José-Antonio Santos, Madrid

The Basis of the Right to Resistance in the Legal Thought of Arthur Kaufmann

Abstract: This paper discusses two of the main theories regarding the right to resistance: first, that the right to resistance is that of resistance against injustice; and secondly, that the right to resistance is the original, or most basic of all rights. The analysis provides a characterization of the nature of the right to resistance, that is, whether it is a *moral* right or a properly *legal* right. On the other hand, we raise the question as to whether the right to resistance can even be considered a fundamental and/or original right. We also look at the role of this right in a lawless state as opposed to a state governed by the rule of law. Thus, the paper concludes with an examination of the conception of resistance in a state governed by the rule of law, by means of a *small-coin* right of resistance.

I. In his publications, Kaufmann relates the contemporary legal right to resistance to the classical conception of the right to resistance as a means of highlighting his *iusnaturalism* conceptualization of the subject. They are certainly not the same, however, as the classical right to resistance is a right to illegal resistance. This also includes violent resistance and, as *ultima ratio* or last resort, murder. With this, the attribution of resistance is taken from a normative order that is located outside positive regulation. The traditional name for this is 'natural law'.[1]

Resistance and, therefore, the right to resistance have nothing to do with revolution. This is essentially "the twin brother of the reaction: as soon as it takes over, it aspires to the securing of the achieved power as irrevocable and therefore prohibits any kind of change. Resistance on the contrary means permanent evolution."[2]

Kaufmann takes his arguments further when he reveals two of his fundamental theses on the right to resistance. First, he determines the notion of this right in a reverse sense when he states that "the essence of the law is resistance against injustice."[3] He goes yet further when asserting that "the right to resistance is the original of all rights."[4] For him, the freedom of every man is implicit, whereas the same is not true of injustice; and since this right is a condition of freedom, the right to resistance is the original right (*Urrecht*[5]) of human rights. If a right guaranteeing the inviolability of human dignity can be deduced from Article 1, Paragraph 1, of the German Constitution, it is the right to resistance. This right cannot be suppressed by any law or Constitution. It is absolutely illogical to 'legally' fix that which cannot be opposed by injustice.[6]

1 Ralf Dreier, Widerstand und ziviler Ungehorsam im Rechtsstaat, in: *Ziviler Ungehorsam im Rechtsstaat*, ed. P. Glotz, 1983, 55.

2 The Small-Coin Right of Resistance, in: *Prescriptive Formality and Normative Rationality in Modern Legal Systems. Festschrift for Robert S. Summers*, ed. W. Krawietz et al., 1994, 577.

3 Kaufmann, Martin Luther King, in: *Rechtsphilosophie im Wandel. Stationen eines Weges*, 1984, 256. For a similar affirmation, see Kaufmann, Gedanken zum Widerstand, in: *Vom Ungehorsam gegen die Obrigkeit*, 1991, 6.

4 Martin Luther King (note 3), 256. See also Gedanken zum Widerstand (note 3), 7.

5 At present this word is in disuse. It is used in the cultured language and is translated by original or more fundamental right.

6 Gedanken zum Widerstand (note 3), 7.

To consider the right to resistance an original right, is an idea particular to Kaufmann, not found in the writings of other authors, and perhaps due to his having lived through National Socialism under the Nazi party.

Both Kaufmann's affirmations noted above are linked to the discussion regarding whether the right to resistance is a fundamental right or a secondary right, and on the other hand, whether this right to resistance is properly legal or not. According to this conceptualization, resistance in a lawless state is not only a moral, but also a legal duty. Resolving this question – as to whether the right to resistance is legal or not – is not easy. Opinions are divided.

