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German Discourses on Autonomy from the
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What does diversity have to do with autonomy? First of all, autonomy is a mode of the “decentralized production of law”,¹ i. e. it generates diversity within the legal system. Second, autonomy refers to social diversity; it marks social differences in a normative way. In order to determine the significance of autonomy and its significance for diversity within the legal system, however, one must first realize that the law can deal with social differences in a variety of ways. In modern legal systems, it is primarily the state legislature that anchors social differences in law. This can take the form of special legal orders that provide for particular constellations of rights and obligations for certain functionally defined groups, e. g. for military personnel, civil servants, workers, merchants, craftsmen, etc.,² or by granting special rights to certain ethnic groups.³ Social boundaries can, however, also be marked in legal normative terms by the legal determination of disadvantages which are eliminated or at least mitigated by the law. This turns social differences into legal differences. Examples include: male/female, young/old, disabled/non-disabled.

Bearers of autonomy rights also operate within a special legal order. Yet, they are difficult to integrate into the scheme described above, in which the persons concerned are *objects* of a legal distinction and its legal consequences. In the case of autonomy, in contrast, those affected are *active subjects*. The groups themselves, that is, the concerned parties, develop their own character in a normative way. In modern Western states, this creates a tension with

1 BACHMANN (2006) 182.

2 In Germany: *Soldatengesetz* (Law on Soldiers); *Beamtenstatusgesetz* (Law on the Status of Civil Servants) and *Beamtengesetze des Bundes und der Länder* (Law on Civil Servants of the *Bund* and the *Laender*); *Handelsgesetzbuch* (Commercial Code); *Handwerksordnung* (Crafts Code).

3 In Germany, for example: *Gesetz über die Ausgestaltung der Rechte der Sorben/Wenden im Land Brandenburg* (Law on the Development of the Rights of the Sorbs/Wends in the Federal State Brandenburg).

the state's legislative monopoly. This tension explains the special character of the legal discourses on autonomy in Germany. Another peculiarity of the German debate is that autonomy as a legal concept was only rarely used when the rights and competences of bigger territorial units, such as provinces and the individual German states,⁴ were under discussion. Hence, there are also striking differences with respect to the debate about autonomy in other countries.

1 Autonomy as a legal concept

1.1 Demarcations

First of all, autonomy is not a specific legal concept. The term is equally at home in the language of politics, economics, art or morality. But even if it is used as a legal concept, different dimensions of meaning can be distinguished. A distinction must be made between a descriptive, a programmatic and a legal-normative use.⁵ Used descriptively, autonomy functions as a collective term for various forms of legally guaranteed spheres of freedom and independence. In this context, reference is made to legal phenomena, but no legal consequences are associated with the use of the term. Here, it is also possible to use it as a key jurisprudential term that bundles together certain legal phenomena, emphasizes common characteristics, and is a significant influence in current law and / or its future development.⁶ As a programmatic concept, the concept of autonomy has a legal-political function. By demanding more autonomy, one refers to a possible future state; it is a use of the term *de lege ferenda*.

Used in a legal normative sense, the concept of autonomy is applied in order to assert certain legal consequences. This can be done in different ways. On the one hand, a competence can be asserted: Anyone who says that a certain legal subject is a bearer of autonomy is claiming that this legal subject is entitled to certain rights. On the other hand, it can be an assignment of characteristics with legal relevance: Anyone who says that autonomy is a

4 An important exception is Paul Laband, who regarded only the individual German states as bearers of autonomy; for his conception see KREMER (2012) 22 ff.

5 Also in the sense of differentiation, albeit in a slightly different way (autonomy as a guiding principle, ordering mechanism or dogmatic figure): BUMKE (2017) 8.

6 BUMKE/RÖTHEL (2017).

source of law (*Rechtsquelle*) is claiming that the relevant norms have the quality of law. While both uses were often linked to one another, they were not completely congruent. Autonomy as a source of law referred to law-making, whereas autonomy claimed as a competence could also mean the competence to apply the law.⁷

The German debate on autonomy as a legal term as it developed in the 19th century, however, was primarily concerned with the autonomy of law-making.⁸ Initially, it was necessary to establish the position of autonomy in relation to private autonomy – this sharp distinction between “autonomy” and “private autonomy” also marks a difference to the contributions of Agustín Casagrande and Michele Pifferi. The differentiation was made on the basis not of the criterion of bearer, where private autonomy is granted to individuals and autonomy to collective actors (any such differentiation would break down because private autonomy can also be exercised in collective form), but of the rights associated with it: Private autonomy was to be equated with the authority to self-determine the application of law, autonomy was tantamount to self-determined law-making. Even though it still took well into the 20th century for a fixed conception of private autonomy to emerge,⁹ the distinction itself had finally prevailed by the end of the 19th century.¹⁰

But there is still another understanding of autonomy that needs to be distinguished, namely, autonomy as a means of regulating ethnic and religious diversity,¹¹ i. e. as a basis of competence for the self-administration of certain ethnic groups within a state characterized by ethnic and religious differences. Though not in Germany itself, this understanding of autonomy was nevertheless to be found in German-speaking countries, that is, in the multi-ethnic and multi-religious Habsburg Empire. In this context, the concept of autonomy was also used as a legal concept.¹² From an ethnic point of view, Germany differed from the Habsburg Empire in being largely homo-

7 More detail on this, COLLIN (2014).

8 Another use of “autonomy”, as found in the work of Lorenz von Stein, will be discussed later.

9 BACHMANN (2006) 182 f.

10 MEDER (2009) 80 f.; for details on this debate: HOFER (2011).

11 On this issue – albeit, in relation to individual, non-group autonomy – FOGLETS (2017).

12 STOURZH (1985) 105 ff.; in a contemporary perspective see, for example, SCHWICKER (1870); ANONYMUS (1902).

geneous. Although some ethnic minorities (above all Danes, Sorbs, Poles) also lived in the territory of Germany, they only settled in relatively small areas or were part of a mixed population within one area. Whenever special rights were debated in those cases,¹³ the term autonomy was not employed as a legal term. As far as religious differences were concerned, the individual German states were by and large religiously homogeneous (apart from the differences between the Christian denominations in larger German countries such as Prussia). This means that the problem of religious diversity did not arise there in the same way as it did in the Habsburg Empire.¹⁴ Moreover, the autonomy of the churches¹⁵ did not refer to the regulation of religious diversity within a state, but rather to the relationship of the church to the state.¹⁶ Two religious groups, namely the Jews and the Huguenots, the descendants of those French Calvinists who had found refuge in Germany, were an exception. They had been granted numerous privileges, and these are occasionally treated in today's research literature under the heading of autonomy.¹⁷ However, these privileges were abolished at the beginning of the 19th century and – to the best of our knowledge – were not discussed by contemporary jurisprudence under the concept of autonomy.

