to the dangerousness attributed to the different types of behaviour.

blies have been called together, or men convoked for sedition; or where, by the malicious aid and advice of anyone, plans have been formed by which the magistrates of the Roman people, or other officials invested with command or authority may be killed; or where anyone bears arms against the government, or sends a messenger or letter to the enemies of the Roman people, or communicates to them any password; or commits any act with malicious intent by means of which the enemies of the Roman people may be assisted in their designs against the government; or where anyone solicits or inflames soldiers, in order that a sedition or a tumult may be excited against the State”.

29 The notion of *maiestas* referred to the *dignitas* attributed to the *populus romanus*, which originally held it; during principate time *maiestas* shifted from *populus* to *princeps*, becoming a personal attribute of emperor.

30 C. 9. 12.

The *crimen vis* was an alternative option to criminalize and repress violence: it aimed at protecting minor magistrates and, as such, was a flexible instrument to control violent behaviour in everyday political life. In contrast to that, the *crime maiestatis* covered only attacks against the top figures of the political hierarchy and left the intermediate levels of power without legal protection. For the jurist of the early modern age, who accepted the *lex Iulia maiestatis* as a doctrinal model for the definition of political crimes, this feature represented a problematic aspect to be reconsidered and integrated based on contemporary needs.³¹ Indeed, they had to provide legal defence for all the intermediate public officers – members of local government, tax collectors, representatives of central authorities – which were not protected by *crimen maiestatis* as it was defined in the Roman law.

The process of adaptation of the titles of the *Codex* and the Digest related to the changed political context led to an extensive application of the *crimen maiestatis* in order to punish all manifestations of resistance against the authorities. This extension was based on the idea that all members of the power's hierarchy, even minor magistrates holding only a derivate *maiestas*, had to be protected by it. This led to a considerable increase of occasions and possibilities to oppose an authority invested with *maiestas* and therefore to commit the crime. Importantly, a proper and exhaustive definition of the *crimen maiestatis* was missing in the juridical doctrine: rather than elaborating a definition, jurists compiled extensive lists answering the question *crimen laesae maiestatis quid sit*. Due to this, instead of a theoretical understanding of the *qualitas rei* of the crime they indicated concrete ways in which it was committed; therefore, starting with the cases specified in the Roman law, they extended the behaviour which was punishable as *crimen maiestatis*. Finally, during the development of the early modern penal law, the doctrine started to consider behaviour with a minimal political connotation as political crimes; this behaviour was previously not considered as a threat to the authority and consequently not yet assimilated to the *crimen maiestatis*.³²

These three developments led to an extensive interpretation of the concepts of *rebellio* and *seditio*, which were the two crimes subsumed under the broader *crimen laesae maiestatis*, namely the two concrete manifestations of the crime.³³ The

31 Ghisalberti, Sulla teoria dei delitti di lesa maestà nel diritto comune, 146-150.

32 Sbriccoli, Crimen laesae maiestatis, 258-266.

33 In order to define the notion of *rebellio*, the early modern doctrine constantly referred to the comment by Bartolus de Saxoferrato to the Imperial Constitution *Quis sit rebellis* (1313) promulgated by Henricus VII. According to Bartolus, rebelling was like resisting and resisting meant to do something against, to refuse to do something or to disobey. See Bartolus de Saxoferrato, “Tractatus super Constitutione Extravaganti, Ad Reprimendum”,

process of extension that has been briefly described, involved indeed both notions: on the one hand, during the sixteenth century penal doctrine started to increasingly equalise *crimen maiestatis* and *crimen rebellionis*, thereby abandoning the differentiations made by previous doctrine.³⁴ For political conflicts this meant that one could be accused of rebellion more often and, at the same time, a clear and indubitable subsumption of that accusation under the *crimen maiestatis*. On the other hand, the enlargement of the concept of *seditio* was based on the idea that every form of perturbation of the public order, even minor episodes of violence, must be recognized as a direct strike against the authority.

4. DEFINITION OF *SEDITIO* IN THE SIXTEENTH CENTURY

a) Nicolas Bohier

In 1515 Nicolas Bohier,³⁵ a French jurist, member of the *Grand Conseil* and President of the *Parlement de Bordeaux*, wrote his aforementioned treatise *De seditiosis*. Just one year before he had been sent to repress an insurrection in Agen and was directly involved in the organisation of the trial against the insurgents. The experience gained on that occasion represented the starting point to reconsider the former legal tradition dealing with collective forms of discord and to elaborate a first systematic attempt to bring order to the topic. The first part of the treatise is dedicated to a general analysis of the causes of civil discord. This is followed by a depiction of the revolt he had recently repressed.³⁶

The revolt in Agen in July 1514 was provoked by a new impost on wine and other goods for consumption. The town consuls had levied the tax in order to pay back a municipal debt. The burghers perceived this as unfair and unjust. After initial murmurings people met to discuss a common reaction and some minor

gl. Tenore, in *Consilia, Quaestiones et Tractatus* (Venetiis, 1585), 104r: "...rebellare idem est quod resistere, secundum Hug. C. de seder. L. 2. Lib. 12, et hoc resistere potest fieri faciendo aliquid contra, vel non faciendo, et non obediendo [...]". On Bartolus' comment on the Imperial Constitution see Diego Quaglioni, "Rebellare idem est quam resistere". Obéissance et résistance dans les gloses de Bartolo à la constitution "Quoniam nuper" d'Henry VII (1355), in *Le Droit de résistance XIIIe-XXe siècle*, ed. J.-C. Zancarini (Lyon, 2001), 35-46.

34 Ibid., 263 f.

35 On Bohier see G.D. Guyon, "Bohier (Boyer, Boerius), Nicolas", in *Dictionnaire historique des juristes français (XIIe-XXe siècle)*, ed. P. Arabeire et al. (Paris, 2007), 95-97.

36 Bohier, *De seditiosis*, § 1, pp. 104-114.

incidents followed; the revolt began with the ringing of the bells which summoned the crowd to gather in the main square, who then besieged the town hall and captured some members of the local elite. Attacks against the town consuls continued for days, while the widespread violence led to the destruction of several buildings and parts of the city wall. The insurrection lasted for two weeks until it was brutally repressed.

According to Giovanni Procacci, the uprising should be understood within the framework of a broader conflict: the protest was the result of the growing burden of taxes and a direct act against the local oligarchy and rich families, who were accused of monopolizing offices, pursuing their particular interests in running public affairs and profiting from the unequal distribution of taxation.³⁷

After his description of the unrest, Bohier used the words *seditio* and *discordia civilis* indifferently, implying a convergence between the two concepts.³⁸ It is only in the passages that follow, that two terms are explained separately: sedition is described as a form of violent and degenerated discord, while *discordia* is defined as a precondition to the explosion of a widespread conflict, which could also lead to armed insurrection. This introduction to the topic and the narration of the revolt in Agen are functional to the following definition of the crime, insofar as sedition is presented not as a unique violent act against the authority, but rather as a series of related behaviour aiming to plot against the *res publica*. *Seditio*, according to the formula offered by the Roman law is a form of perturbation of the public peace.³⁹ Bohier, referring to the medieval glosses and commentaries, tries to explain the etymological origin of the term: "seditio dicitur quasi seorsum itio, quia in diversum vadunt aliosque trahunt: vel dicitur a sedo per contrarium, plerumque populo

37 See Giovanni Procacci, *Classi sociali e monarchia assoluta nella Francia della prima metà del secolo XVI* (Torino, 1955), 161-173. See also David F. Burg, *A world history of tax rebellions. An encyclopedia of tax rebels, revolts and riots from antiquity to the present* (New York, 2004), 144; Perez Zagorin, *Rebels and rulers 1500-1660, Society, states and early modern revolution, agrarian and urban rebellions*, vol. 1 (Cambridge, 1982), 237 ff.

38 On the concept of *seditio* in Bohier and Braun see David von Mayenburg, "Ubi est inco-lumitas obedientiae, ibi sana est forma doctrinae – Aufruhr und Revolte im kanonischen Recht", in *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, vol. 2: *Öffentliches Recht*, ed. Franck Roumy (Köln, 2011) 217-266.

39 Bohier, *De seditiosis*, § 2, n. 1, 114: "seditio est quietis publicae perturbatio"/"sedition is a perturbation of public order"; the reference to the Roman law is C. 9. 30.

discordante itur ad manus”.⁴⁰ As well as an unsuccessful attempt to link the term to the Latin verb *sedare*, meaning the opposite of sedition, the term is explained as referring to a movement that divides the people and splits them up.

