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Different Notions of Autonomy in Italian Legal
Thought (19th–20th Centuries)
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Autonomy was an important notion in Italian legal doctrine from the mid-19th century to the fall of Fascism and the enactment of the Republican Constitution in 1948. Its use and meaning, however, were different according to the disciplinary field and the goal that jurists aimed to achieve. This paper will provide some examples concerning: (1) the role played by the concept of autonomy within public and constitutional law, first as an argument to emphasize characters of a national legal identity after political unification in 1861 and later – especially in the second decade of the 20th century – as a way of underlining the pluralism of (legal) orders within the state; (2) how autonomy impacted private law and the Civil Code of 1865 by both reshaping abstract formulas in contract law and contributing to creating separate disciplines such as labor law; (3) the theoretical struggle over the autonomy of will as the philosophical and legal justification for punishment, which adherents to the classical school and advocates of the positivistic school were confronted with from the 1880s until World War I. In these different cases autonomy was used as a discursive tool to consolidate the legal order or, on the contrary, to dismantle it.

1 From medieval municipal autonomy to a centralized state ... and back

Following a trajectory quite similar to what Peter Collin has described with regard to Germany,¹ in the Italian case medieval history provided model experiences of political and legal autonomy which became particularly meaningful for the process of political unification of the state in the 19th century. On the verge of unification, legal culture played a key role in stressing the

1 See the contribution by Collin in this volume; COLLIN et al. (2012).

existence and legacy of an Italian legal tradition whose roots could be traced back to Roman law and medieval jurisprudence as a demonstration of a long-standing and uninterrupted national legal identity.² Within this rhetorical framework, Federigo Sclopis³ and Vincenzo Gioberti⁴ associated the autonomy of the commune to the notion of absolute freedom, independence, and sovereignty in order to stress the continuity between this foundational past and national independence, to be achieved through the Risorgimento.⁵ Such an (historical) interpretation of the medieval municipal experience was rather unusual and clearly politically oriented. According to a more traditional perspective, the autonomy of the *civitates* had to be understood in terms of the relationship between different legal orders of different scales: empire and cities, the whole and its parts, central and peripheral powers.⁶ Autonomy, in this sense, was referring to the commune's power of enacting territorial laws (*potestas condendi statuta*), having its own judges and courts (*iurisdictio*), levying local taxes, even though the commune was still legally considered subject to the upper imperial power. Like a pendulum, the notion of autonomy swung between the two historiographical meanings of independence or of multi-normativity and pluralism of legal orders: if the former seemed to be more functional to legitimize and corroborate the unifying effort, the latter was applied to describe and substantiate the complex institutional and legal framework of a nationalizing project which had to realize unity without obliterating the particular and distinct regional legal identities.

Autonomy thus became a concept as well as an argument to claim a "resistance" confronted with a centralizing and standardizing state-building process which was perceived as disrespectful and oppressive of the local communities' legal identity and power. Advocates of a federalist state referred to autonomy in order to shape institutional balances capable of preserving a margin of self-government and freedom to each territorial state:⁷ this tension between center and periphery characterizing the pre-

2 CAZZETTA (2018); PIFFERI (2018); COSTA (2013); SPINOSA (2013).

3 SCLOPIS (1863) 142, first ed. 1840.

4 GIOBERTI (1843) 13–18.

5 COSTA (2014) 724–733; MANNORI (2014) 101–106.

6 This is the prevailing interpretation of the notion of autonomy even in recent historiography: see e.g. GROSSI (1996).

7 MANNORI (2014); MANNORI (2007); MERIGGI (2011).

unitarian period can be seen for example with regard to both constitutional law⁸ and the process of civil codification.⁹ Even after 1861, however, this tension did not completely disappear into a homogeneous discourse emphasizing the role of the central state, but some federalist projects and proposals even persisted in the 1940s.¹⁰ In the field of administrative law for example, it characterized the debate on the role of the prefect (*prefetto*) and the allocation of powers between central government and local powers.¹¹ In the field of criminal law, the debate on the abolition of the death penalty led some prominent scholars, including Francesco Carrara who was the most influential,¹² to openly maintain the preservation of different regional codes of punishment rather than being absorbed into a national uniform legislation forcing the application of capital punishment.¹³