1.2 Range of variation of autonomy as a legal concept

Although the term “autonomy” had already established itself in law in the early modern period, it had not yet become a legal concept with firm contours. What emerges is an inconsistent and rather unspecific use of terms.¹⁸ The term first secured an established place in jurisprudential debate – in the sense of a legal concept related to a certain social group – at the end of the 18th century in connection with the autonomy of the high nobility.¹⁹ However, autonomy did not denote the legislative power of the high nobility over

13 For example ELLE (2010).

14 In the 16th century, the term autonomy in the sense of “freedom of belief” (*Glaubensfreiheit*) had been used in connection with confessional disputes, but this use of the term had been abandoned in the course of the early modern period, SCHWEMMER (2005) 319.

15 PFIZER (1834) 726 f.

16 HARDTWIG (1997) 376 f.

17 For example, ASCHE (2010); BATTENBERG (2010).

18 REISS (1902) 5 ff.; HAUG (1961) 4 ff.

19 SCHÄFER (2008) 648.

its subjects – this resulted from territorial sovereign rights²⁰ – but rather its authority to fix its own law internally, i. e. within the context of the family. This impinged on both questions of public law (e. g. succession to the throne, regency, title) and matters of private law, essentially, family law and inheritance law. The generally applicable – mostly Roman – family and inheritance law did not meet the requirements for the stable maintenance of the ruling dynasty and because of the necessity of the participation of the Estates, these family issues could not be entrusted to the ‘normal’ legislature.

Rather, it was assumed – even if controversial – that a special tradition of German law was decisive in the regulation of these matters.²¹ Even if such rationales changed in many respects over the course of the 19th century, as they adapted to the altered constitutional framework conditions²² and were disputed by influential jurists²³ – the “autonomy of the high nobility” (*Autonomie des Hochadels*) created a type exhibiting essential characteristics that were also deemed crucial for forms of autonomy in different spheres. At the same time, however, lines of tension became visible that were to shape the debate about the concept of autonomy in the period that followed:

- Was autonomy a private law or a public law legal institution?
- Did autonomy embody an original or derivative competence?
- Did autonomy only confer leeway within the dispositive state law or could it derogate state law?
- Were norms that arose on the basis of autonomy only binding on those directly involved in the act of norm-setting or were they also binding on other persons?
- Which groups were entitled to autonomy?

In general, it can be said that the debate enjoyed its heyday in the 19th century. The concept of autonomy was a fixture in legal encyclopaedias²⁴ and in the chapters on “sources of law” in legal textbooks.²⁵ This already points to a certain thematic perspective: autonomy was treated primarily as a source of

20 STOLLEIS (2012) 170 ff.

21 MIZIA (1995) 149 ff.

22 In detail GOTTWALD (2009).

23 GERBER (1854) 51 ff.; for a brief overview on the disputed points, OERTMANN (1905) 5 ff.

24 For example WILDA (1839); PFIZER (1834); BRUNNER (1875).

25 See on this KREMER (2012) 9 ff.

law (alongside other sources of law such as legislation and custom). Within the jurisprudential subdisciplines or directions, the attention paid to autonomy was distributed differently. It had a prominent place – because of the origin attributed to it in German law²⁶ – in the discipline of German private law (*juristische Germanistik*). It also attracted attention in the branch focusing on Roman private law (*juristische Romanistik*), although there it was treated with greater scepticism. It found its way too into the scholarship of public law, but it is striking that it met with considerable resistance among the most important public law scholars of the time: Gerber completely rejected the use of the term.²⁷ As he had already made very clear in his previous treatises on private law,²⁸ he did not classify such acts as a form of law-making, but rather as the application of law. Laband accepted the use of this term only within a very narrow scope of application.²⁹ Administrative law also included autonomy in its doctrine of legal sources, although in some cases with a clearly etatist emphasis;³⁰ however, here, too, opinion was not uniform.³¹

The question as to which legal subjects could be considered bearers of autonomy also gave rise to a broad spectrum of opinions, which entails taking into account different assumptions regarding the prerequisites and scope of autonomy. On a narrow view, it could be argued that only the houses of the high nobility (in the form of their house laws [*Hausgesetze*]) as well as the cities of Wismar and Rostock, which enjoyed a privileged status based on older rights, were able to produce law that derogated from state laws and was free of state confirmation.³² Beyond that, opinions were divided over the extent to which municipalities, non-municipal corporations or even private associations could be holders of autonomy; in some cases, the concept of autonomy was even mobilized in order to grant railway companies the right to produce law-equivalent rules³³ so that they could lay down more favourable liability conditions that deviated from state law.³⁴

26 See only PUCHTA (1828) 159.

27 GERBER (1865) 56 fn. 3, 137 fn. 1; see also KREMER (2008) 177 f.

28 GERBER (1854).

29 See in detail II. 2.

30 See in detail II. 2.

31 KREMER (2012) 27 f.

32 For a summary of the probably prevailing opinion, REISS (1902) 8 ff. with further references.

33 See, for example, GOLDSCHMIDT (1860) 362.

34 POHLHAUSEN (1978) 66 ff.

Finally, there was an equally broad spectrum of opinions on the issue of the extent to which autonomy required state intervention – in other words, whether autonomy was an original or a derivative power, i.e. a power derived from state authorization. There were various possibilities here: autonomy that did not require any state involvement at all; autonomy that required state recognition but only with a declaratory effect; autonomy that required constitutive state recognition; autonomy that was granted by the state. Grosso modo, a liberal view tended towards a rather minimal share of state participation, while an etatist view favoured greater state dependence. In the 20th century, this dispute was of little consequence, the prevailing view being that only autonomy granted by the state was legitimate.³⁵

However, this description only provides a rough overview, which does not yet sufficiently show the importance attached to autonomy in the legal system and the theoretical and conceptual ideas behind it. This will be explained in what remains of this chapter as it concentrates on a selection of threads in the debate and thematic emphases which give particularly clear expression to the political and legal normative dimensions of autonomy.