In order to better understand the meaning of the concept and to clarify the relationship between *seditio* and *discordia*, Bohier quotes three authorities: Antonius Florentinus, Thomas Aquinas and Isidore of Seville. They are central to an understanding of the medieval representation of sedition. According to Antonius Florentinus’ *Summa Theologica*, *seditio* is a particular form of discord, namely the discord that arises within the multitude.⁴¹ Florentinus referred to the *Summa theologiae* by Thomas Aquinas, where the *seditiosus* was described as

qui seditionem excitat. Et quia seditio quamdam discordiam importat, ideo seditiosus est qui discordiam facit non quamcumque, sed inter partes alicuius multitudinis. Peccatum autem seditionis non solum est in eo qui discordiam seminat, sed etiam in eis qui inordinate ab invicem dissentiunt.⁴²

The discord produced by a seditious man was in this way characterised as of public nature: not just a disagreement between two private parties, but discord triggered by political reasons and involving the “multitude”. The understanding of what should be considered as *seditiosus* was based on what Isidore of Seville had already written in his encyclopaedic work *Etymologiae*. According to Isidore, “qui dissensionem animorum facit et discordias gignit”⁴³ can be accused as the author of sedition. Starting from this definition, Thomas Aquinas claimed that fomenting civil discord in general or committing sedition could be considered as the same sin. By referring to these definitions, Bohier presents an extensive interpretation of the crime, which allowed him to criminalize several types of behaviour which cause dissension

40 Ibid.: “sedition derives from going a part, because they go away and bring others with them, or it derives from the verb squash (as its contrary) and generally it comes from the idea of the people fighting among themselves”.

41 Antonius Florentinus, *secunda pars summae*, tit. 4, c. 8, § 1 (Basilee, 1511): “seditio importat discordiam, non quamcumque sed inter partes alicuius multitudinis”/“sedition does not refer to every discord, but to discord developing among parts of a multitude”.

42 Thomas Aquinas, *Summa Theologiae*, II^a-IIae q. 42 a. 1 ad 1: “A seditious man is one who incites others to sedition, and since sedition denotes a kind of discord, it follows that a seditious man is one who creates discord, not of any kind, but between the parts of a multitude. And the sin of sedition is not only in him who sows discord, but also in those who dissent from one another inordinately”.

43 Isidore of Seville, “Seditiosus”, in *Etymologiae sive origines*, X, 250: “a seditious man is who sows dissent among minds and begets discord”.

within the political community, from the first murmuring against members of the government up to more explicit appeals to resist the authorities. This position was far from unique in the debate. On the contrary, it was the standard argumentation used by several jurists; the authorities quoted by Bohier were indeed a shared reference for all jurists dealing with collective forms of protest, insofar as their definitions were always the background for further analysis of the phenomenon.

In this preliminary attempt to retrace a definition of *seditio* in Bohier, we see that its core concepts were *dissensio* and *discordia* and that a sedition was understood as a form of division of or within the multitude, although the word *multitudo* was not yet specified and therefore used in a general way. A further effort to clarify the crime was the distinction between sedition and the other forms of division and opposition, which were not to be confused.

Thomas Aquinas, in a passage quoted later by all the jurists, wrote that a *seditio* was different from a war, which was a conflict against foreign people, namely against people not bound to the same political obligations and loyalty. *Seditio* was thus described as a clash or division taking place within a singular people, i.e. when one part of it stood against the other. Moreover, since a multitude referred to a large number of persons, *seditio* was different from a simple strife (*rixa*) between two or a few individuals.⁴⁴ Private strife was not perceived as a political problem and was therefore considered as different from sedition, which was strongly connected to the idea of a multitude in action. Indeed, sedition could happen in different contexts – and Bohier specified “*in exercitu, in classe, in campo, in schola*”⁴⁵ –, but a large number of people always had to be involved.

War and strife were also different from sedition for another reason, which had considerable consequences on the possibility of intervention and repression. Again

44 Aquinas, *Summa Theologiae*, II^a-IIae q. 42 a. 1 co.: “Secundo differunt, quia bellum proprie est contra extraneos et hostes, quasi multitudinis ad multitudinem; rixa autem est unius ad unum, vel paucorum ad paucos; seditio autem proprie est inter partes unius multitudinis inter se dissentientes, puta cum una pars civitatis excitatur in tumultum contra aliam. Et ideo seditio, quia habet speciale bonum cui opponitur, scilicet unitatem et pacem multitudinis, ideo est speciale peccatum”/“Secondly, they differ in that war is, properly speaking, carried on against external foes, being as it were between one people and another, whereas strife is between one individual and another, or between few people on one side and few on the other side, while sedition, in its proper sense, is between mutually dissentient parts of one people, as when one part of the state rises in tumult against another part. Wherefore, since sedition is opposed to a special kind of good, namely the unity and peace of a people, it is a special kind of sin”; Bohier, *De seditiosis*, § 2, n. 2, 114.

45 Bohier, *De seditiosis*, § 2, n. 4, 115.

Bohier quotes Thomas Aquinas, who wrote that “bellum et rixa important mutuam impugnationem in actu, sed seditio potest dici sive fiat huiusmodi impugnatio in actu, sive sit praeparatio ad talem impugnationem”.⁴⁶ Following this interpretation, the term war is applied only to an open conflict, whereas the concept of sedition is rather different: it refers indeed to unrest and insurrections, but also to all the activities that usually precede them, such as murmuring against authorities, gathering people or plotting. This position is sustained by the gloss to Paulus’ Second Epistle to the Corinthians⁴⁷ that has already been quoted by Aquinas and was now taken up by Bohier. Aquinas, according to the gloss, wrote that “seditioes sunt tumultus ad pugnam, cum scilicet aliqui se praeparant et intendunt pugnare”.⁴⁸ Therefore, sedition was defined as the will of plotting against authorities and the term could also be applied to describe all the unlawful behaviour preceding an insurrection.

This is a core passage that helps to comprehend how the process of criminalization of collective forms of protest was connected to the enlargement of the semantic field of *crimen seditionis*. Not only concrete violent actions were to be considered as a crime, but also types of behaviour, which could be interpreted by the authorities as a form of organised malcontent and a way to prepare a protest.

Such an effort to produce an extensive idea of sedition is the result of the practical approach assumed by the jurists. Bohier, as well as other authors of treatises on sedition, had been directly involved in the repression of insurrections. He was well aware of the different steps producing a collective disagreement and wanted to develop legal instruments to nip sedition in the bud. We can see here how the legal doctrine was forced to serve political needs and how it was used to define strategies to control public spaces and to repress political protest. Indeed, by classifying the initiation of disagreement and discord within the political community as part of the *crimen seditionis*, Bohier wanted to legitimize preventive action taken by the *magistratus*. The jurists embraced the idea that it was necessary to consider a seditious man as not only one who actively took part in sedition, but also anybody involved in its preparation. This was aimed to criminalise the very intention to disturb public order as well as all behaviour perceived as a threat to established authority. It emerges here that the will of plotting was recognised as a core element in defining the crime. Jurists implied that any possible criticism of the

46 Aquinas, *Summa Theologiae*, II^a-IIae q. 42 a. 1 co.: “war and strife denote actual aggression on either side, whereas sedition may be said to denote either actual aggression, or the preparation for such aggression”.

47 2 Corinthians 12.

48 Aquinas, *Summa Theologiae*, II^a-IIae q. 42 a. 1 co.: “seditioes are tumults tending to fight, when a number of people make preparations with the intention of fighting”.

authorities should be characterised as a plot to consciously damage them. At the same time, they perceived any episode of collective violence as a concrete manifestation of a more or less shared will to destabilise the public order. Therefore, not only violent acts were unlawful, but also all behaviour producing discord and considered as a preliminary phase of unrest.