Thus, for example, René Marcic supports Kaufmann's argument when considering the right to resistance a properly legal right, as there is an intrinsic connection between the right to resistance and human dignity. At the same time, he underscores his disagreement with Tammelo's article, entitled "Marginal Remarks on Arthur Kaufmann's Conception of the Right to Resist", in which he argues that the right to resist injustice is primarily a *moral* right and only exceptionally a *legal* right. For Marcic, however, the problems of revolution and resistance are fundamentally legal problems. He considers that "the word 'legal' is used here (…) in a sense broader than the sense which this word has when used by professional lawyers. Accordingly, 'legal' relates not only to enacted law but also to right-law, that is, not only to law as it laid down but also to law as it ought to be so that it would be an authentic, decent law – law which would exclude outrageous injustice."[7]

The situation has not been clarified if it remains necessary to recognize a prestate or suprastate right to resistance, or a conception of 'natural law' in a state that is governed by the rule of law and thus possesses a complete system of fundamental rights and legal protections. The problem is that the Federal Constitutional Court (*Bundesverfassungsgericht*) left this question unresolved when it did not clearly distinguish between a positive right to resistance in the fundamental rights and a prestate right to resistance.[8]

Behind the conception of a valid right to resistance is the specific question of the relation between law and morality. After all, law and morality are not completely separated nor perfectly coinciding normative orders, rather, there is a polar relation between them. This means that in order to be possible, evaluative contradictions must avoid both normative systems.[9] Law would not have to openly contradict morality. On the other hand, this means that the model of polarity between law and morality is not necessarily congruent with legal and moral valuation, and that actions directly challenging moral valuation do not necessarily have to be declared illegal.

Kaufmann's definition is important when he notes that Radbruch never speaks of suprapositive law (*überpositives Recht*), but rather of supralegal law (*übergesetzliches Recht*). It marks an area of distance from authors like Alexy and Dreier who speak of a suprapositive law without any motive, as Radbruch does not use this term. For Kaufmann "there only exists positive law, but not all positive law is legal law."[10] An example of supralegal law would be human rights. Another thing is that this turns out to operate much like consuetudinary law, as Kaufmann asserts.[11] The criteria of custom

7 René Marcic, The Persistence of Right-Law, *ARSP* 59 (1973), 87–88.

8 Ralf Dreier, Recht und Moral, in: *Recht-Moral-Ideologie*, 1981, 202–203.

9 Ulfrid Neumann, Nachruf auf Arthur Kaufmann, *ARSP* 87 (2001), 422.

10 Kaufmann, Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht, *NJW* (1995), 85.

11 Loc. cit., 86.

could not be utilized – the prolonged and uniform exercise of a rule agreed upon by the legal community for the purpose of social life – as a means of evaluating the possibility for the existence of human rights. Human rights require legitimization and prior to this, an objective foundation. These cannot simply be made available according to the whim of the legislator, but rather must take root in the very being of man.

The theory that the right to resistance is a fundamental right does not appear very apt. This is perhaps due to the fact that Kaufmann belongs to that generation of authors very in tune with the problems that occurred under National Socialism. In addition, it is correct to say that the right of resistance lacks a *de facto* positivation. More debatable is whether the right to resistance is a properly legal right. This is the majority opinion at the present time, departing from a more or less strict separation between law and morality. When we speak of the "law," we generally refer exclusively to that of positive and "moral" law, traditionally known as "natural law," "the law of reason" and/or "justice." As a result, according to some authors, morally grounded resistance is not recognized as legally grounded.[12]

On the other hand – according to Marcic – Kaufmann conceives of resistance and the right to resistance in a thoroughly restricted manner, excluding from their scope both revolution and active resistance through the use of force. Marcic disagrees with this position, grounded in the classical doctrine of the right to resistance, according to which these forms of resistance are permissible. These may represent acts realized in reference to the highest laws, and thus the law is executed or applied to these acts.[13]

Returning to the legal character of the right to resistance, Kaufmann notes that it is necessary to keep in mind – as Luther and Melanchton stated, and as Aquinas did before them – that the right to resistance is not theological, but rather legally grounded. It transcends all positivation of the inalienable rights of the individual and the people, and also respects the power of the public. Essentially, it maintains that which is today referred to as fundamental human rights. If a public power does not respect fundamental human rights, as in Hitler's regime for example, it is not an authority and is not due obedience.[14] In this sense, the right to resistance is framed as a legal right, not only a *moral* right against the lawless state, as it is not essentially theological in nature, but legal. Following Ludwig Cardauns, Kaufmann's foundation is that "the people have inalienable, natural rights, to which they must subordinate the prince."[15] For him, this idea could be well applied in present times.