2 Debates and perspectives

2.1 Autonomy and cooperative theory (*Genossenschaftstheorie*)

The debate about the legal institution of autonomy was initially focused on the discipline of German private law, i.e. in that branch of scholarship that dealt with legal institutions that had not arisen from Roman law, but were assigned to a specific tradition of German law. This did not mean that Roman law jurisprudence (*juristische Romanistik*) ignored this topic.³⁶ Nevertheless, Germanic jurisprudence was able to combine the discussion about autonomy with a specific approach that allowed autonomy to be established as a central legal institution. The starting point was the cooperative concept provided by legal *Germanistik*. This will be illustrated by the considerations

35 MEDER (2009) 83 f. However, especially in the 1950s, authors who called for a state-free autonomy had their say, to a large extent as an expression of the so-called renaissance of natural law (*Naturrechtsrenaissance*); but it remained only a passing episode.

36 On the contributions of Roman law jurisprudence MEDER (2009) 73 ff.; KREMER (2012) 9 ff.

offered by Georg Beseler, Otto Bähr and Otto von Gierke, all of whom had a decisive influence on the development of the cooperative concept.

Georg Beseler is the authoritative founding figure of cooperative law (*Genossenschaftsrecht*). Drawing on his work, this section first outlines certain basic principles of the cooperative concept that will be key to understanding of the following explanations. For Beseler, cooperatives are a subset of the corporation, an association of several persons for the long-term pursuit of certain aims.³⁷ A corporation defines itself either territorially, in which case it is a municipality, or not in terms of a territory, in which case it is a cooperative. Such cooperatives include:

- federations of states, like the *Deutscher Bund*,
- associations of landowners for certain purposes, e. g. dyke cooperatives,
- religious associations outside the recognized national churches,
- economic cooperatives, e. g. in the form of public limited companies,
- associations for the prevention of risks (insurance cooperatives)
- and finally, the numerous associations for the pursuit of cultural, scientific, artistic and economic purposes (here Beseler meant the system of associations [*Vereinswesen*] that was emerging at this time).

This list is not reproduced in the subsequent literature on cooperative law in exactly the same way. However, it does serve the purpose of illustrating the manifold varieties of the cooperative system. It is crucial for the legal point of view that Beseler did not limit himself to stating the existence of such associations as a mere fact. Rather he drew a conclusion from factuality to legal validity: Cooperatives were not only a group of people, but legal persons. Thus he intervened in the famous dispute over the so-called fiction theory (*Fiktionstheorie*),³⁸ i. e. the dispute as to whether a cooperative exists as a corporation only if it is recognized by the state.³⁹ For Beseler, a cooperative as a legal person already obtains on the participants' corresponding act of constitution. Thus, however, he also recognises independent legal spheres in addition to the state, i. e. non-state social correlations, which produce law. This is because recognition as a legal person independent of the state corre-

37 BESELER (1843) 161.

38 HATTENHAUER (2000) 33 ff.

39 BESELER (1843) 173.

sponds to autonomy: a right to make laws with regard to its internal organisation.⁴⁰

This connection between the cooperative and autonomy is also emphasized in later literature. Thus Bähr, a conceptual soulmate of Beseler,⁴¹ writes:

“The legal importance of the cooperative thus does not merely consist in the fact that [...] it is regarded as a legal subject in relation to property transactions [...]; but it also generates in its interior a peculiar area of law which has as its object the rights and duties of the members of the cooperative as such.”⁴²

Bähr emphasises that this internal, state-independent norm-setting is not only of a contract law nature – and thus the application of law – but genuine law-making, a law-making that can draw its legitimacy from the autonomy of the associations.⁴³

This autonomy of associations as empowered to set “real” law is also retained by Gierke.⁴⁴ However, a change can be observed in his systematic legal classification of autonomy. Bähr classified autonomy as an institution of “cooperative law” (*Genossenschaftsrecht*), which in turn – at least partially – was a functional equivalent of public law. Gierke does not go that far. However, he only deals with the autonomy of the cooperative in the context of public law, making it thereby an institution of public law.⁴⁵ From this

40 BESELER (1843) 182 f.

41 KERN (1982) 412.

42 BÄHR (1864) 31 f.: “Die rechtliche Bedeutung der Genossenschaft besteht also nicht bloß darin, daß sie [...] in Beziehung auf den Vermögensverkehr als Rechtssubjekt gilt [...]; sondern sie erzeugt auch in ihrem Innern ein eigenthümliches Rechtsgebiet, welches die Rechte und Pflichten der Genossenschaftsglieder als solcher zum Gegenstand hat.”

43 BÄHR (1864) 33.

44 GIERKE (1895) 142, 150 f.

45 GIERKE (1873) 889: “Ein bei jeder Genossenschaft vorhandenes, wenn auch an Umfang ungleiches Gebiet öffentlicher Rechte entsteht durch das innere Leben des genossenschaftlichen Organismus. Das Verhältnis einer Gesamtpersönlichkeit [sic] zu andern Personen, die ihr als Glieder eingefügt sind, erzeugt nothwendig für die von der Verbindung ergriffene Lebenssphäre einen Kreis von Rechten und Pflichten, welche ein Analogon der in Staat und Gemeinde begründeten öffentlichen Rechte und Pflichten bilden. Diese Rechte haben daher selbst dann, wenn die Körperschaft im Ganzen nur für Privatrechtsw Zwecke besteht, einen öffentlichrechtlichen Charakter. Denn insoweit es sich um den Aufbau eines korporativen Organismus handelt, entstehen Verhältnisse einer Allgemeinheit und ihrer Glieder [...]. Insbesondere hat zunächst jede Genossenschaft das Recht der Autonomie [...] und [...] damit [...] löst der Begriff der Autonomie sich vollkommen von dem Vertragsbegriff als der Willenseinigung mehrerer Subjekte.”

point of view, Gierke's concept of autonomy stands for a legislative power of non-state actors equal to that of the state and thus for genuine legal pluralism. Gierke has often been perceived in this way.