The more the role of the centralistic state was strengthening in the last decades of the 19th century, the more the notion of autonomy was losing significance as well as any federalist project. As Vittorio Emanuele Orlando – the leading public law scholar at the turn of the century¹⁴ – clearly pointed out, the medieval history of local sovereignty and jurisdiction, which finds a kind of parallel in federal states such as the United States and Switzerland, was inconceivable in continental modern states such as France and Italy, in which

“the source of sovereignty is unique, and no limitation is admitted neither of the medieval type nor of a federal type. Territorial districts [e. g., provinces and communes] therefore, the larger ones as well as the minor ones, shall be purely and simply considered as organs of the state, and all their activity is nothing but a consequence of a delegation of powers which the state gives to them.”¹⁵

The notions of liberty, autonomy, and decentralization took on meanings different from historical precedence, which referred to a plurality of powers and legal orders and were somehow absorbed into a monopolistic state erasing whatever form of competing or self-ruling power. The English con-

8 MANNORI (2018).

9 SPINOSA (2017).

10 MALANDRINO (2014).

11 ROMANELLI (1995).

12 CARRARA (1870a and 1870b).

13 GERI (2005); CAPPELLINI (2007); SBRICCOLI (2009).

14 GROSSI (2000) 28–37.

15 ORLANDO (1892) 139–140.

cept of self-government was, according to Orlando, unusable with regard to the Italian experience, due to historical and cultural fundamental differences.¹⁶ The path was marked for a clear shift, at the same time dogmatic, methodological, and terminological, which was realized by Santi Romano at the turn of the century.¹⁷ considerably influenced by Laband's and Jellinek's theories, Romano dismissed the notion of autonomy, too burdened with historical legacy, and conceived the notion of *autarchia*, derived from the German concept of *Selbstverwaltung* and – with some strained interpretation – from the English notion of self-government as a tool to definitively sterilize municipal autonomy and absorb any claim of pluralism into a monolithic 'absolute' state.¹⁸

The reappearance of the word and notion of autonomy is due to a rethinking (and to later writings) of the same Santi Romano. His cultural trajectory is characterized, from the first decade of the 20th century, by a marked criticism of the formalistic, abstract, and absolutist conception of the modern state shaped by the continental legal culture since the French Revolution, whose crisis was, according to him, by then plainly manifest.¹⁹ The unveiling of the modern state's simplistic illusions led Romano to embrace a pluralistic approach in his book *L'ordinamento giuridico* (1918), in which he strongly argued for the existence of autonomous legal orders within the state.²⁰ In 1945 he finally summarized the need to recognize the importance of the notion of autonomy in its proper and particular meaning, which refers to both self-determination and the power of a group/body/institution to produce its own legal order.²¹ Romano's attention was no longer focused on the relationship between central and peripheral powers (state and munic-

16 ORLANDO (1892) 144–152.

17 ROMANO (1899 and 1911).

18 RUGGE (1993); SORDI (2014); GUSTAPANE (1980); CIANFEROTTI (1998), ch. VII; BERSANI (1990).

19 ROMANO (1950 [1909]); GROSSI (2012); SANDULLI (2009) 167–171.

20 GROSSI (2008); CASSESE (1972); COSTA (2002).

21 See ROMANO (1953) 14–30: He argued that “the word ‘autonomy’ has different meanings in the field of law. In its broader and more generic meaning, it refers to every possibility of self-determination and, therefore, to active capacities, powers, and subjective rights. In a more specific meaning [...] it indicates: subjectively, the power of giving themselves their own legal order, and, objectively, the distinctive character of a legal order which is self-constituted by individuals or bodies, as opposed to the character of legal orders which are constituted by others” (14). See also CAZZETTA (2014).

ipalities), but on the very existence of groups, associations, bodies of varied nature, competencies and goals, which created and applied their own normative order even though they were still part of (and subjected to) the law of the state, and whose increasing significance in influencing and directing the social life of many citizens was nothing but the proof of the legal complexity of 20th-century society.