First, it would be useful to draw a boundary that, while obvious, is still interesting: it is one thing to demand freedom and equality in a state governed by the rule of law; it is quite another to resist in a lawless state.

The question lies in asking what is meant by the term 'lawless state'. In this sense, it can refer to a state that is not organized on the basis of the division of powers, that does not grant and guarantee fundamental rights, and in which the possibility of the state's injustices is not limited, for example, to wrongful criminal sentencing, but that in fact, unlawful sentences are passed. Thus, as indicated in a sentence passed in the German Federal Court of Justice (*Bundesgerichtshof*) on July 30, 1961, the first and true condition of the right to resistance is the existence of a dominion of injustice.[16]

12 Dreier (note 1), 55.
13 Marcic (note 7), 87.
14 Prüfungsgespräch über das Widerstandsrecht, in: *Wahlfach Examinatorium. Rechtsphilosophie*, ed. A. Kaufmann et al., 1976, 144.
15 Kaufmann, Das Widerstandsrecht in der Luther-Zeit, in *Vom Ungehorsam gegen die Obrigkeit* (note 3), 22.
16 For the principal thesis and the reasons of this sentence, see *NJW* (1962), 195–196.

In light of the above, it is not that the right of resistance can only be based on a conception of natural law, but rather that the right to resistance cannot occur in accordance with the positivist conception. The logical consequence is that, according to the positivist conception, there cannot be a right to resistance against the power of the state. If the power of the state decrees a law, a right against that law is unthinkable.

However, Martin Luther King and his model Gandhi pleaded for passive, non-violent resistance. They have shown that pacific resistance can be absolutely effective. The use of force is not an essential characteristic of resistance.[17] Similarly, Kaufmann was in favor of resistance without violence.

II. It is relevant to ask whether it is possible to speak of a right to resistance in a state governed by the rule of law. If the rule of law is carried out so that no type of injustice occurs, then there cannot be a right to resistance in that state. Nevertheless, experience has shown that such a situation is virtually impossible.

In this context we should keep in mind that the right to resistance, in the classical sense, was carried out through the invocation of natural law, or of human or prestate civil rights, but that these enter a second plane when their positivation has been produced by the state, and in particular, the growing judicial protection by the state. At first glance, it may appear that Germany does not now have any need to recognize a right to resistance. Such a view, however, only displaces the problem of resistance.

The underlying question in this context is that of so-called civil disobedience. The debate surrounding civil disobedience has been revitalized by John Rawls in his book, *A Theory of Justice*, in which he promotes a 'right to resistance' in a nearly-just society that is witness to grave violations of justice, and which he refers to as civil disobedience rather than resistance. It is civil disobedience in the face of a democratically-established authority, but which carries out some form of injustice. Therefore, civil disobedience does not combat tyranny (characteristic of an illegitimate state), since in this case we would be facing a properly-stated right to resistance. An adequate definition of civil disobedience might be that set out by Rawls – following Bedau and more defined than that proposed by Thoreau – which qualifies it as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[18] To this exception we might add the criteria that it be timely and that it protests a grave injustice through action, from which private motivations would be excluded.

It is also appropriate to differentiate this from allowable or indifferent, legally neutral conduct, whose incompletion would not be an illegal act, and which would not be an example of civil disobedience. There must be suitable prohibitive or obligatory laws for the corresponding legal sanction in the event of non-compliance. Nonetheless, this is not the place to get caught up in each of Rawl's requirements for the condition of civil disobedience in a state governed by the rule of law. Here we might stop and consider the notion of civil disobedience according to Kaufmann. Although he echoes the definition put forth by Rawls, he has adapted his own term to speak of civil disobedience: *small-coin* right of resistance (*Widerstandsrechts der kleinen Münze*). This will become the "small" resistance in a nearly-just society that will prevent it from becoming a lawless state, and with that, give life to the "larger" resistance.[19]

17 Kaufmann (note 14), 146.

18 John Rawls, *A Theory of Justice*, 2003, 320.

19 Kaufmann, Problemgeschichte der Rechtsphilosophie, in: *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, ed. Arthur Kaufmann et al., 2004, 139.