However, this view needs qualification in the light of Gierke's far more differentiated conception of autonomy in his later work, *Die Genossenschaftstheorie und die deutsche Rechtsprechung*. Initially, one can gain the impression of a comprehensive regulatory power of the cooperative when Gierke constructs these cooperative communities in analogy to the state. However, the fact that he situates the cooperative in different legal spheres already entails some initial constraints. The distinction between "individual sphere" and "common sphere" (*gemeinheitliche Sphäre*) is essential.⁴⁶ In the individual sphere, the members of the association and the association itself exist as individuals with their own subjective rights; from a legal point of view, everyone exists for themselves. The association wields no regulatory power by means of which it could intervene in the subjective rights of the individual members. Not only does this mean a substantial limitation of the association's power vis-à-vis its members, but it also represents a limitation of that power by state law. For the subjective rights of the members usually arise from corresponding rules of state law. Only in the common sphere or sphere of "social law" (*Socialrecht*) – that sphere whose members function not as individual legal subjects, but as elements of the totality – does the cooperative enjoy comprehensive autonomy and therefore legislative power.⁴⁷

A further restriction is no less important. Whereas the early Gierke routed these parts of cooperative law to public law, he is now opts for a momentous dichotomy: on the basis of the existing rules of positive law, he notes the existence of some cooperatives organized under public law and others under private law. Both types of cooperatives are entitled to autonomy – in the area of the common sphere, i. e. social law. However, this results in different laws. Public cooperatives are endowed with public authority; the law produced by these cooperatives has the character of statute law.⁴⁸ And while private cooperatives also produce objective law, it only holds for "their area", that

46 GIERKE (1887) 174 ff.

47 Also drawing attention to the importance of this distinction, Bock (1994) 89.

48 GIERKE (1887) 168: "Die autonome Satzungen nehmen an den Eigenschaften des Gesetzes Theil."

is, only within associations. It cannot claim a binding force equivalent to the statute law,⁴⁹ and courts are not bound by it.⁵⁰

2.2 Autonomy and divided power – public law perspectives

Another perspective on the legal institution of autonomy focuses on the question of how it parcels out state power within a state, i. e. how power is distributed amongst different actors. This is the public law perspective. In Germany, that distribution could be addressed both within an individual state and, from 1871, within the state as a whole. Thus, the question was to what extent sovereignty was conceivable within state sovereignty.

After the end of the Old Reich at the beginning of the 19th century and the consolidation of the (partly new) states of the *Deutscher Bund*, only two communities that did not fit into the arrangement of national sovereignty remained the subject of debate within the literature. The port cities of Rostock and Wismar enjoyed a peculiar status due to old and fiercely defended privileges (in the case of Rostock) and guarantees from the Swedish Crown, to which Wismar had belonged until 1803. They were neither sovereign city states (unlike Hamburg) nor municipalities that could issue their own by-laws within the framework of state laws and under state supervision. Rather, they were entitled to enact their own laws, even if these deviated from state laws. The literature took this as a clear case of autonomy.⁵¹ One could, of course, simply dismiss the autonomy enjoyed by the North German port cities of Rostock and Wismar as utterly unique and thus of little relevance. Yet both cities are cases where autonomy emerged in its clearest form, namely, as the right of a non-state actor to enact, in his own right, legal provisions that were equal in status to state law and could even derogate it.

49 GIERKE (1887) 164: “ihre statutorischen Normen sind in den Augen des Staates Privatornomen und nehmen in keiner Weise an den publicistischen Eigenschaften der Gesetze Theil? Also, on the result: GIERKE (1895) 151. Less clearly, by contrast, BESELER (1866) 75, who states that “statutes, even if they have legal force (*legis vicem*), are not yet actual laws” [dass “Statute, wenn sie auch Gesetzeskraft (*legis vicem*) haben, noch keine eigentlichen Gesetze sind”].

50 GIERKE (1887) 164 fn. 2.

51 So summarizing the probably dominant opinion REISS (1902) 8 ff.

Much less unequivocally subsumed under the legal institution of autonomy was another case of shared sovereignty, the legislative law of the individual federal states of the German Reich. The background to this is provided by the conception of sovereignty of late constitutionalism's leading scholar of public law, Paul Laband. According to Laband, although the federal states still existed alongside the German Reich as subjects enjoying the condition of states, there could only be undivided sovereignty, and it was held by the Reich. Consequently, the individual states were left only with "autonomy", an authority to legislate that belonged to their original rights.⁵² This conception was not self-consistent⁵³ and deviated from the general understanding of autonomy, which conceived of it in terms of corporate autonomy,⁵⁴ i. e. as the regulatory power of entities within the state and thus sub-state entities.⁵⁵ Therefore, as a legal concept for the dogmatic description of the regulatory powers of individual states within a federal state, this understanding of autonomy was ultimately unable to prevail.

In contrast, the concept of municipal autonomy proved to be more durable. This in itself was nothing new. Even in older debates, municipalities had been recognised as bearers of autonomy.⁵⁶ But it was Otto Mayer who defined municipal autonomy in accordance with modern administrative law, thereby distinguishing it clearly from old concepts of cooperative autonomy. In Mayer's terms, communal autonomy was the legislative power that the municipalities were entitled to in their own affairs on the grounds of their right to self-administration.⁵⁷ This autonomy was an expression of a genuine, albeit derivative, authority.⁵⁸ The break with the traditional concept of autonomy becomes apparent in the fact that Mayer did not grant autonomy to associations with a membership structure, like water cooperatives, even if they were associations with a public law structure. For Mayer,

52 LABAND (1876) 56 ff., 107 f.

53 One could argue with good reason that the legislative power of the individual states did not result from their own law, but was based on a corresponding competence norm of the constitution of the Reich, PAULY (1993) 194.