The possibility of having an autonomous legal order comprehended within a superior order, which may also determine the conditions of its constitution, does not necessarily imply the amalgamation and absorption of the former into the latter: there will certainly be a (more or less strict) connection between the two or more orders, but this does not exclude autonomy, which means independence that, however, is not absolute but may be expressed on different levels.²² This first pillar of autonomy in Romano's thought (the second one refers to individual autonomy, that will be discussed in the following paragraph), his model of the relationship between monism (state) and pluralism (groups and legal orders), will make a significant impact on the public law of the 1920s and 30s,²³ and will also have a momentous influence on the debate of the Constituent Assembly, especially with regard to the formulation of art. 2 and the contribution of jurists such as Giuseppe Dossetti or Giorgio La Pira.²⁴

2 The crisis of individual autonomy in contract law and the rise of social-special laws

Starting in the 1880s, Italian civil law doctrine was confronted with the so-called discovery of the social question, rising welfare-state legislation, and the crisis of the centrality of the code as bulwark of the unity of the law.²⁵ Within the broad range of issues related to this subject which have been investigated by legal historians in the last decades, I would like to stress just two points. The first concerns the rethinking underwent by the liberal key notion of individual contractual autonomy in face of the social critiques against the abstract formula of the Civil Code of 1865 and its exaltation of

22 ROMANO (1953) 16.

23 COSTA (1986) 124–135.

24 FIORAVANTI (2017).

25 CAZZETTA (2002); RODOTÀ (1995) 318–326.

(only) formal equality in spite of ever-growing social and economic inequalities.²⁶ The overemphasis (rooted in the doctrine of natural law and formalized in the Napoleon Code) which the code gave to the contract as the utmost manifestation of individual freedom and autonomy as well as the perfect combination of free mutual consent by equal individuals, was questioned by the unveiling of social disparities, especially between employers and employees and the fiction of their equal freedom to contract. Autonomy was overcome by the need of rebalancing these positions, asking for laws more correspondent to – and more consistent with – the real conditions of real individuals.

Individual autonomy, in this sense, had somehow to be integrated, corrected, or equalized by an external intervention of the state providing legal protections (such as mandatory insurance against personal industrial accidents to be paid by employers), welfare, and social security rights. In Italy, as in many other European countries, this claim led to the enactment of a growing number of social-special laws in an increasingly broader range of social and economic fields.²⁷ The crisis, or at least weakening of individual autonomy, can be here exemplified with regard to two different cases. The first case refers to the gradual elaboration and legal implementation of the notion of collective labor agreement, a new form of contract with *erga omnes* mandatory effects agreed upon by the employer and a collective body (e. g. workers union): notwithstanding the firm opposition of some leading jurists who feared the disappearance of the pivotal principle of autonomy²⁸ and, as a result, of the very autonomy of codified civil law, the collective labor agreement gradually gained doctrinal and legislative recognition.²⁹ The second case, in which again the notion of autonomy was at stake, concerns the possibility that, starting in the 1880s, a judge was partially but increasingly allowed to somehow modify, integrate, or amend the very content of the contract freely agreed upon by the two parties. This attack on autonomy was, once again, justified by the need to interpret and apply any contract with equity, namely on the one side, to go beyond the strict rule according to

26 CIMBALI (1885); SALVIOLI (1890).

27 GABBA (1901); ROSELLI (1951); CAZZETTA (2017a); CAZZETTA (2007), ch. 3; MANNORI/SORDI (2004) 409–413.

28 BARASSI (1901).

29 MARCHETTI (2006); CAZZETTA (2007), ch. 7; CAZZETTA (2017b).

which the contract was as binding as the law between the parties and, on the other side, to recognize that unforeseeable circumstances could occur requiring a forced and judicial (i. e. outside and above individual autonomy) revision of the economic content of the agreement. The theoretical debate and judicial application of the so-called *rebus sic stantibus* clause under the 1865 Civil Code (which did not explicitly mention this clause), is a clear example of this approach: by following a systematic interpretive approach to the code influenced by the German school of Pandectists, scholars and magistrates started to conceive the admissibility of allowing the debtor the resolution of the contract or a rebalancing of the economic position in case of “excessive onerousness of the consideration” due to unpredictable causes aroused after the contract’s conclusion.³⁰