As we can see, the extensive interpretation of the term *seditio* was grounded in a broad definition of *seditionis*. Bohier quoted a long extract from the *Tractatus de maleficiis* by Bonifazio Vitalini:

Seditiosus autem dicitur ille, qui seditionem vel proditionem tractat de aliqua civitate vel castro habendo, vel dando causam faciendi guerram contra publicam utilitatem, vel tractat facere novitatem in civitatem, vel novitatem contra publicum et bonum statum civitatis, vel tractat se fieri dominum terre, vel loci alterius ad turbam populi, vel similia contra publicam utilitatem.⁴⁹

The seditious man was defined as whoever was involved in sedition or treason (*proditio*), whoever waged war against the common good or tried to introduce something new into the political body; in general, a person who produced discord among the people and acted against public unity was considered as *seditionis*. This extensive definition offers several points to be analysed and clarified. For the first time in Bohier the convergence between sedition and treason was made explicit and clear and, in this way, the crime was connected to the *crimen laesae maiestatis*. Political treason is evidently something different from public disorder produced by the public use of violence. By introducing the concept of treason jurists considerably changed the crime and assigned new meaning to all the activities preceding unrest. Murmuring against authorities or the meeting of people were considered as evidence of a will to plot. Disorder produced by violence, and the consequent damage of the *bonum publicum*, were not collateral effects, but the real aim conceived by insurgents.⁵⁰

49 Bonifazio Vitalini, *Tractatus de maleficiis*, tit. De seditionis, 396r: “A seditious man is defined whoever manages to set a sedition or treason within a city or stronghold by waging war against common good or by giving reason for it; he is whoever wants to introduce changes in the city or against the government or wants to take domain and control of a territory in order to bring discord among the people and against the common good”.

50 Bohier, De seditionis, § 1, 104-114.

b) Konrad Braun

The treatise of Bohier was well known to the Catholic German jurist Konrad Braun,⁵¹ who, in 1550 wrote his *De seditionibus libri sex*.⁵² In a first attempt to answer the question *quid sit seditio*, the jurist referred to the ancient classics. According to Cicero, who considered the phenomenon in several passages in his works, sedition occurs when there is a division within the people, because of an inner disagreement or a conflict with the authorities.⁵³ This first definition also introduces the leading theme of discord within the people. Referring to classical political thought, the jurist had the possibility to list several terms used to circumscribe the concept of *seditio*. Sedition was the result of a violent movement of the people and could be defined as *impetus, motus, incursio, concitatio plebis, vis multitudinis*. This movement of the multitude was associated with the idea of uncontrolled violence and illustrated with violent images designed to appal the reader. Many metaphors were used to describe movements of protest. Apart from Cicero, Braun referred to the works of Sallust, Cyprian, Pindar, Livy and Virgil, where the movement of the people was described as a disease, a fire and as a storm. All these metaphors were based on antonymous conceptual couples such as order/disorder, stillness/movement, unity/division and health/illness.⁵⁴

51 See Theobald Freudenberger, “Braun, Konrad”, in *Neue Deutsche Biographie* 2 (1955), 556; Maria Barbara Rößner, *Konrad Braun (ca. 1495-1563) - ein katholischer Jurist, Politischer, Kontroverstheologe und Kirchenreformer im konfessionellen Zeitalter*, (Münster, 1991).

52 On the concept of *seditio* in Braun see Jörn Johannsen-Reichert, *Das Thema “Aufruhr” aus religiöser, juristischer und politischer Sicht im deutschen Raum während des konfessionellen Zeitalters (1517-1617)* (Aachen, 1996), 32-56.

53 Braun, *De seditionibus*, 1: “Seditio à seorsim eundo dicta est, ut Ciceroni placet, quod plebis vel inter se, vel cum magistratibus dissentiens, seorsim secedat”/“Sedition derives from the idea of coming asunder, as Cicero wrote; this occurs when the people disagree among themselves or with public officers”.

54 *Ibid.*: “[...] seditio, nunc vehementiori morbo, nunc incendio, turbini, et à Pindaro tempestati maris comparatur: Quam et tempestatem aliquoties appellat Livius. Ad quam comparationem, etiam Poeta noster alluisse videtur, qui Aeolum ventos oratione sua placare fingens, eos seditioso populo comparatur. Ac veluti (inquit) magno in populo cum saepe coorta est,/Seditio, saevitque animis ignobile vulgus,/Iamque faces et saxa volant, ac meritis si forte virum quem,/consplexere, silent, arrectisque auribus adstant,/Ille regit dictis animos, et pectora mulcet./Sic cunctus pelagi cecidit fragor, aequora postquam/Prospiciens genitor, coeloque invectus aperto./Flectit equos, curruque volans dat lora secundo (Virgil, *Aeneid*, 1, vv. 147-154). Hinc etiam concitari, incendi, flagrare,

At the end of his brief historical overview Braun discusses and criticizes the definition offered by Bohier. As it has been stressed, the French jurist, with his background of education in Roman law, identified sedition as a perturbation of the public peace. According to Braun, this was not acceptable as a definition, but simply as a description of the phenomenon. Moreover, if sedition produces a perturbation of the internal order of the *respublica*, it is also true that not every disorder could be related to it. It was therefore necessary to provide a legal definition of the phenomenon, able to suit different situations. For that, Braun proposes a complex explanation of the concept, composed by a series of elements that need to be clearly defined. He wrote that:

verius itaque definitur seditio, ut fit motus populi et subditorum, eorumque qui eiusdem multitudinis partes sunt, vel in eadem multitudine versantur, quo vel plures inter se, vel unus pluresve adversus eos, quibus fidelitate astricti sunt, utilitatis alicuius consequendae, vel damni alijs aut iniuriae inferendae causa, scientes et volentes in detrimentum et damnum Reipublicae, ad dissensionem concitatur.⁵⁵

Sedition is presented as a movement of the people, namely of those who were part of a multitude. This movement could take place within the multitude itself or against the authority, to which the subjects were bound by political obligation. Such a movement consciously and willingly produced discord in order to take advantage of it or to damage the *respublica*. The jurist's attempt to define *seditio* exceeded the simple description of the phenomenon we have seen in Bohier's writings. For Braun the definition had to be sufficiently abstract and formal, in order to be valid

aestuate, saevire seditiones apud autores dicuntur: ab incendio videlicet, et morbo sumpta metaphora: et seditiosi ipsi turbulenti, et tumultuosi appellantur”/”sedition is sometimes compared to the most violent illness, sometimes to a whirlwind and by Pindar to a storm. Livy as well calls it storm. We see that also our Poet, Virgil, alluded to that similarity: “And when – he wrote – seditions rise among great people, and low people enrage, and flames and rocks fly, then if the people see a serious and virtuous man, they calm down and listen, he soothes their anger, thus the storm's commotion quiets: the father squashes the horses and drives the coach”. Therefore, other authors also refer to sedition as the act of instigating, inflaming, burning, enraging; the metaphors come from blaze and illness and seditious men are called turbulent and tumultuous”.

55 Ibid., 2: “sedition is more correctly defined as a movement (commotion) of the people and subjects, namely of whoever is or becomes part of a multitude; this movement takes place among the people or against those, to whom the people are tied by a fidelity bond; finally, this movement is provoked in order to provoke dissension and to willingly achieve an advantage or to damage the political community”.

for different conflicting contexts. Therefore, he offered a flexible model for a general theory of sedition.

The semantic field of the concept defined by Braun was partially different from the one elaborated by Bohier and responded to different needs. Specification was achieved through the combination of the term with other concepts. At the base of sedition there was the idea of a movement, which was not to be understood as just an ordinary change in the political order. The Latin word he used was *motus*, but according to Braun, to understand the meaning of this movement, it was necessary to link it to the words *studium* and *conatus*.

Motum in hac definitione pro genere ponimus, non quidam ut generaliter mutationem in Republica designet, ut generationem, corruptionem et similia: nec ut quemlibet etiam animi motum denotet, ut in illo Iureconsulti [Callistratus : D. 1. 18. 19]. [...] Item in illo Ciceronis [Cicero, De claris oratoribus] [...]. Nunquam animus agitatione et motu vacuus esse potest. Sed ut studium et conatum ardentius aliquid machinandi significet.⁵⁶

The notion of a sudden movement, representing the violent action of the insurgents, was combined with the idea of an effort to change the political order or to plot against authority. The *motus* was a conscious motion aimed at changing the political order. It should be understood as a passion, a desire to conspire. The given description conveys the idea of purposeful and deliberate participation in the protest, not only a generic malcontent, but also a will to intervene and to achieve a specific result.