54 Stressing this point GIERKE (1895) 142 fn. 2.

55 KREMER (2012) 24.

56 KINNE (1908) 5 ff.

57 MAYER (1895) 126 f.

58 This became (from the end of the 19th century) dominant opinion in science by public law, HAUG (1961) 25, 39.

the decisive difference was that municipalities could also issue regulations whose effects were binding on non-members, whereas associations with a membership structure only had power over the members and therefore the binding effect of the regulations could only be extended to where a relationship of membership existed.⁵⁹ While Mayer's view partly met with criticism in the literature of the time,⁶⁰ in the end this clearly public-law understanding of autonomy prevailed, even if not terminologically. The concept of autonomy no longer plays an independent legal-dogmatic role in municipal law today, but the idea as such does so in so far as the norm-setting power of the municipalities is an integral part of the guarantee of municipal self-administration.⁶¹ This also reflects the development of the municipality "from a societal corporation to a public law local authority".⁶²

2.3 A special path? Lorenz von Stein's concept of autonomy

Largely forgotten is Lorenz von Stein's conception of autonomy.⁶³ It earns its place here as an impressive attempt to reconcile liberalism and etatism as well as, to this end, to understand self-administration and state administration not as opposites but as cooperative relations.⁶⁴ Stein understood autonomy as the "right of the constitutional organs of the legal person to issue ordinances and decrees within their competence and to implement them through their own organs".⁶⁵ At first glance, this definition does not seem to differ from traditional understandings of autonomy. However, Stein's conception of autonomy includes not only the right to legislate but also the right to enforce these legal norms. In this way, the concept of

59 MAYER (1895) 129. In a later edition Mayer relativized his statement somewhat and granted "exceptionally" autonomy to other public corporations as well, but only if they were granted the power by statute to regulate with external effect, which was very rarely the case, MAYER (1924) 87 fn. 11.

60 KREMER (2012) 26 f.

61 See, for example, MEYER (2002) 71.

62 HOFMANN (1965) 270.

63 More detail on this in COLLIN (2014) 170–176.

64 SLAWITSCHKE (1910) 102 f.

65 STEIN (1869) 61: "Recht, vermöge der verfassungsmäßigen Organe der juristischen Persönlichkeit Verordnungen und Verfügungen innerhalb der Kompetenz derselben zu erlassen und dieselben durch die eigenen Organe zu verwirklichen".

autonomy is first liberated from the traditional context of discussion (autonomy as a source of law) in order to construct a coherent complex of norm-setting and norm-enforcement authority. At this juncture it soon becomes apparent that Stein is not concerned with the legal-dogmatic elaboration of individual legal institutions, but rather with the holistic consideration of public task correlations.

The originality of Stein's view becomes even clearer when it comes to the matter of who bears this autonomy. His considerations of an administration that is at once socially proactive and liberal serve as his starting point. For him, self-governing corporations (*Selbstverwaltungskörperschaften*) and associations were an essential structural element of such an administration. This amounts to a demarcation between state and society that deviates from the usual pattern. For Stein, associations in the broader sense are divided into associations (in the narrower sense) and societies. While the former also include general interests in their designated aims, the latter are limited to the realization of private individual wills. Only associations in the narrower sense are part of Stein's conception of administration. Together with the self-governing bodies organised under public law, they form the "free administration" ("freie Selbstverwaltungskörper"), which is thus separated from the direct state administration.⁶⁶ This free administration is the holder of autonomy.

This also clarifies the difference from the cooperative concepts described above. Autonomy is not legitimised simply by the cooperative constitution of associations of persons, but by the fact that these associations fulfil public tasks. In other words, the recognition of self-regulation by collective non-state actors is not only justified from the point of view of liberal individual guarantees, but also by their public purposes.⁶⁷ Here we see the connection with Stein's concept of the "freedom" of the administration. On the one hand, the administration is supposed to integrate and implement legal requirements, which has two corollaries. First, while not entitled to the right to determine the *what* of their tasks, it was granted extensive freedom to dispose with regard to the *how*, and thus also a comprehensive conceptual leeway.⁶⁸ On the other hand, freedom – in the sense of the self-determina-

66 STEIN (1869) 14 ff.

67 SCHEUNER (1978) 298.

68 STEIN (1869) 64.

tion of the individual – was to be realised no more and no less than through participation in the administration. This participation was taken to establish a balance between the individual will and the general will.⁶⁹

As we all know, Stein's concept was not incorporated into any subsequent legal systems. The comprehensive conception, formulated in a style much like Hegel's and elaborated in a relatively abstract fashion, swam against the contemporary tide of a positivistic ordering of the material by way of sub-disciplinary division. The far-reaching claim to representation and explanation could only be accomplished by partly sacrificing professional depth, and the work was thus of little practical use.⁷⁰ Also, the "formulation(s) held in Hegelian fogginess"⁷¹ might have deterred many readers. What remained, however, was the elaboration of an understanding of autonomy that, with regard to the legal reality of the emerging interventionist and welfare state, was much better suited to analytically grasping manifestations of private-state coordination since it had a broader scope both with regard to the forms of regulation and with regard to the actors. In contrast to the model of autonomy that conceives of it as a source of law, Stein's version also covered sublegal regulations and their enforcement; and unlike the later understanding of autonomy as relating to legal persons under public law, it also included associations under private law.

