Mortimer Sellers
Editor

Ius Gentium: Comparative Perspectives on Law and Justice 1

Autonomy in the Law

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IN THE LAW

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To the Student Fellows of the Center for
International and Comparative Law,
past, present and future,
with gratitude and affection.

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PREFACE

The collection of essays in this volume is first in the series *Ius Gentium: Comparative Perspectives on Law and Justice*, published by Springer Verlag in cooperation with the University of Baltimore Center for International and Comparative Law. This book series replaces the journal *Ius Gentium*, which concluded with volume 12 in 2006.

The essays in this collection are based on papers originally presented at the fifth meeting of the European-American Consortium for Legal Education (EACLE), held at American University in Washington, D.C. in May, 2006. EACLE has published several previous collections of essays in the journal *Ius Gentium*. For a list of past volumes, see http://law.ubalt.edu/cicl/ilt.

EACLE is a transatlantic consortium of law faculties dedicated to cooperation and the exchange of ideas between different legal systems and cultures. Each year the EACLE colloquium considers a specific legal question from a variety of national perspectives. The 2006 initiative on "Autonomy" was coordinated by Professor Robert Dinerstein of the American University School of Law.

I would like to thank those who attended the 2006 meeting for their insightful remarks, and for their inspiration, suggestions, and encouragement in making this volume and the EACLE consortium so effective in fostering greater transatlantic cooperation on law and legal education.

Thanks are also due to the faculty, staff and students of the Center for International and Comparative Law who prepared this volume for publication, and particularly to Morad Eghbal, James Maxeiner, Kathryn A. Spanogle, Natalie J. Minor, Renee L. Bailey, P. Hong Le, Thomas Pilkerton III, David Schaffer, Pooja Shivangi, Katherine Simpson, Catherine Wahl, Ryan Webster and Cheri Wendt-Taczak.

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An Introduction to the Value of Autonomy in Law

M.N.S. Sellers

Autonomy has universal appeal, but vastly divergent applications in different legal systems and in different circumstances. Like all legal ideals, legal embodiments of the value of autonomy must seek generality in principle, to justify particularly in practice. When lawyers from different jurisdictions compare their differing doctrines, this comparison clarifies what all legal systems have in common, or ought to have in common. The value of autonomy can be discovered in the overlapping ideals of otherwise dissimilar legal systems, in which conceptions of autonomy shape the structures of relationships between individuals and their families, between families and the state, and between the state and international organizations. Concerns for autonomy determine how lawyers may defend their clients, and what clients can expect from their lawyers. Each of these circumstances reveals a different conception of autonomy, and the ultimate unity of the underlying concept that informs them all. Protecting autonomy is one of the central benefits of law.

Autonomy, in its simplest and most natural sense, signifies self-rule: the right of states, or of families, or of associations or individuals to make their own laws for themselves. Understood in this way, autonomy is almost a synonym for license, which is to say, the ability to do what one wants, without restraint. Autonomy differs from license, however, in that it implies some measure of self-restraint. This difference is not in itself enough to justify the concept's popularity. What makes autonomy so desirable is its inevitable connect-

ion with (and restraint by) liberty, understood as the right not to be interfered with by the state or by others, except to the extent that this interference is warranted by the common good of society as a whole. Liberty, so defined, is among the most important purposes and justifications of law. Law draws the lines that protect the autonomy of states, of families, and of persons, from the unwarranted intrusions of other persons, families, the state, or anyone else.

Law protects liberty and the autonomy of various groups by drawing the lines that determine the range of their self-rule. This makes autonomy itself an inevitable product of law. Autonomy is not only an inevitable, but also a desirable result of legality, because liberty (and, therefore, some measure of autonomy) is a central element in justice. If justice consists (as it does) in those social arrangements that best maintain and advance the common good of all members of society, and true justice is achieved in a state or society when all its members have the opportunity to lead worthwhile and fulfilling lives, then liberty and autonomy are essential prerequisites of justice, because worthwhile lives require some element of self-rule. If law seeks justice (as it should), then law will protect liberty, and autonomy will always be a central element in law.