The crowd (*hominum multitudo*) was the collective subject of this movement. Braun, as well as Bohier, wrote that sedition was always associated with a multitude of people assembled. If it was possible to simply list situations in which people gathered, it was difficult to specify a number that would define a congregation, or other more rigorous definitions of such a collective subject. Braun was sure that it was not possible to establish a general rule and left it to the magistrate to decide case by case.⁵⁷

56 Ibid.: “The term movement does not indicate a general change in the political community, like generation or corruption, or a general commotion like in Callistratus (D. 1. 18. 19) or in Cicero (De claris oratoribus). This movement cannot be without an aim, but, on the contrary, it is a passion and an effort to plot”.

57 Ibid.: “Addidimus in definitione: Populi, Cuius appellatione hoc loco omnis hominum multitudo venit. Nam seditio esse potest, ubicunque est hominum multitudo, ut in populo, in gente, in collegio, in exercitu, in classe, in schola, et in quolibet coetu et congregatione [...]. Caeterum, quot homines multitudinem, quot populum, quot collegium, quot gentem, quot exercitum, quot caetum et congregationem faciant: certa quidam regula dari

The core of the definition is the infraction of political loyalty, to which all subjects are bound. The basic element of the crime thus consisted of the resistance of authority. This allowed the jurist to directly link the concept of *seditio* to rebellion. Braun wrote that it was not even important to determine the number of the people taking part in the action: the relevant point was the rebels' behaviour towards legitimate superiors.⁵⁸

Braun further discussed the problem of conscious and willing participation in sedition. In order to sustain that the phenomenon had to be subsumed under the broader idea of high treason he kept arguing that all sedition was aimed at achieving an established advantage or damaging the political body. Every violent action against authority potentially weakened the whole community and thus had to be considered as a threat to the *respublica*. The injury inflicted to the community was the result of civil discord, which was understood at the same time as a means to perturb the inner equilibrium and as the outcome of sedition:

vel Utilitatis consequendae, vel damni alijs, aut iniuriae inferendae causa: Haec verba finem seditionis denotant. Omnis enim seditio fit aut ob utilitatem aliquam consequendam, aut damnum iniuriamue a nobis repellendam, alijsue inferendam. Inter se ad dissensionem scientes et volentes in detrimentum et damnum Reipublicae concitantur: His verbis forma seditionis explicatur: Quippe à discordia seditio et nomen et formam accipit. Nam quid aliud est seorsum ire, quàm cum alij dissentire. Nec omnis discordia seditionem parit, set ea

non potest. [...] Est igitur in arbitrio Iudicis, et boni viri positum, ut ipse, quot homines multi sint vel pauci, quot populus, turba, gens, caetus, congregatio et c. interpretetur: eamque rem ita arbitretur, ut materie subiectae convenire existimabit”/”We add to the definition: people, this term comes from the idea of a multitude of men. Indeed, sedition can occur wherever there is a multitude of men, like among the people, in an assembly, in the army, in a battlefield, inside a union and in any congregation. It is not possible to give a rule in order to determine how many men make a multitude, a people, an assembly, an army or a congregation. Therefore, the judge has to interpret it and decide how many men make a multitude or a congregation”.

- 58 Ibid.: “Sed et propter rebelles, additur verbum Subditorum. Rebello siquidem subditorum est erga Dominos suos, nec ad numerum vel multitudinem hoc casu respicitur: Sive enim multi sunt, sive pauci, Si obedientiam dominis suis subtrahunt, seditiosos et rebelles appellantur”/”In order to explain the term “rebels” we add the term “subjects”. Indeed rebellion against authorities does not depend on the number of men taking part in it. Even if they are many or few, if they deny obedience to the authorities, they have to be considered rebels and seditious men”.

tantum, quae Reipublicae detrimentum, et damnum affert, et quietem illius et tranquillitatem perturbat.⁵⁹

Moreover, Braun specified that not all kinds of discord should be criminalized and repressed, only those aimed at damaging the community.⁶⁰

The general theory proposed by Braun was a flexible instrument to criminalize different forms of unrest. The perturbation of the public order could develop indeed in both horizontal and vertical direction.⁶¹ On the one hand, the concept could be used to criminalize all the horizontal forms of disagreement within the people, namely any division produced by inner discord such as, for instance, the existence of factions. The crime associated with sedition could be applied to political discord within the people even without any direct attack against the authority. Disorders and violence within the community were enough to perturb the public order and, consequently, to be considered as a threat. On the other hand, *seditio* was also a concept suitable to describe attacks against the vertical structure of power, namely when the multitude moved against the established government. Despite these two possibilities, the *crimen seditionis* was always considered as an act of rebellion against the legitimate authority and therefore likened to the *crimen rebellionis*. The core of the crime was indeed, according to Braun, subtraction from the political obligation to which all the subjects were bound. The convergence between *seditio* and *rebellio* was functional to legitimise the repression of every form of collective dissent.

59 Ibid., 4: “Achieving advantages, provoking damages or injuries: these words indicate the aim of sedition. Indeed, any sedition is made in order to achieve an advantage, to avoid damages or to inflict them to others. Willingly provoking dissension in order to create damages to the political community: these words explain the form of sedition. Certainly, sedition derives its name and form from disagreement. Moreover, dividing and disagreeing are different: not every kind of dissent produces seditions, but just the one aimed at inflicting damages to the political community and at perturbing the public order”.

60 There were indeed also forms of positive competition between the people, which have to be tolerated and even encouraged by the authority: *ibid.*: “Sic nec mutua inter cives aemulatio et dissensio, qua alter alterum prudentia, consilio, et rebus gerendis, superare intendit, seditio est: Nam et ipsa Reipublicae, non solum non noxia est, sed etiam utilis”/“So, competition and discord among people, aimed at improving prudence and judgment, are not sedition: indeed, these kinds of competitions not only are not noxious for the political community, but in fact are useful”.

61 Johannsen-Reichert, *Das Thema “Aufruhr”*, 41-43.

5. DEVELOPMENT OF *CRIMEN SEDITIONIS* IN THE SEVENTEENTH CENTURY

During the seventeenth century the legal debate on sedition revealed increasing attention on the forms of collective violence that did not immediately aim to oppose or criticise the top level of the political hierarchy. The treatises dealt with the emergence of dissent within the crowd and attempted to provide the public officer with the necessary wisdom to cope with all unlawful uses of violence that might incite disorder within the community, from minor riots to more structured and organized rebellions. Jurists like Bohier and Braun were mostly interested in defining a crime that was suitable for brutal repression of any forms of protest against authority. Apart from this aspect, subsequent authors rather concentrated on conflicts among the people that were threatening to result in a generalized state of violence. They were particularly concerned with violence itself and focused on all kinds of infraction of public peace. Therefore, they elaborated a concept of *seditio* that was appropriate to provide a more adequate punitive reaction to a wider range of violent behaviours.

From outside the legal debate, in 1589 in his *Politicorum sive civilis doctrinae libri sex* Justus Lipsius briefly defined sedition as a “multitudinis in Principem aut magistratus, subitus et violentus motus”,⁶² describing therefore the crime as a violent assault on the authorities. This definition synthesized former doctrinal elaborations, focusing on violence as a core element of the crime and indicated that sedition could be directed against both the top level of the political hierarchy, or against a public officer of a lower rank. A more nuanced distinction between strikes against the *princeps* and offences against a public officer received more attention in the ensuing debate in which jurists tried to achieve a more refined calibration of the authorities’ reactions.

A few years later, in 1599, Andreas Dalner, who like Bohier was a direct witness of peasant protests,⁶³ wrote in his *tractatus* that “seditio nihil aliud est,

62 Justus Lipsius, *Politicorum sive civilis doctrinae libri sex* (Antversiae, 1598), 210.

63 Dalner was a councillor in Lower Austria and witnessed the peasant uprising of 1597. He was deeply impressed by the violence of that event and wrote his treatise under the influence of his immediate experiences. Two years after its first edition in Latin, the treatise was published in German translation under the title *Ein Tractat: Von Aufruhr und Empörung auß geistlichen und weltlichen Historien* (Ingolstadt, 1601). See Roth, *Kollektive Gewalt*, 125 and Schulze, *Die veränderte Bedeutung sozialer Konflikte*, 299. On the peasant uprising of 1597 in Lower Austria see Otto Kainz, “Das Kriegsgerichtsprotokoll im niederösterreichischen Bauernaufstand aus dem Jahre 1597” (Ph.D. diss., University of Wien, 2008).

quam in provincia, territorio, urbe, castro, vel alio aliquo loco, contra publicam quietem et disciplinam, consulto animo, facta populi suis legibus uniti concitatio”.⁶⁴ Dalner, distinguished between sedition committed against the *respublica* or the Emperor and sedition committed against a minor part of the political body that might produce some sort of inner disorder.⁶⁵ This second case was not subsumed under *the crimen maiestatis*, but it was punished according to the law concerning public use of violence, namely the *lex Iulia de vi publica*.⁶⁶

In his work *De Seditiōibus seu discordiis domesticis*, published in 1664, Martin Schoock⁶⁷ made great efforts to analyse the genesis and development of inner discord. According to him the best definition of a state of sedition was the one offered by the rhetorician Libanius (ca. 314- ca. 394), who wrote, in his *Oration pro*

64 Dalner, *Tractatus de seditione*, 5: “sedition is nothing else than a commotion in a region, a city, a stronghold against public order and established rules; this commotion is based on a deliberate union among the people”.