Just as the right to resistance does not exist only in a lawless state, that is in *ius contra legem corruptam*, but also against a state authority under specifically determined conditions, a citizen revolt may arise in the form of *permissible* actions, not only moral, but also legal, against the legal and legitimate law. These acts of rebellion, determined to be *permissible* against an unjust law, are referred to, as noted above, as *small-coin* right of resistance.[20]

In this context, Kaufmann says: "Perversion begins at the moment when law and the rule of law are considered a given. The consequence, according to this manner of thought, is necessarily a petrification, a solidification, and with that, a distancing from the law, since the law can only remain as such when it is derived from experience – that is, in a continual process of formation and perfecting. Only that which is still incomplete and procedural can be said to be living." From this new understanding we do not see "the right to resistance as a grand and heroic act, but rather as an act that arises from practical, everyday reasons, a *small-coin* right to resistance..." Thus, "resistance, in this sense, is not the last resort against a complete abuse on the part of the state, but rather the first instrument against discrepancies, its function being to defend against the beginnings of abuse."[21] The right to resistance is not primarily the last resort against a completely abusive state; on the contrary, its first function is to oppose the state at the first sign of abuse, also promoting itself as a legitimate institution under the rule of law.[22] Here he contradicts one of the criteria set out by the Federal Constitutional Court, in the case of the German Communist Party (*Kommunistische Partei Deutschlands*), when the court notes the following condition for the right to resistance: not only the notoriety of the injustice, but also the requirement that the exercise of resistance be a last resort, for the conservation or reestablishment of the law, only after all other available judicial resources have been exhausted.[23]

We can also observe one of the more important and novel points in Kaufmann's thinking on the right to resistance, since for him "it does not exist solely under the conditions of a dictatorship or tyranny, but also in a democratic state governed by the rule of law, whose highest virtue is not the obedience of its subjects."[24] The foundation for this statement can be seen in other of his works, where he highlights that, truly, "tyranny and the perversion of law do not signify an inevitable catastrophe, but rather – in Europe as in any other place – a constant problem and danger to both the state and judicial order."[25]

In the wake of the events of the second World War, the German constituents of 1949, obsessed with the memory of Nazism and its criminal use of democratic procedures, attempted to prevent the Constitution from being empty of content, and for this reason introduced Article 79, Paragraph 3: "An amendment of this Basic Law affecting the division of the Federation into Federal States, the participation in principle of the Federal States in legislation, or the basic principles laid down in Articles 1 and 20, is inadmissible." Years later, with the 1968 reform, the right to resistance was legalized with the inclusion of Article 20, Paragraph 4, which reads: "All Germans shall have the

20 *Rechtsphilosophie*, 1997, 211.

21 Kaufmann (nota 2), 575–576. For a similar affirmation, see Über die Tapferkeit des Herzens, *ARSP* 77 (1991), 12–13.

22 Kaufmann, Das Widerstandsrecht der kleinen Münze, in: W. Krawietz, *Objektivierung des Rechtsdenkens. Gedächtnisschrift für Ilmar Tammelo*, 1983, 91.

23 *Entscheidungen des Bundesverfassungsgerichts*, vol. 5, 1956, 377.

24 Hermann Klenner, Das Recht zum Widerstand in Arthur Kaufmanns Rechtsphilosophie, in: *Verantwortetes Recht*, ed. Ulfrid Neumann et al., 2005, 116.

25 Kaufmann, Recht als Mass der Macht, in: *Rechtsphilosophie im Wandel* (note 3), 43.

right to resist any person seeking to abolish this constitutional order, should no other remedy be possible." A conclusive regulation regarding the right to resistance is not found in the reading of this article.