2.4 Autonomy in the 20th century – a swan song?

In the course of the 20th century, the legal institution of autonomy gradually disappeared from legal textbooks and legal debate. There were two main reasons for this. On the one hand, the tradition of cooperative thinking no longer flourished, or at least no longer played a decisive role. Thus, autonomy had also lost an important theoretical-conceptual foothold. On the other hand, autonomy became superfluous in the doctrine of legal sources. When public corporations issued a statute on the basis of a legal authorization, this statute itself was a source of law. It was no longer necessary to resort to autonomy.⁷²

69 KOSLOWSKI (1989) 166 f.; similarly, much earlier, HUBER (1965) 129 f.

70 STOLLEIS (1992) 391 f.

71 SLAWITSCHKEK (1910) 102 ("in Hegelscher Nebelhaftigkeit gehaltenen Formulierungen").

72 KREMER (2012) 31 f.

The concept of autonomy only has a legal-dogmatic function in special areas of application, in respect of which the debate has been split up into numerous special discourses. These include the traditional autonomy of the corporation⁷³ and, above all, the autonomy of associations (*Vereinsautonomie*) and collective bargaining (*Tarifautonomie*). The term “association autonomy” describes the right of associations to shape their structure and their internal relations in a self-determined way; the core of association autonomy is statute autonomy (*Satzungsautonomie*).⁷⁴ In its detail, association autonomy poses many legal problems, but it does not affect fundamental issues of the relationship between state law and non-state norms: the state’s monopoly of legislation or the monopoly of recognition of the law (*Rechtsanerkennungsmonopol*⁷⁵) is not called into question. The case of collective bargaining autonomy is similar: it is to be understood as the constitutionally guaranteed right of employers’ and employees’ associations to stipulate rules for the shaping of working conditions independently of state influence. This, too, has repeatedly raised hotly debated legal-dogmatic questions and its legal nature is still controversial today;⁷⁶ nevertheless, it is a very special and, at the same time highly, complex field which has moved away from the “general” legal system more than other legal areas due to its extraordinarily strong embedding in the political and economic system.⁷⁷

Apart from these legal-dogmatic uses, autonomy has recently experienced a kind of renaissance,⁷⁸ though not as a legal-dogmatic concept, but as a key concept of civil law theory and legal policy. The background to this development is chiefly provided by the debates about private norm-setting in the globalized world. Autonomy is one way of justifying private legislation.⁷⁹ Here, references to epistemic authority or to liberal civil-society ideas of democracy predominate.⁸⁰ As far as the latter is concerned, it might be added that the reference to the sources of liberal self-organization has shifted.

73 PAPPENFUSS (1991) 23 f.

74 SCHOCKENHOFF (1993) 39; BÄR (1996) 159 ff.

75 BACHMANN (2006) 182.

76 See on this aspect BUCK-HEEB/DIECKMANN (2010) 198 ff.

77 For recent developments regarding this specific feature of the autonomy of collective bargaining, BENDER (2018).

78 See, above all, BUMKE/RÖTHEL (2017).

79 BACHMANN (2012) 215 f.

80 In an elaborated form CALLIES (2001) 85–110, especially 96 ff.

The concept of cooperatives, originally shaped by legal *Germanistik*, was ascribed – almost certainly against the background of national socialism – to a Western European tradition of thought committed to the idea of pluralism.⁸¹ Whether this is historically true remains to be seen. But it also shows that the originally all-powerful, *Germanistic* legal-historical legitimation no longer plays a part. Finally, the concept of autonomy has also landed in feminist jurisprudence, where, in its variant of individual autonomy, it is deployed to give legal underpinning to feminist postulates.⁸² In all these cases, however, the somewhat interchangeable use of the term as a catchword or as a collective term for similar legal phenomena or lines of argumentation predominates: it is no longer associated with any concrete, legal-dogmatic consequences.

3 Conclusion

Autonomy denotes the legal possibility to bring special interests to bear in legal normative terms. In the German tradition, however, autonomy did not refer to special orders of large ethnically, religiously, or culturally defined population groups, but to a legal regime of local units or associations or groups of persons that were traditionally of particularly prominent status.

Autonomy was understood as a source of law. Rules created by the bearers of autonomy were seen as objective law, not just as an articulation of the application of law. This was also the decisive characteristic of the distinction between autonomy and private autonomy, even though this distinction was only to become fully established at the end of the 19th century. Private autonomy merely conveyed the power of self-determination concerning the application of law.

But the combination of autonomy and legislative power also sowed the seeds for emancipatory approaches. These emerged above all in cooperative concepts of autonomy. A look at the basic elements of these approaches first

81 As early as the 1960s, WIETHÖLTER (1968) 181, called for “a politico-cooperative society of Western European tradition to take the place of the German-style authoritarian state” (“eine politisch-genossenschaftliche Gesellschaft westeuropäischer Tradition an die Stelle des herrschaftlich-anstaltlichen Staates deutscher Prägung zu setzen”); similarly today, BUMKE (2017) 35 (“autonomie as a Western ideal”); BUCK-HEEB/DIECKMANN (2010) 258.

82 BAER/SACKSOFSKY (2018).

reveals the image of a pluralistic legal order in which associations create their own law on an equal footing with the state. In particular, Gierke's legal-systematic refinement of the concept embedded autonomy in the existing legal order. The superior legal power of the state remained untouched, as did the subjective rights of association members. The liberal impetus, however, persisted. The concept of autonomy as part of a new understanding of the state was mobilized by Lorenz von Stein, who aspired to integrate societal associations into the fulfilment of public tasks. But this approach soon fell into oblivion.

From the end of the 19th century onwards, the concept of autonomy was progressively given an etatist gloss as it shifted to sphere of the competences of public corporations. This ultimately made autonomy superfluous as an independent legal institution. When it came to making laws, state authorization replaced it and the statutes issued on this basis were recognized as a source of law.

Autonomy has not disappeared from the current jurisprudential debate. However, it is no longer a legal institution of central importance but has drifted into numerous special discourses with their respective special autonomies. It no longer has overarching significance as a legal-dogmatic concept with normative consequences, but as a legal-political buzzword or as a collective term that is more descriptive than anything else.