65 *Ibid.*, 7-8: “Seditio autem duplex est; una adversus Rempublicam vel Imperatorem committitur: altera eiusdem membra fit. Illa quidem [...] est, quando quis opera sua, fraudolentove consilio, non modo paganos, verum etiam milites, [...] sollicitat, concitatve, quo telis et armis instructi seditionem seu tumultum in Reipublicae seu Imperatoris exitium moturi conveniant. [...] Item si quis per seditionem Reipublicae seu Imperatoris subiectam civitatem oppugnet, occupetque; nam et ipse crimen laesae maiestatis incurrit [...]. Haec vero est, quando quis opera, seu malo consilio suo, homines concitat, quo telis et armis convenientes, adversus Reipublicae seu Imperatoris membra, seditionem moveant, civitatesve ad Imperatorem non pertinentes oppugnet, vel bona rapiant: quo pertinet l. in eadem causa. 3. in princ. et §. in eadem causa, his verbis: in eadem causa sunt, qui pessimo exemplo, convocata seditione villas expugnaverint, et cum telis et armis bona raperint. ff. ad legem Iuliam de vi publica [D. 48. 6]”/“Sedition is double: one I committed against political community and emperor, the other against political body's parts. The first one occurs when people, armed with weapons and spears, organise seditions and tumults against political community and emperor, or when the people occupy or assault a city that is subject to the emperor. This is a case of lese majesty. The second one occurs when the armed people organise seditions and tumults against a part of the political community or against a city that is not subject to emperor. This sedition is covered by the Julian law on public violence”.

66 C. 9. 12; D. 48. 6.

67 Schoock was born in Utrecht in 1614. He had a very “cross-disciplinary” education and became professor of Classic Literature, Oratory, History and Logic in Deventer and Groningen. After 1664 he became the official historian of the prince-elector of Brandenburg and worked as professor in Frankfurt (Oder) until his death. See Jacob Cornelis van Slee, “Schoock, Martin”, in *Allgemeine Deutsche Biographie* 32 (1891), 324-325.

Thalassio of 388, that “seditio est, quando diversitas cupiditatis perturbato inter se committit: quando scinditur incerti in studia contraria: ut hi arces occupent, alii portus detineant: quando muniunt se muris et propugnaculis: quando in se invicem auxilia vocant: quando civitas non una manet”.⁶⁸ Schoock understood sedition as an intermediate step between *factio* and *bellum civile*, which he perceived as the last and most dangerous stage of the disruption of political unity.

In order to better understand what sedition meant for the political community, the jurist compared it with *rebellio* and *perduellio*. Starting from the explanation of *rebellio* provided by Henricus VII in the Imperial Constitution *Quis sit rebellis*⁶⁹ (1313) and from Ulpianus’ comment on the *lex Iulia de maiestate*,⁷⁰ Schoock emphasised the convergence of the two terms and concluded that

qui perduellionis reus est, hostili animo adversarius rempublicam vel principem animatus. Ex quibus patet, seditiosos, quatenus tumultuantur illegitime contra legitimum suum

68 Schoock, *De Seditioibus, Seu Discordiis domesticis*, 63. The passage quoted is Libanius, *Libanii Opera. Orationes XXVI-L*, vol. 3, ed R. Foerster (Lipsiae, 1906), 308-333.

69 Heinrich VII, “Declaratio Quis sit rebellis”, a. 1313, in *Monumenta Germaniae Historia. Legum sectio IV. Constitutiones et acta publica imperatorum et regnum*, Tomi IV. Pars II., ed. Jakob Schwalm (Hannoverae/Lipsiae, 1909-11), n. 931, 967: “...quod illi omnes et singuli sunt rebelles et infideles nostri et imperii, qui quomodocunque publice vel occulte contra nostrum honorem infidelitatis vel rebellionis opera faciunt et in nostramseu imperii prosperitatem aliquid machinantur contra nos sive nostros officiales in hiis, que ad commissum eis offitium pertinent...” “...are rebel and unfaithful to us and the empire all those that organise publicly or secretly rebel or unfaithful activities against our honour, or plot against our prosperity, against us or our public officers...”.

70 D. 48. 4. 11: “Is, qui in reatu decedit, integri status decedit: extinguitur enim crimen mortalitate. nisi forte quis maiestatis reus fuit: nam hoc crimine nisi a successoribus purgetur, hereditas fisco vindicatur. plane non quisque legis iuliae maiestatis reus est, in eadem condicione est, sed qui perduellionis reus est, hostili animo adversus rem publicam vel principem animatus: ceterum si quis ex alia causa legis iuliae maiestatis reus sit, morte crimine liberatur” “He who dies while an accusation against him is pending retains his civil status unimpaired, for the crime is extinguished by death, unless he was accused of lese majesty; for if he is not cleared of this offence by his successors, his estate will be forfeited to the Treasury. It is evident that not everyone accused of lese majesty under the Julian Law is in this position, but only he who is guilty of high treason, and is animated by hostile intent against the State or the Emperor. For if anyone is accused under any other section of the Julian Law on lese majesty, he will be released from the charge by death”.

Magistratum, habendos quoque esse Rebelles et perduelles. Licet aliquis, imo plures quoque crimen perduellionis incurre possint citra seditionem.⁷¹

Despite this statement, he underlined that the Roman jurist Modestinus – a student of Ulpianus – in the Digest defined episodes of sedition subsumed under rebellion as *atrox seditio*⁷², implying that it was different from simple sedition. Although Schoock did not develop this argument, this quotation reveals a breach with the former understanding of *crimen seditionis* that was always thought to be a concrete manifestation of the broader *crimen maiestatis*. Modestinus suggested dividing the concept of *seditio* into two subcategories: *atrox seditio*, which is properly a case of rebellion, and *simplex seditio*, which is an episode of collective violence but not necessarily an offence against *maiestas*. Embracing this specification of the crime, Schoock seems to be interested in describing sedition as a form of civil discord that did not always lead to *crimen maiestatis*.

This distinction was made clear and more explicit by Achilles Augustus Lersner (1662-1732)⁷³ in his *Disputatio politico-juridica de seditionibus*,⁷⁴ published in 1688. In order to understand the doctrine of sedition, the jurist explains the meaning of concepts used in the legal debate that, according to him, were often confused, producing an inaccurate idea of *crimen seditionis*. *Tumultus civilis*, *turba* or *discordia domestica* were used as synonyms of *seditio*, although they indicated previous stages of inner discord, that usually occurred before the explosion of the real sedition. Lersner states a lack of accuracy in how the perturbation of the public order was expressed: he sustained that often the term *seditio* was confused with *conjuratio* and *rebellio*, which were not necessarily the same offences.

According to Lersner, sedition is different from a plot (*conjuratio*) and therefore should not be confused with treason. People taking part in a sedition do not necessarily share the will to damage the government or strive for a common purpose. The argumentation here is the opposite of what we have seen in Bohier:

71 Schoock, *De Seditionibus, Seu Discordiis domesticis*, 79-80: “Whoever is guilty of treason is moved by hostile will against the political community or against the *princeps*. Among them, those who take part to sedition rebelling against lawful officers have to be considered rebels and betrayers. Though, it is also possible to commit treason without taking part to sedition”.

72 D. 49. 16. 3. 19: “Qui seditionem atrocem militum concitavit, capite punitur”/“Whoever excites a violent sedition among the soldiers is punished with death”.

73 Lersner was born in Frankfurt am Main and worked there as a chronicler. We do not know much about his life. See W. Stricker, “Lersner, Achilles August”, in *Allgemeine Deutsche Biographie* 18 (1883), 432-433.