This rule arises as a right under 'exceptional circumstances'. It is in this sense that Dreier speaks of 'channelling'. The right to resistance enters by way of exception into the legal system of a democratic constitutional state; but in fact, it is not only a right of exception, but a right under the 'normal situation' of a legal state. That is to say, it is the right to resist an illegal use of sovereign power in the form and with the means of law, or, to resist any attempt to eliminate the basic democratic and liberal order. Thus it appears that the right to resistance would be 'channelled' in the state governed by the rule of law, in the process taking on the capacity both to make demands and to protest.[26]

Regarding the discussion of the positivation of the right to resistance, Kaufmann notes that "just as a decision cannot be made free of conscience, little can be done to regulate the right to resistance in the face of state injustice. A legal system cannot institutionalize its own system externally", such that "to permit resistance is, primarily, an ethical decision, and such decisions are determined via the conscience."[27] He then goes back to insist that, as a result of this constitutional regulation "the right to resistance is stripped of its essential nature as a 'right', the perception of which can only truly be valued as an abuse of right."[28] He also challenges Peter Schneider when he speaks of the inevitable doubly negative effect provoked by the legal-constitutional extension of the right to resistance: the "*dramatization of the normal situation*" and the "*trivialization of the exceptional situation*."[29]

Kaufmann's argument transcends a moral justification of civil disobedience, although he prefers to speak of resistance in the face of injustice, of this *small-coin* right of resistance, since the individual possesses the autonomy to make conscious decisions. This appears to be possible under the model of a democratic and tolerant state society, in which the free citizen possesses the right to decide. This does not stop serving as a foundation for ideas of peace and justice – clearly influenced by and underscored in the sad stage of National Socialism – a social ideal in which the dictatorship of the majority does not prevail, but rather in which a society regulates itself according to a certain sense of justice.

The development of Kaufmann's thought is marked by utopism. His objective is this 'small' resistance, which must continually take place, in order to avoid the necessity, one day, of the 'larger' resistance. It is worthwhile distinguishing between a 'large' and a 'small' form of resistance. Since resistance is not directed, in this form, against an illegitimate authority, it is instead, against a legal authority. Nevertheless, the exercise of power that endangers the common good is the employment of *authority*, and the application of *violence*, but also the prohibition of *open civil disobedience* under any circumstance.[30]

The *small-coin* right of resistance "becomes resistance against apathy of the heart, and against the path of least resistance, and above all, resistance to indifference and

26 *See* Dreier, Widerstandsrecht im Rechtsstaat?, in: *Recht-Staat-Vernunft*, 1991, 39–40.

27 Prüfungsgespräch über das Widerstandsrecht (note 14), 145, 148. For a similar affirmation, see Das Widerstandsrecht der kleinen Münze (note 22), 87.

28 Das Widerstandsrecht der kleinen Münze (note 22), 88.

29 Peter Schneider, *Recht und Macht*, 1970, 151.

30 Kaufmann, Das Widerstandsrecht der kleinen Münze (note 22), 92. For a similar affirmation, *see* Das Widerstandsrecht in Geschichte und Grundgesetz, in: *Der Rechtsstaat und seine Feinde*, ed. B. Rill and R. Scholz, 1986, 65.

resignation, to the temptation to remain impassive and silent; but also resistance against the impatience of those who want everything immediately." Resistance in a state governed by the rule of law, "must not be put *ad acta*", since "opens up a way out of the fatal vicious circle of action and reaction, of destructive social unrest and paralyzing law-and-order ideology that appears to be significant for our present day situation. Only in the tension of obedience and objection freedom becomes reality."[31]

III. He relates the contemporary legal right to resistance to the classical conception of the right to resistance, obviously influenced by classic Catholic ethics, while maintaining the impossibility of grounding the right to resistance in a positivist point of view.

Framing the right to resistance as an original right is an idea particular to Kaufmann, not found in the work of other authors, and which may result from his experience having lived through National Socialism.

The right to resistance is treated as a properly legal right, as there is an intrinsic connection between the right to resist and human dignity.

For Kaufmann the right to resistance is not revolution, but rather permanent evolution, such that his objective is this 'small' resistance which must be continually taking place, so that the 'larger' resistance is never necessary.

31 Kaufmann, Über die Tapferkeit des Herzens (note 21), 16. For a similar affirmation, *see* The Small-Coin Right of Resistance (note 2), 579.