Bibliography

- ANONYMUS (1902), *Über die Autonomie des italienischen Landsteils nach den Verhandlungen des Tiroler Landtages*, Innsbruck
- ASCHE, MATTHIAS (2010), Hugenotten und Waldenser im frühmodernen deutschen Territorialstaat zwischen korporativer Autonomie und obrigkeitlicher Aufsicht, in: NEUHAUS, HELMUT (ed.), *Selbstverwaltung in der Geschichte Europas in Mittelalter und Neuzeit*, Berlin, 63–94
- BACHMANN, GREGOR (2006), *Private Ordnung. Grundlagen ziviler Regelsetzung*, Tübingen
- BACHMANN, GREGOR (2012), Legitimation privaten Rechts, in: BUMKE, CHRISTIAN, ANNE RÖTHEL (eds.), *Privates Recht*, Tübingen, 207–227
- BAER, SUSANNE, UTE SACKSOFSKY (2018), Autonomie im Recht – geschlechtertheoretisch vermessen, in: BAER, SUSANNE, UTE SACKSOFSKY (eds.) *Autonomie im Recht – geschlechtertheoretisch vermessen*, Baden-Baden, 11–29

- BÄHR, OTTO (1864), *Der Rechtsstaat*, Kassel (reprint: Aalen 1961)
- BÄR, FRED G. (1996), *Die Schranken der inneren Vereinsautonomie – historisch-dogmatische Überlegungen zu einem Vereinsgesetz*, Berlin
- BATTENBERG, J. FRIEDRICH (2010), *Die jüdischen Gemeinden und Landjudenschaften im Heiligen Römischen Reich. Zwischen landesherrlicher Kontrolle und Autonomie*, in: NEUHAUS, HELMUT (ed.), *Selbstverwaltung in der Geschichte Europas in Mittelalter und Neuzeit*, Berlin, 101–136
- BENDER, GERD (2018), *Herausforderung Tarifautonomie. Normative Ordnung als System*, in: DUVE, THOMAS, STEFAN RUPPERT (eds.), *Rechtswissenschaft in der Berliner Republik*, Berlin, 697–725
- BESELER, GEORG (1843), *Volksrecht und Juristenrecht*, Leipzig
- BESELER, GEORG (1866), *System des gemeinen deutschen Privatrechts*, 2nd ed., Berlin
- BOCK, MATTHIAS (1994), *Zur Verbandstheorie Otto von Gierkes*, in: *Rechtstheorie* 25, 87–100
- BRUNNER, HEINRICH (1875), Art. „Autonomie“, in: HOLTZENDORFF, FRANZ VON (ed.), *Rechtslexicon*, vol. 1, 2nd ed., Leipzig, 146–148
- BUCK-HEEB, PETRA, ANDREAS DIECKMANN (2010), *Selbstregulierung im Privatrecht*, Tübingen
- BUMKE, CHRISTIAN (2017), *Autonomie im Recht*, in: BUMKE, CHRISTIAN, ANNE RÖTHEL (eds.), *Autonomie im Recht. Gegenwartsdebatten um einen rechtlichen Grundbegriff*, Tübingen, 3–44
- BUMKE, CHRISTIAN, ANNE RÖTHEL (eds.) (2017), *Autonomie im Recht. Gegenwartsdebatten um einen rechtlichen Grundbegriff*, Tübingen
- CALLIES, GRAL-PETER (2001), *Die Zukunft der Privatautonomie. Zur neueren Entwicklung eines gemeineuropäischen Rechtsprinzips*, in: *Jahrbuch junger Zivilrechtswissenschaftler 2000*, Stuttgart, 85–110
- COLLIN, PETER (2014), *Konzeptionen, Spielarten und Wechselbeziehungen administrativer und justizieller Autonomie im späten 19. und frühen 20. Jahrhundert*, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno* 43, 165–228
- ELLE, LUDWIG (2010), *Die Sorben – (Selbst-)Verwaltung einer nationalen Minderheit*, in: NEUHAUS, HELMUT (ed.), *Selbstverwaltung in der Geschichte Europas in Mittelalter und Neuzeit*, Berlin, 39–52
- FOBLETS, MARIE-CLAIRE (2017), *Assessing Individual Autonomy in the Face of Cultural Diversity: Views of Bodily Integrity*, in: BUMKE, CHRISTIAN, ANNE RÖTHEL (eds.), *Autonomie im Recht. Gegenwartsdebatten um einen rechtlichen Grundbegriff*, Tübingen, 387–410
- GERBER, CARL FRIEDRICH (1854), *Ueber den Begriff der Autonomie*, in: *Archiv für die civilistische Praxis* 37, 35–62
- GERBER, CARL FRIEDRICH (1865), *Grundzüge eines Systems des deutschen Staatsrechts*, Leipzig
- GIERKE, OTTO (1873), *Das deutsche Genossenschaftsrecht*, vol. 2, Berlin (reprint: Graz 1954)