74 See footnote 16.

while the French jurist sustains that gathering together was already to be understood as evidence of an agreement between people, Lersner considers the possibility of spontaneous unrest, which is therefore not the result of a planned action. The two jurists are moved by different scopes: Bohier wants to assimilate any sedition to *crimen maiestatis*, sustaining that there is a shared will in any collective form of dissent. On the contrary, Lersner is interested in showing that it is also possible to have spontaneous sedition, which should not be punished as *crimen maiestatis*.

At the same time, also the term *rebellio* was often incorrectly used to criminalise sedition. Indeed rebellion did not simply refer to the refusal of respect and fidelity to the magistrates: rebelling meant literally to wage war against the legitimate authority and against the entire political community. Lersner states that sedition is not always a collective case of rebellion. The term *rebellio*, he keeps arguing, is similar to *perduellio*, namely to high treason, and therefore *seditio* and *rebellio* should not simply be used as synonymous. Similarly to Schoock, Lersner wants to differentiate the concept of *seditio* into two subcategories, which correspond to different levels of sedition. He believes that sedition can be the result of a spontaneous commotion of the people without the conscious will to subvert the established authority and, in that case, he argues that the *crimen maiestatis* cannot be applied. Secondly, we have seditions that can be considered as collective rebellion and is characterised by the intention to plot against the government. Only an insurrection against the top level of the hierarchy, or aimed at damaging the entire community, should be considered, according to Modestinus and Schoock, an *atrox seditio*.

As Lersner specifies

est igitur seditio Commotio populi, qua pars civitatis vel exercitus adversus eos insurgit, qui rebus praesunt. Per eos qui rebus praesunt, tam principes summos, quam magistratus intellectos volo. Et quidem si commotio illa tendat adversus principem, vel directa sit in perniciem reipublicae incidit in crimen laesae Majestatis: si vero adversus inferiorem solum Magistratum sit esorta, et in eo subsistat, crimen Majestatis non est.⁷⁵

The jurist introduced again the distinction, known to the Roman law, between assaults against the *princeps*, namely the top of the hierarchy, and against minor

75 Ibid., 2-3: “Therefore sedition is a commotion of the people; with this commotion part of the political body or of the army rises against the government. Using the term government I mean both the top level of the hierarchy (*princeps*) and lower officers. If the commotion is against the *princeps* or produces damages to the political community it is a case of *crimen maiestatis*; otherwise, if it is only directed against lower officers it cannot be considered a case of *lese majesty*”.

magistrates. Offences against minor magistrates should not be punished by the *crimen maiestatis*. Sedition could be considered a case of high treason (*perduellio*) – and therefore treated as a breach of *maiestas* – only when it was aimed towards ruining or damaging the *res publica* or when it was an attempt to subvert or destabilise the political order.⁷⁶

To allow the application of the punishments provided by the *crimen maiestatis*, the sedition had to be motivated by the will to injure the political order. If the unrest was the result of private discord and the people involved did not intend to damage the authorities or break the political order, then the punishments to be applied were the ones provided by the *lex Iuliam de vi publica et privata*. Therefore, death was not the only punishment available and the magistrate was free to evaluate case by case, taking into account the state (*dignitas*) of the person accused.⁷⁷

76 Lersner, *Disputatio politico-juridica de seditionibus*, 32: “Dicendum itaque eam demum seditionem in perduellionis crimen incurrere, quae tendit ad exitium principis aut senatorum ejus, vel subversionem ac immutationem reipublicae: non quae ad exitium privatorum, ut post alios docet Antonius Matthaeus, *De criminibus. Commentarius ad Lib. XLVII et XLVIII Digesti*, tit. 2, cap. 2, Vesaliae, 1679, Prospero Farinacci, *Variae quaestiones*, quaest. 113. num. 183. et 192, Venetiis, 1584, ubi quod dictum est poena laesae Majestatis teneri qui tumultum concitat, ita declaratur, si ille tumultus tendat in damnum principis: sin vero concitetur absque animo offendendi aut laedendi principem, locum esse poenae arbitrariae. Ita si quis privato ductus odio plebem colligat, et excitato tumultu ad arma vocat, ad creandam adversario suo molestiam, licet in crimen Majestatis non incidat, pro qualitate tamen dignitatis aut in furcam tollendus, aut bestiis objiciendus, aut in insulam deportandus est”/”Therefore, seditions that tend to ruin the *princeps* and his senators, or tend to subvert the political community, are considered high treason; but seditions that tend to ruin private subjects are not considered high treason, as it is taught in Antonius Matthaeus and Prospero Farinacci, where it is said that whoever incites tumults, if they are aimed at damaging the *princeps*, is punished by *crimen maiestatis*. Otherwise, if they do not injure or damage the *princeps*, the punishments can be arbitrary. Therefore, if tumults are produced by private disagreements, it is lawful not to apply the *crimen maiestatis*: in this case, according to the *status* and honour of the people involved, they can be hanged, thrown to wild beasts or deported in an island”.

77 *Ibid.*, 33: “Nec dissentiunt ab hac sententia illi, qui tumultum in privatorum hominum perniciem et damnum concitatum in poenam legis Juliae de vi publica vel privata incidere censent, in quibus est Menochio, *De arbitrariis iudicium quaestiones et causas*, lib. 2. cas. 394. n. 78, Venetiis, 1578, Antonius Matthaeus, *De criminibus. Commentarius ad Lib. XLVII et XLVIII Digesti*, tit. 2, cap. 2, Vesaliae, hujus enim criminis poena, quae olim fuit deportatio et publicatio bonorum, vel si privata fuerit, hodie aritraria est, et ad mortem quoque extendi potest”/”This position is also sustained by who, like Menochio and Mat-

Lersner was concerned with an evaluation of the *gradus* of sedition, namely with the possibility to distinguish between different levels of dangerousness for the stability of the political community.

(Seditiones) vero gradus quidam sunt: vel enim intra solam fidei et obsequii denegationem subsistit, moxque iterum sopitur: vel ulterius ad caedem puta magistratus vel ducis aliorumque ac rapinas progreditur: vel denique in bellum intestinum erumpit, quae omnium maxima et atrocissima species est seditionis et vere lerna malorum.⁷⁸

These passages show how the jurist tried to distinguish different forms of sedition, depending on how they were affecting the public order. Instead of reducing several different categories of collective protest to the *crimen maiestatis*, by considering every violent strike as a rebellion, he suggested that minor forms of discord be considered separately from violent assaults which threaten the security of the entire political order. The aim of this argumentation was to provide a better understanding of social conflict and consequently to calibrate the authorities' repressive measures.

6. UNLAWFUL VIOLENCE AND *RESISTENTIA LICITA*

A further element of the concept of *seditio*, which did not enter the definitions offered by the jurists, but emerged from their political analysis of the causes of concrete insurrections, is the idea that sedition is usually provoked by the perception of an injustice committed by the authorities.⁷⁹ The jurists criminalized any form of collective protest that was perceived as a threat by the authorities. As we can see from the treatises of Bohier and Braun, they classified revolts, seditions and rebellions indiscriminately as unlawful forms of violence against the authority that had to be severely criminalized and repressed. At the same time, they tried to limit the application of the crime and analysed situations in which it was even

thaeus, claim that tumults provoked to damage private people have to be punished by the Juliam law on public violence. The punishment for this offence, with earlier was deportation and confiscation, is now arbitrary and can be also extended to death”.

78 Ibid., 3: “Seditions differ in their degree: they can consist just in the refusal of fidelity and deference and can be quickly settled; they can proceed from this degree to murders of officers and robberies and they can finally become civil wars, which are the worst kinds of sedition”.