The importance of autonomy in law is also intimately connected with the concept of privacy, which guards individuals, families and associations against unwarranted intrusion. "Privacy" is the negative expression of the positive value expressed by "autonomy." Autonomy signifies the right to decide for oneself. Privacy signifies that zone in which no others may interfere. Both privacy and autonomy are fundamental requirements in any just legal order because they both are basic attributes of liberty, and liberty is a fundamental element of the common good that all legal systems have a basic obligation to establish and protect.[1]

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[1] *See* M.N.S. Sellers, *Republican Legal Theory*. Macmillan, Basingstoke, 2003.

Liberty is the assurance that individual autonomy (privacy) will not be invaded, unless the common good of the people as a whole warrants this invasion.[2]

Privacy is best understood as comprising that zone in which individuals ought to enjoy autonomy. Some actions are private in the sense that they are the activities in which the state ought not to take an interest. The state ought not to constrain its subjects in their private activities, because these arise, by definition, only when citizens ought to enjoy autonomy. Those activities in which the state could legitimately constrain autonomy constitute the public sphere. Personal autonomy properly ends at the boundary between the public and the private. This boundary is determined in turn by the areas in which individuals (or groups) ought or ought not to enjoy autonomy.

These definitions of law, justice, liberty and the common good are not (or at least ought not to be) controversial. They have been well-established for centuries. But the concept of autonomy is more complicated, largely because of the influence of Immanuel Kant. Kant believed in the possibility of a sort of false consciousness in which a person desires or intends one thing, but really would (or should) have wanted something else, if only the person were reasonable, and thought clearly.[3] Kant perceived that persons in the grip of an unregulated passion or desire or emotion, may make wrong choices. So neo-Kantians now often speak of "moral autonomy," to signify the choices that people would make if they were not so short-sighted and morally obtuse. Kant advocated moral autonomy only insofar as it signifies doing the right things for the right reasons. This way of looking at things is very similar to the attitude of Jean-Jacques Rousseau,

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[2] See M.N.S. Sellers, *The Sacred Fire of Liberty*. Macmillan, Basingstoke, 1998.

[3] Immanuel Kant, *Critique of Pure Reason*, translated and edited by Paul Guyer and Allen Wood. Cambridge, 1997.

who wrote of "forcing" people to be free.[4]

This conception of autonomy does violence to our ordinary use of language. The better and more usual understanding of autonomy restricts itself to what is sometimes called "personal autonomy": the opportunity to regulate one's own life for oneself, according to one's own judgment, even when one's judgment is bad. The proper zone of personal privacy is that area in which a person ought to be able to regulate her or his own life, according to her or his own judgment, even when that judgment is wrong.

This understanding of autonomy recalls the basic premises with which this discussion began. Law, for example, exists to secure justice, as much as it possibly can, but there may be some elements of justice that cannot be secured by law, or should not be. In the just distribution of pieces of cake at a party, for example, the person who cuts the cake should strive for a just distribution of cake, but the common good would suffer if societies tried to secure the just distribution of cake by force of law. This is equally true of the just distribution of chores within a family. Families properly enjoy a certain amount of autonomy. But, as this example shows, autonomy should have limits, because it can facilitate oppression. Families can become oppressive, and so the state properly imposes limits on their autonomy, in order to prevent oppression within families. The autonomy of some actors must be constrained when it begins to threaten the common good of the whole.

When we speak of autonomy, or of privacy, or of self-rule, we can speak of the privacy or autonomy or self-rule of individuals, and what limits we should place on these to facilitate the common good of the whole. But we can also speak of the privacy or autonomy or self-rule of groups. For example, families, churches, nations, or regions can enjoy

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[4] "On le forcera à être libre" Jean-Jaques Rousseau, *The Social Contract* I.7.8, translated and edited by Victor Gourevitch. Cambridge, 1997.

autonomy, as can many other organized groups. Groups can maintain a private or autonomous sphere, within which they enjoy independence, even while they are also subject to broader bodies of law, which constrain their autonomy and prevent them from oppressing others. This is as it should be. Discussions of autonomy must always recur to this question of precisely where to draw the line between the "public" and the "private" spheres, to better define the area in which individuals, or organizations, or states ought to have autonomy, and those areas in which they ought to be subject to external control.