The second theme in relation to which the notion of autonomy was debated refers to the crisis of the centrality (or rather autonomy) of the civil code and the correspondent rise of autonomous branches of law regulated by particular dispositions and grounded on specific and more social-oriented rationale. Such an approach is particularly clear with regard to the building of labor law as an autonomous discipline different from the ‘common’ codified civil law: in this case, autonomy was used to define the boundaries of a field governed by principles which were no longer merely individualistic and entailed both a more solidarity-based interpretation of the law of contract, and a recognition of mitigation of the pure autonomy to contract. The pressure of workers unions, associations, and political parties undermined the liberal artificial image of individual autonomy, naturally inclined to achieve mutual interests and turned out to demand a kind of overturning of the notion of autonomy: rather than referring to free individual choices as a recognition of legal individualism, it started being used to refer to the collective autonomy of social forces and groups to produce and comply with their own normative order.³¹ Even in this legal discourse on labor law, autonomy, after being used as a prerogative of the individual, was turned into a discursive lever to shape a legal pluralism, which proved very fruitful in the process of founding the autonomy of labor law in the post-constitution period.³²

30 BARSANTI (1901); DUSI (1915).

31 SORDI (2018); CAZZETTA (2007), ch. 4–5; CAZZETTA (2016); GIUGNI (1989).

32 GIUGNI (1960).

3 Free will and determinism: the challenge of criminal positivism to the autonomy of the individual

A third legal field in which the notion of autonomy was highly disputed between the 1870s and World War II is criminal law. The liberal rationale of punishment, in Italy as well as in many other European countries from the Enlightenment, Beccaria, and the French Revolution, was retributivism. The underlying idea presupposed the notion of free will and of criminal conduct as an autonomous choice of the individual, without which any repressive punishment would be illogical and therefore unjustified.³³ The Italian Penal Code of 1889 was based on this view. However, since the publication of Cesare Lombroso's *L'uomo delinquente* (1876) and, above all, Enrico Ferri's foundation of the Positivist School of Criminal Law (1881), the notion of criminal liability rooted in moral responsibility as traditional and undisputed fundamental of criminal law was radically questioned.

Among the more radical changes claimed by these reformers,³⁴ maybe the most revolutionary was the frontal attack on free will and the acceptance of a deterministic approach. According to Ferri,³⁵ free volition and moral liberty, i. e. the freedom to deliberately make choices and direct one's own behavior, "is a pure illusion, derived from lack of conscience of the physiological and psychic immediate background of every of our voluntary decisions". Human beings think they are autonomous, but they are not so, and criminal law is falsely based on this illusion. Potentially, the consequences of such an idea could be tremendous on many points of criminal law: the substitution of prevention for repression, of dangerousness for liability, of indeterminate measures of social defense for fixed and determined sentences.³⁶ Therefore, it was strongly opposed by those advocates of a liberal penal law who feared nothing but the end of criminal law.³⁷ Here, my focus is limited to stress how the crisis of the liberal and individualistic notion of autonomy of will, which – as briefly analyzed above – characterized contract law at the turn of the century under the weight of rising social problems and actors, had a

33 FARMER (2016); LACEY (2016).

34 PIFFERI (2016).

35 FERRI (1900) 468.

36 GAROFALO (1880); LONGHI (1911); MARCHETTI (2016).

37 PESSINA (1914 and 1915).

parallel in criminal law as well. The epistemological influence of a naturalistic and scientific approach to crime and criminals as social phenomena to be understood and neutralized led to questioning the notion of autonomy as the necessary condition of any penal intervention of the state. Even though these theories were rejected and did not find normative implementation, their impact on the development of criminal law (in terms of social defense and dangerousness-oriented punitive intervention) was not inconsequential.

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