79 On the problem of justice practices as reason of revolts see Andrea Zorzi, “Politiche giudiziarie e ordine pubblico”, in *Rivolte urbane e rivolte contadine nell'Europa del Trecento: un confronto*, ed. Monique Bourin et al. (Firenze, 2008), 381-419.

lawful to resist the authority. What was not possible to punish as a *crimen seditionis* had to be recognised as *resistentia licita*.⁸⁰

While defining what violent actions led to the crime, the jurists also pointed out which behaviours should be considered as lawful. Indeed, the definition of the crime and the effort to understand the processes of organisation of dissent also took into consideration violent reactions that could not be legitimately punished. However, jurists were mostly concerned with the protection of the public order and left only little scope for the people to react lawfully to the government. As jurists, they were part of the intellectual elites legitimating the political authorities and defending them from strikes and criticism. Defining the *crimen seditionis* and providing strategies to intervene into problems of public order were part of the process of affirmation and consolidation of governmental policies towards different conflicting contexts. Therefore, all these authors were not interested in arguing to

80 On the right of resistance see Robert von Friedeburg, *Widerstandsrecht und Konfessionskonflikt: Notwehr und Gemeiner Mann im deutschen-britischen Vergleich 1530-1669* (Berlin, 1999); id. (ed.), *Widerstandsrecht in der frühen Neuzeit: Erträge und Perspektiven der Forschung im deutschen-britischen Vergleich* (Berlin, 2001); Angela De Benedictis, “Supplicare, capitolare, resistere. Politica come comunicazione”, in *Suppliche e “gravamina”. Politica, amministrazione, giustizia in Europa (secoli XIV-XVIII)*, ed. Cecilia Nubola and Andreas Würigler (Bologna, 2002), 455-472; id., “Resistere: nello Stato di diritto, secondo il diritto 'antico', nell'Europa del 'diritto al presente’”, *Quaderni fiorentini per la storia del pensiero giuridico moderno* 31 (2003): 273-321; id., “Il diritto di resistere. Una città della prima età moderna tra accusa di ribellione e legittima difesa (Bologna, 1506)”, in *Ordnung und Aufruhr im Mittelalter. Historische und juristische Studien zur Rebellion*, ed. Marie Theres Fögen (Frankfurt/Main, 1995); id., “Sapere, coscienza e scienza nel diritto di resistenza. Le ragioni di un seminario e del suo titolo”, in *Wissen, Gewissen und Wissenschaft im Widerstandsrecht (16.-18. Jahrhundert)*, ed. Angela De Benedictis and Karl-Heinz Lingens (Frankfurt/Main, 2003), 1-47; Luise Schorn-Schütte, “Obrigkeitskritik und Widerstandsrecht. Die politica christiana als Legitimitätsgrundlage”, in *Aspekte der politischen Kommunikation im Europa des 16. und 17. Jahrhunderts. Politische Theologie – Res Publica – Verständnis – Konsensgestützte Herrschaft*, ed. id. (München, 2004), 195-232; Angela De Benedictis, *Una guerra d'Italia, una resistenza di popolo. Bologna 1506* (Bologna, 2004); id., “Narrare storie, difendere diritti: ancora su “tumulto” o “resistenza””, in *Praktiken des Widerstandes: Supplichen, Gravamina und Revolten in Europa (15.-19. Jahrhundert)*, ed. Cecilia Nubola and Andreas Würigler (Berlin, 2006), 29-50; id., “Resisting Public Violence: Actions, Law, and Emotions”, in *Finding Europe. Discourses on Margins, Communities, Images ca. 13th - ca. 18th centuries*, ed. Anthony Molho et al. (Oxford-New York, 2007), 273-290.

sustain the people's resistance – nor were they allowed to do so – and maintained a very detached perspective when considering the problem.

I would like to summarize the argumentations of three of these authors in order to present only a few examples from the very rich and broad debate on resistance that unfolded during the sixteenth century, mainly in the wake of the Protestant Reformation.

Bohier analysed this problem referring to the congregations within the political community. It was necessary to define criteria in order to evaluate the different kinds of congregations and to decide in which cases the people were entitled to assemble. The jurists started from a definition of *congregatio*, which was the generic term for any organised group bound together by an agreement. Such congregations among the people were subdivided into different categories, implying different degrees of legitimacy or illegitimacy: *unio*, *confederatio*, *secta*, *conventicula* or *coniuratio*.⁸¹

Bohier dedicated several pages to answer the question “populus quando posit se congregare sine superioris, aut suorum iudicum auctoritate”.⁸² The analysis of the problem started from the clear prohibition of any congregation, which was sustained by several authoritative quotes: from 1 Maccabees 14, where it was said that the people have no right to make an assembly without the authority's permission, to the reference to the *Codex Iustiniani*, namely to the *lex Denuntiamus vobis* and the *lex Conventicula*.⁸³

81 Bohier, De seditiosis, § 2, n. 5, 115: “Item etiam de congregatione in qua aliqui pactionibus vel statutis firmatur quae habent diversa nomina secundum quod congregati eis nomen imponunt, vel secundum quos ius imponit. iam aliquando vocatur unio, aliquando confoederatio, aliquando secta, aliquando conventicula, aliquando coniuratio”.

82 Ibid., 116: “...whenever people are allowed to lawfully assemble without permission of authorities”.

83 Law *Denuntiamus vobis omnibus*, Codex, *De his qui ad ecclesias confugiunt vel ibi exclamant* (C. 1. 12. 5): “Denuntiamus vobis omnibus, ut in sacrosanctis ecclesiis et in aliis quidem venerabilibus locis, in quibus cum pace et quiete vota competit celebrari, abstinence omni seditione. nemo conclamationibus utatur, nemo moveat tumultum aut impetum committat vel conventicula collecta multitudine in qualibet parte civitatis vel vici vel cuiuscumque loci colligere aut celebrare conetur. nam si quis aliquid contra leges a quibusdam sibi existimet perpetrari, liceat ei adire iudicem et legitimum postulare praesidium. sciant sane omnes, quod, si quis contra huius edicti normam aut agere aliquid aut seditionem movere temptaverit, ultimo supplicio subiacebit?” We notify all of you to abstain from every kind of sedition in the Holy Churches, and in all other venerated places, in which it is proper for you to offer your prayers in decent tranquillity, and let no one make use of loud cries, cause any tumult, commit any attack, or collect or hold any nu-

According to Bohier, assemblies and congregations did not necessarily have to be considered as a negative phenomenon, but they had negative influences on the people and led them to discord.⁸⁴ Any agreement between the people was perceived as a danger to the public order, insofar as it was always followed by fights, violence and, in general, discord among the people. From the perspective of the defence of public peace, every discussion or organisation was considered as a potential threat to authority. According to this, a congregation could be considered lawful depending on its scope and therefore all organised activity of the people aimed at weakening the authority or damaging the common good had to be banned.⁸⁵

Only against a tyrannical government the people had the right to assemble in order to resist. Bohier, quoting Aquinas, sustained that a tyrannical government is not lawful because it is not aimed at achieving the common good, but private interests. Therefore, the perturbation of this government must not be criminalized as sedition, unless this perturbation produces a worse situation for the people than the tyrannical government.⁸⁶ Bohier thus claimed that in some cases resistance was

merous assemblies in any part of a city or village, or in any other place whatsoever. For, if anyone thinks that the laws have been violated to his prejudice, he can go into court and demand the protection of the law; and all persons are hereby notified that if anyone disobeys, or contravenes the provisions of this Edict, or attempts to excite sedition, he shall be subjected to the extreme penalty"; law *Conventicula*, Codex, *De episcopis et clericis* (C. 1. 3. 15): "Conventicula illicita extra ecclesiam in privatis aedibus celebrari prohibemus, proscriptionis domus periculo imminente, si dominus eius in ea clericos nova ac tumultuosa conventicula extra ecclesiam celebrantes susceperit"/"We forbid holding religious assemblies in private houses, even outside the Church, under the penalty of confiscation of the house, if the owner of the same permitted ecclesiastics to hold new and tumultuous meetings therein outside the church".

84 Bohier, *De seditiosis*, § 5, n. 2, 117: "...quia istae conventions illicient subditos ad peccandum, et ad iurgia, quae licet per se non sint malae, temen quia malum ex eis sequi potest reprovantur a iure..."

85 *Ibid.*, § 5, n. 4, 117: "...per finem licitum, licita cognoscitur congregatio, et contra, per finem illicitum quod sit illicita..." "...assemblies are considered lawful if aimed at lawful purposes; on the contrary, they are considered unlawful if aimed at unlawful purposes".

86 Bohier quoted Aquinas, *Summa Theologiae*, II^a-IIae q. 42 a. 2 ad 3: "...quod cum regimen tyrannicum non sit iustum, quia non ordinatur ad bonum commune, sed ad bonum privatum regentis [...]. Ideo perturbatio huiusmodi regiminis non habet rationem seditionis, nisi forte quando sic perturbatur inordinate tyranny regimen, quod multitudo subiecta maius detrimentum patitur ex perturbatione sequenti, quam tyranny regimine"/"A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler. Consequently there is no sedition in disturbing a government of

lawful, but he also put strict limitation to that possibility. Neither did he explain how the damage caused by a tyrant should be concretely evaluated and by whom, nor would he determine at what point it was legitimate for the crowd to intervene.