- GIERKE, OTTO (1887), *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, Berlin
- GIERKE, OTTO (1895), *Deutsches Privatrecht*, vol. 1, Leipzig
- GOLDSCHMIDT, LEVIN (1860), *Das receptum nautarum, cauporum, stabulariorum*, in: *Zeitschrift für das gesamte Handelsrecht* 3, 58–118, 331–385
- GOTTWALD, DOROTHEE (2009), *Fürstenrecht und Staatsrecht im 19. Jahrhundert*, Frankfurt am Main
- HARDTWIG, WOLFGANG (1997), *Genossenschaft, Sekte, Verein in Deutschland*, vol. 1, München
- HATTENHAUER, HANS (2000), *Grundbegriffe des bürgerlichen Rechts*, 2nd ed., München
- HAUG, WINFRIED (1961), *Autonomie im öffentlichen Recht (Geschichte und allgemeine Dogmatik)*, Diss. jur. Heidelberg
- HOFER, SYBILLE (2011), *Die Diskussion um den Begriff »Privat-Autonomie« in der ersten Hälfte des 19. Jahrhunderts*, in: COLLIN, PETER et al. (eds.), *Selbstregulierung im 19. Jahrhundert – zwischen Autonomie und staatlichen Steuerungsansprüchen*, Frankfurt am Main, 63–84
- HOFMANN, WOLFGANG (1965), *Plebiszitäre Demokratie und kommunale Selbstverwaltung in der Weimarer Republik*, in: *Archiv für Kommunalwissenschaften* 4, 264–281
- HUBER, ERNST RUDOLF (1965), *Lorenz von Stein und die Grundlegung der Idee des Sozialstaats*, in: IDEM, *Nationalstaat und Verfassungsstaat. Studien zur Geschichte der modernen Staatsidee*, Stuttgart, 127–143
- KERN, BERND-RÜDIGER (1982), *Georg Beseler. Leben und Werk*, Berlin
- KINNE, HUGO (1908), *Die Autonomie der preußischen Städte nach den Städteordnungen*, Berlin
- KOSLOWSKI, STEFAN (1989), *Die Geburt des Sozialstaats aus dem Geist des Deutschen Idealismus. Person und Gemeinschaft bei Lorenz von Stein*, Weinheim
- KREMER, CARSTEN (2008), *Die Willensmacht des Staates. Die gemeindeutsche Staatsrechtslehre des Carl Friedrich von Gerber*, Frankfurt am Main
- KREMER, CARSTEN (2012), *Autonomie als Rechtsquelle. Die Diskussion über nicht-staatliche Rechtssetzungsbefugnisse in der Rechtswissenschaft der zweiten Hälfte des 19. Jahrhunderts*, in: COLLIN, PETER et al. (eds.), *Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat*, Frankfurt am Main, 3–32
- LABAND, PAUL (1876), *Das Staatsrecht des Deutschen Reiches*, vol. 1, 1st ed., Tübingen
- MAYER, OTTO (1895), *Deutsches Verwaltungsrecht*, vol. 1, 1st ed., Leipzig
- MAYER, OTTO (1924), *Deutsches Verwaltungsrecht*, vol. 1, 3rd ed., Leipzig
- MEDER, STEPHAN (2009), *Ius non scriptum – Traditionen privater Rechtssetzung*, 2nd ed., Tübingen
- MEYER, HUBERT (2002), *Kommunalrecht*, 2nd ed., Baden-Baden
- MIZIA, ROBERT MARTIN (1995), *Der Rechtsbegriff der Autonomie und die Begründung des Privatfürstenrechts in der deutschen Rechtswissenschaft des 19. Jahrhunderts*, Frankfurt am Main

- OERTMANN, PAUL (1905), *Die standesherrliche Autonomie im heutigen deutschen bürgerlichen Recht*, Erlangen
- PAPENFUSS, MATTHIAS (1991), *Die personellen Grenzen der Autonomie öffentlich-rechtlicher Körperschaften*, Berlin
- PAULY, WALTER (1993), *Der Methodenwandel im deutschen Spätkonstitutionalismus*, Tübingen
- PFIZER, PAUL ACHATIUS (1834), Art. „Autonomie“, in: ROTTECK, CARL VON, CARL WELCKER (eds.), *Staats-Lexikon*, vol. 1, Altona, 724–728
- POHLHAUSEN, ROBERT (1978), *Zum Recht der allgemeinen Geschäftsbedingungen im 19. Jahrhundert*, Ebelsbach
- PUCHTA, GEORG FRIEDRICH (1828), *Das Gewohnheitsrecht*, vol. 1, Erlangen (reprint: Darmstadt 1965)
- REISS, HANS (1902), *Kritik des Begriffs und Umfang der Autonomie nach deutschem Privatrecht*, Diss. jur., Erlangen, Preußisch Holland
- SCHÄFER, FRANK L. (2008), *Juristische Germanistik. Eine Geschichte der Wissenschaft vom einheimischen Privatrecht*, Frankfurt am Main
- SCHNEIDER, ULRICH (1978), *Zur Rolle der Verbände im Rahmen der sozialen Verwaltung nach der Lehre von Lorenz von Stein*, in: SCHNUR, ROMAN (ed.), *Staat und Gesellschaft. Studien über Lorenz von Stein*, Berlin, 273–304
- SCHOCKENHOFF, MARTIN (1993), *Der Grundsatz der Vereinsautonomie: Inhalt und Geltung eines ungeschriebenen Tatbestandsmerkmals*, in: *Archiv für die civilistische Praxis* 193, 35–67
- SCHWEMMER, OSWALD (2005), Art. „Autonomie“, in: MITTELSTRASS, JÜRGEN (ed.), *Enzyklopädie Philosophie und Wissenschaftstheorie*, vol. 1, 2nd ed., Stuttgart/Weimar, 319–321
- SCHWICKER, JOHANN-HEINRICH (1870), *Die Katholiken-Autonomie in Ungarn*, Pest
- SLAWITSCHKEK, RUDOLF (1910), *Selbstverwaltung und Autonomie*, Leipzig
- Statut über die autonome Verwaltung (1909): *Statut über die autonome Verwaltung der islamitischen Religions-, Stiftungs- und Schulangelegenheiten in Bosnien und der Hercegovina*, Landesdruckerei Sarajevo
- STEIN, LORENZ (1869), *Die Verwaltungslehre. Erster Theil, Zweite Abtheilung*, 2nd ed., Stuttgart
- STOLLEIS, MICHAEL (1992), *Geschichte des öffentlichen Rechts in Deutschland*, vol. 2: *Staatsrechtslehre und Verwaltungswissenschaft 1800–1914*, München
- STOLLEIS, MICHAEL (2012), *Geschichte des öffentlichen Rechts in Deutschland*, vol. 1: *Reichspublizistik und Policywissenschaft 1600–1800*, 2nd ed., München
- STOURZH, GERALD (1985), *Die Gleichberechtigung der Nationalitäten in der Verfassung und Verwaltung Österreichs*, Wien
- WIETHÖLTER, RUDOLF (1968), *Rechtswissenschaft*, Frankfurt am Main
- WILDA, EDUARD (1839), *Autonomie*, in: WEISKE, JULIUS (ed.), *Rechtslexikon für Juristen aller deutschen Staaten*, vol. 1, Leipzig, 539–560