This comparison between individuals and groups gives rise to several possible areas of confusion about autonomy and privacy as applied to law. There are important differences between individual and collective self-rule. Individuals benefit directly from liberty. We all properly enjoy and benefit from being able to regulate our own lives (subject to constraints placed upon us for the common good). Oppression arises from constraints imposed for reasons unrelated to the common good. Such oppression is a great human misery, both because it hurts to have one's will arbitrarily thwarted and because one's own plan for one's own welfare is usually more effective than choices imposed by others. So individuals should enjoy autonomy and ought to have some measure of self rule. But groups are different from individuals in this respect. A group's title to self-rule is entirely derivative from the welfare of the individuals within it and of other members of society as a whole, because groups cannot have a single autonomous will or judgment, as individuals do. It is, therefore, necessarily often the case that when groups make decisions, the autonomy of particular members of the group will be overruled. This makes the process by which groups make decisions extremely important. Decisions must be made for the good of the community as a whole, not for the separate good of dominant elites or of self-serving individuals within larger groups of people.

The first question to be asked in evaluating group autonomy should be whether the group itself is useful and whether it serves the common good of its members and of society as a whole. Criminal gangs should enjoy a much narrower zone of autonomy, for example, than the Roman Catholic church; and the Roman Catholic church should have more limited autonomy that the State of Maryland. Group autonomy should depend on the purposes for which the group exists and how well the group actually serves these purposes. People sometimes confuse democracy with autonomy, for example, but this overlooks the fact that in democracies individuals can be outvoted, to the detriment of their own personal autonomy, and therefore run the risk of being oppressed.

Another common confusion about autonomy arises from mistaking personal failings for external controls. This was Kant's mistake. Autonomy is not directly compromised when individuals make bad choices. In fact, the essence of autonomy is the ability to make bad choices for oneself. Good choices are demeaned when they are not freely chosen.

The third common mistake about autonomy is to imagine that autonomy is always desirable. There are a great many bad choices that people ought not to be allowed to make, because they have such dangerous consequences. The effects of one's actions on others will often justify some measure of constraint.

The concept of privacy also gives rise to some common confusions. Many mistakenly believe that any public interest trumps all private rights. But sometimes privacy properly protects violations of the public good. Protecting the borders of personal autonomy may require very broad rules that provide a shield for bad behavior. Privacy also has a territorial as well as a behavioral component. My autonomy has a greater importance in my home, for example, than it does on the public street, where I am more likely to come into contact with others.

A second common mistake about privacy would be to

suppose that private desires always deserve public support. The common good does not necessarily embrace all private desires. A just legal system will tolerate some forms of private behavior that it does not and should not actively support.

These distinctions and similarities between autonomy, privacy, liberty, and license, as applied to law, become more apparent in the context of their application to particular cases and circumstances. For example, as June Carbone demonstrates in this volume, the autonomy to construct one's own family has primary importance in the lives of most people, whose most intimate relationships are perpetuated and supported by family bonds. On the other hand, children born into families have no such autonomy, and deserve legal protection against the self-interest of other family members.

International organizations are much more remote from everyday life, but they too have the power both to liberate, by constraining national governments and to oppress, by interfering in individual lives. Jan Klabbers explains how important procedural checks and balances will be in guiding international organizations, both toward exercising their own autonomy properly and toward respecting the autonomy of others. International organizations have a legitimate zone of autonomous action, as do states, and corporations, and individuals. The difficulty arises in drawing the lines of autonomy and control within and between these different actors.