In Braun, the possibility of lawful association of the people is analysed when he considers the problem of factions within the political body. The faction represented an organized form of discord, which was lawful or unlawful depending on its aim.⁸⁷ All factions aimed at defending the political body and private goods are considered lawful and useful for the entire community. Braun wrote that

si enim ad defensionem rerum nostrarum amicos congregare possumus, quanto magis pro defensione Reipublicae, bonis inter se societatem inire, et adversus improbos cives Rempublicam tueri licebit: Sicut et iusta est factio, quae ob id inter bonos cives coalita est, ut Tyranni e republica eiiciantur, qui nulla alioqui ratione commode expelli possunt.⁸⁸

All alliances among people aimed at the defence of life and properties were considered *coniurationes licitae* and were tolerated and even desired. However, even in the case of a tyrant perturbing the community, the possibility for the people to organise themselves is presented as the *extrema ratio*, not as part of normal political life.

In order to understand Braun's analysis of the possibility to resist an illegitimate tyrannical government, it is necessary to consider how political hierarchy was legitimized in the treatise. According to Braun, all the subjects had to obey secular powers, which were subordinated to God. Indeed, "potestatibus quoque humanis obediendum est, Paulo Apostolo ita praecipiente. Omnis anima, inquit, potestatibus sublimioribus subdita sit. Non est enim potestas nisi a Deo: quae autem a Deo sunt,

this kind, unless indeed the tyrant's rule is disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant's government".

87 Braun, *De seditionibus*, 64: "Factio est divisio multitudinis alicuius per aemulationem, in diversa studia, cum inter ipso alii alii priores esse volunt. Quod et honestis ex causis, et ex inhonestis fieri potest. Unde et faction in bonam et in malam partem accipitur, ac in-izio quidem factio honestum vocabulum erat"/"Faction is a division among the multitude, produced by competition to prevail on others. Factions can be divided in lawful and unlawful according to their reasons. Therefore we have good and bad factions, although at the beginning the term had a positive meaning".

88 *Ibid.*, 64-65: "if we can assemble to defend friends' properties, then we can even more assemble to defend the political community; we can create unions among people and protect the political community against plotters. For the same reason, a faction is right and lawful when it assembles good subjects in order to expel tyranny from the community – if there is no other more suitable way to do it".

ordinata sunt. Itaque qui protestati resistit, ordinationi Dei resistit”.⁸⁹ Quoting Saint Paul, Braun sustained that resisting secular authority was similar to resisting God.⁹⁰

This strong rejection of any resistance was partially outbalanced by another quote from the Bible, namely from the Acts of the Apostles, which states “we must obey God rather than men”.⁹¹ According to this passage, it was possible to conceive lawful resistance to an order that is unjust and against God. Combining these two passages, the Letter to the Romans and the Acts of the Apostles, Braun refers to the traditional Christian discourse on resistance: every man has to obey, but when the orders are against God he has to resist and accept to be persecuted for that.⁹² The possibility to resist was therefore presented by the jurist as a very abstract one and left to individual choice. Braun devoted comparably little attention to the problem: although he was referring to the Christian discourse on resistance, he actually did not conceive of any concrete and lawful opposition to power and did not quote any historical fact to illustrate how that doctrine could actually be applied.

In 1678 Philipp Andreas Oldenburger⁹³ published his *Tractatus iuridico-politicus de rebuspublicis turbidis in tranquillum statum reducendis*,⁹⁴ which in some respects can be considered a comprehensive synthesis of the entire debate (although it was not the last treatise on sedition). Analysing the causes of sedition, Oldenburger indicated two cases of lawful resistance. The violation of the subjects’ liberties and rights was considered an illegitimate government practice that provoked malcontent and discord among the people. Unrest aimed at protecting such liberties and rights was therefore considered lawful and labelled as legitimate defence.⁹⁵ Tyranny was another cause of legitimate resistance. Violence against

89 Ibid., 13: “We have to obey also to secular authorities, as Saint Paul prescribes. Every person is to be in subjection to the governing authorities. There is no authority except from God, and those, which exist, are established by God. Therefore whoever resists authority opposes the ordinance of God”.

90 Epistle to the Romans, 13.

91 Ibid., 17: “Oportet Deo magis obedire, quam hominibus”. See Acts of the Apostles, 5.

92 Wolfgang Reinhard, *Geschichte der Staatsgewalt: Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart* (München, 1999), 227-235.

93 Oldenburger was a student of Hermann Conring and worked as professor of law in Geneva. He was known as an “enfant terrible” of his time for his polemical writings and for his disputes with Conring and von Pufendorf. See Goldschlag, “Oldenburger, Philipp Andreas”, in *Allgemeine Deutsche Biographie* 24 (1887), 261-263.

94 See footnote 13.

95 Ibid., 37: “[...] quando in Rebuspublicis mistis Procerum libertas iura et privilegia violantur atque atteruntur: Sed eo in casu non est vera seditio, sed justa defensio”/” [...] when in the mixed government the rights and privileges of the aristocratic people are vio-

tyrannical government or against the brutalities inflicted by magistrates was often the starting point for commotions and unrest. Responding to illegitimate violence with violence was not a crime: the subjects had the right to fight an illegitimate government whenever their lives were endangered. Any attempt to protect their lives was a case of *defensio licita*.⁹⁶

7. CONCLUSIONS

The study of the development of legal and political concepts used to define collective forms of violence allows a better understanding of how the practices of control changed over time. During the sixteenth century the legal doctrine elaborated a concept of *seditio* based on the strong convergence of *proditio*, *rebellio* and collective violence. Any form of violent reaction to the authorities was understood as a threat to the entire political body and therefore labelled as *crimen laesae maiestatis*. Investigating offences perturbing the public order, jurists advanced an extensive definition of *crimen seditionis*, covering a wide range of collective forms of protest. All violent assaults on the government were attributed to a political will to damage the entire community: this allowed the jurists to relate every organised disagreement to *proditio* and *perduellio* and therefore to consider it as a rebellion against the authority. Moreover, even minor forms of violence, producing inner disorders, were considered episodes of sedition.

In the early modern age the development of political crimes was characterised by the extensive use of *crimen laesae maiestatis* in order to repress any episode of dissent and any form of opposition to the authority. The legal perception of the collective forms of protests changed within this broader development of the penal law and produced a concept of *seditio* functional to the control of public order.

The literature on sedition was characterised by a considerable effort to understand the reasons of inner dissension and political conflict. The jurists were

lated and reduced, that is not a case of proper sedition, but it is a case of right and lawful defence”.

96 Ibid., 44-47: “Sunt autem graviore et frequentiores rebellandi causae ex parte rectorum sive imperantium sequentes; et quidem prima ac potissima Principum et Magistratum crudelitas [...]. Adeo verum est illud: Violenta nemo imperia continuit diu; magisque acerba quam diuturna existunt. Et quidni defensio vitae humanae, qua nihil est carius in ejusmodi casu esset licita et favorabilis?” “There are also serious and common reasons of rebellion created by authorities; the main one is cruelty. It is true that violent governments do not last long. In this case the defence of life – nothing is more valuable than life – is lawful”.

interested in studying all the phenomena related to collective forms of discord and protest, in order to provide the conceptual instruments for repressing and preventing unrest. This attempt to elaborate legal means of controlling insurrections influenced the development of the doctrine and led jurists to define, during the second half of the seventeenth century, a more articulated concept of *seditio*. They distinguished between different grades of sedition, depending on the dangerousness of the violent behaviour for the political order. In doing so, they provided the magistrate with the legal possibility to classify a concrete sedition at their own discretion either as a *crimen maiestatis*, or as a minor violent unrest, which could be punished in different ways, depending on circumstances. This change in the definition of *crimen seditionis* must be understood in relation to the development of a preventive perspective based on the analysis of the concrete political context. The preference for a preventive approach, instead of a merely repressive legal response to unrest, obliged the jurists to examine the processes of development of dissent and made it necessary to have a concept of *seditio* that was suitable for different situations.

The treatises on sedition integrated two closely related levels: the legal doctrine and the political wisdom aimed at controlling public order. The earlier doctrine was always directed at giving concrete answers to contemporary conflicting situations, but was also influenced by the development of political theory. The study of the concept of *seditio* traces the development of legal and political strategies applied to control public order and to neutralise political dissent.