Nowhere does autonomy seem more important than the decision to end one's own life. Both capital punishment and assisted suicide cases turn on this question of life and death and our hesitancy to permit the purposeful ending of human life, even when death is freely chosen. Kandis Scott suggests that people should have the autonomy to end their own lives, when their considered judgment finds the conditions of life to be intolerable and there is no remedy for their suffering. Mark Loth adds that even the creation of a life may violate autonomy, when parents wish to prevent a birth, and fail.

When poor medical advice leads to the unwanted birth of profoundly handicapped children, different courts in different jurisdictions have imposed different underlying rules. Yet no matter which rule is ostensibly chosen, the final legal result is often the same. This reflects universal standards of personal autonomy and justice which confer legitimacy on the courts, and constrain court decisions, to reach substantively just results.

Procedural justice also concerns autonomy, since it protects zones of privacy and self-expression against the operations of the courts. Philip Traest and Tessa Gombeer explain how the rights of the defense in legal proceedings extend to counsel, and how the legal autonomy of lawyers advances the liberty rights of their clients. The defense counsel is in a sense an extension of the legal personality of the defendant and should therefore retain considerable autonomy against the court. At the same time, counsel cannot and should not be held liable for the crimes of those they (legally) undertake to defend. Any restrictions on attorney/client privilege undermine the autonomy which even actual wrongdoers should retain in undergoing the judicial application of the law.

These practical examples of the implications of autonomy for law can be supplemented with some specific observations about the legal system of the United States. The United States Constitution guarantees that neither the Federal government nor any state can deprive any person of life, liberty, or property, without due process of law. This has been interpreted to mean that there are certain liberties that cannot rightfully be denied. These constitute a perpetually private zone, into which the state can never intrude. So the United States Constitution protects for each citizen a zone of autonomy, concerning his or her own body, above all, but also his or her house, private opinions, and religious views, to give just three examples. This empowers judges to constrain the government and legislature, in order to protect individual citizens against arbitrary power. Many lawyers consider this to be the most

important provision of the United States Constitution. By referring directly to liberty, the Constitution embeds justice and the common good at the heart of the constitutional structure, and guarantees a zone of privacy and autonomy to all citizens, so that they can enjoy the blessings of liberty, not only against each other, but also against the state.

Privacy, autonomy and liberty are all three closely related to the republican and liberal foundations of justice under law. Law should seek to establish justice for all, which requires both the imposition of restraints for the common good and the protection of individual and group autonomy, so that each citizen can be in a sense the author of her of his own life, with the protection and support of the state, the law, and society as a whole. Autonomy is one of the most important benefits and justifying purposes of the rule of law.

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Autonomy To Choose What Constitutes Family: Oxymoron Or Basic Right?

June Carbone

Alasdair MacIntyre, Michael Sandel, and other critics have argued that liberalism is living off the borrowed capital of Western civilization.[1] That is, to the extent that liberalism requires neutrality among theories of the good, the generation of values – of strong families, hard workers, honest people, engaged citizens, and devout church members – takes place offstage. These critics worry that the institutions that develop values, such as churches and families, have atrophied in the modern secular state, and that liberalism can no longer assume that private institutions will serve the purposes that, before the rise of liberalism, had been advanced by the state.[2]

William Galston responded to this critique by arguing that liberalism does not require neutrality toward the creation of the values that are central to liberalism itself.[3] A liberal

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[1] *See* Alasdair Macintyre, *After Virtue* (2d ed. 1984); Michael J. Sandel, "Introduction," in Michael J. Sandel, ed, *Liberalism and Its Critics* (NYU, 1984), at 5; Michael J. Sandel, *Democracy's Discontent* (1996), at 7-8. For a summary of this debate within family law, see Jennifer Wriggins, "Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender," 41 *B.C. L. Rev.* 265 (2000), at 265-67 (summarizing discussion, including Bruce Hafen, Carl Schneider, and Mary Ann Glendon, about the law's expressive function and the communitarian critique of individualism).

[2] *See, e.g., Reynolds v. United States*, 98 U.S. 145, 162 (1879) (noting that the colonies sometimes required church attendance and used tax dollars to support established churches).

[3] William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (1991), at 220-21. *See also* Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (1990), at 200.