# THE LEGAL SYSTEM AND THE AUTONOMY OF THE LAW: A PERSPECTIVE FROM LEGAL HISTORY

***Massimo Meccarelli****

*If we consider the role the case law has played in recent years, we, as jurists of the "continent", are impressed by the prominence it has assumed in the production of law (1). This new case law, in fact, seems to operate in a context different to the conventional judge / statute law relationship observed in the so-called civil law legal system (2). This novel framework merits exploration and investigation.*

*Here, the autonomy of law emerges as a significant theoretical issue to be considered and understood against the background of historical experience. Using the lemma "autonomy of the law", I want to examine the scope of legal production, in which the rules are the result of self-organization practices or of institutional dynamics (for example those connected with the Judiciary), without the involvement or mobilisation of political power.*

It seems to me that the law currently shows unprecedented trends towards autonomy within the legal system. I refer in particular to case law produced by the Constitutional Courts or by the Courts with respect to the application of international treaties (or maybe more in general by international Institutions with judicial and / or interpretation functions) (3).

None of these jurisdictional Institutions has the power to govern the entire process of improvement of the living law; each one, however, has a fundamental and specific task in that process of legal production.

In the national legal space the Constitutional Court, exercising the constitutional law review (4), has a merely functional link with the Judiciary; there is no hierarchical relationship between them. Nevertheless, by improving its own case law, the Constitutional Court has promoted the inclusion of the relationship between ordinary case law and constitutional case law within the processes of legal production. At supranational level, the European Court of Justice and the European Court of Human Rights operate with a similar mechanism (5).

Very schematically, the essential features of this novel scenario are as follows: case law arises from a field of open relations between the sources of law (between statutory law and principles as well as between principles and principles (from the constitutional, from the European or from the international legal system)); the development of this relationship is in fact determined by principles that need a jurisdictional improvement to express their exact value; the jurisdictions responsible for this task do not interact on the basis of a hierarchical principle but in accordance with a principle of recognition of competence; developments in case law are always the result of a problem of substantive justice; they stem from a search for the concrete legal dimension corresponding to a principle established by Constitution or Treaty.

These interactions – which form a space of autonomy of the law – assign a *nomopoietic value* to this kind of case law. In addition, a novel feature becomes evident: this case law attributes *degrees of freedom* to the law rather than stabilizing the law; the judicial Institutions I refer to

* **Massimo Meccarelli**, Full Professor of Legal History at the Law School of the Università di Macerata, Italy, affiliate researcher at the Max Planck Institute for European Legal History in Frankfurt am Main.

(including the Supreme Courts) in fact induce, within the legal system, a development of case law, whose dynamic they control neither directly nor hierarchically. They introduce inputs intended to provide horizons of possibilities for case law, *rather than to apply constraints.*

As a matter of fact the present scenario exhibits some unusual traits. How can we understand this phenomenon? What does this imply for legal science? A perspective from legal history can give us some useful keys to comprehension. The following pages shall attempt to do this.

**1. Features of the case law of the Supreme Courts in the 19th and 20th Century**

Let us compare this framework with the one that has characterized the period between the Nineteenth and mid-Twentieth centuries. This was the golden era of statutory law in continental Europe, but close analysis shows that this period was also marked by a dialectic between case law and statutory law, between jurist, judge and legislator [11, Anonymous, 2011]. How can we explain – in this framework dominated by the principle of legality and the format of the Code – this recovery of a role for case law and jurisprudence?

It was necessary to resolve the issue of the sustainability of legal systems based on statutory law, which quickly showed that it cannot operate properly without solid case law and jurisprudence. This recovery of case law and jurisprudence has not emerged as contradictory to the regimes of the legality principle; on the contrary it was a factor *determining* the regimes of legality. And that rests on the fact that this case law, albeit creative, did not develop in a space of autonomy of the law.

Let me explain this statement. First of all we have to consider that the highest judicial level was the main channel for the emergence of the centrality of case law in the Nineteenth century. Note also the reconfigurations undergone by the supreme jurisdictions in different States of continental Europe.

I have studied three examples in particular: France, where the *Cour de Cassation* was established; unified Germany where, with the *Reichsgericht*, a Supreme Court as a third level of jurisdiction (the Revision) was instituted; and unified Italy, where a complex system of five regional Supreme Courts was developed as an hybridization of the french model of *cassation*.

These Supreme Courts [5, Meccarelli, 2005], although with different features and functions, stand out for their capacity to produce guidelines for the underlying case law. But we must note that this "*reference case law*" was developed in relation to the needs of *statutory law enforcement*. In France the problem was to renew over time the significance of the Civil Code by way of case law, without negating the fundamental ideological choices of the legislator. In the German case the issue was to harmonize the diverse regional legal systems through case law (*Rechtsharmonisierung durch Rechtssprechung*), to promote a unified national law (almost a parallel task to the construction, by the Pandektistik, of the system of dogmas, as a basis for the codification of private law).

In the third case, Italy, the question was to tackle the inherent inadequacy of the Civil Code, introduced prematurely after the Unification [12, pp.9-28], into a territory characterized by regional diversity. The very particular hybridization of the *cassation*, together with the pluralism of the Supreme Courts, made it possible to implement a dialectical relationship between code and case law (tasking the judicial situation with the weighting of statutory law, and enabling a hermeneutical improvement of codified law). This dialectic, however, worked in support of that codified law, saving it from the risk of more impactful erosion by the case law.

These supreme Courts were designed to produce case law behind the screen of the primacy of statutory law and in relation to it. In fact, in each of the three systems analyzed, case law was determined on the assumption of separation (though differently conceived) [5, pp.127-188] between *quaestio facti* and *quaestio iuris* through a process of subsumption. The creative potential of their case law was meant to assure a process of standardized interpretation of statutory law. In this they were called on to promote a case law that constitutes a *stabilizing factor for the law.*

**2. The role of juridical thought in the 19th and 20th centuries**

We can corroborate this conclusion by also studying, in the same time frame, the doctrinal debate on the interpretation of the law and the role of the jurist. We can consider in particular two main trends in the 19th Century: approaches to the *implementation* of the legal system, and approaches for the *innovation* of the legal system.

The first trend allowed legal science to act as a hermeneutical space for building "a System on the statutory law" [8, pp.39-44, pp.71-93][9, pp. 756-767].

Regarding the *epistemological* aspect, this produced a formalistic closure of legal know-

ledge as dogmatic; and on the *axiological* side it implied adherence (under the veil of neutrality) to the principles established by the legislator through statutory law; on the *strategic* level this stance aspired towards the guardianship of the individualistic conception of private law.

The approaches hinging on the *innovation* of the legal system were aimed at enhancing the interpretation of the law, elevating it as an hermeneutical activity able to affect the content of statutory law, in response to social and economic changes.

The task was to discover the law, in the process of formation, from below and to support its emergence. This encouraged legal science to open to other fields of knowledge capable of understanding social changes in progress; moreover, these approaches were able to improve the legal system with new principles and values not aligned with those originally chosen by the legislator. The strategy was in fact to promote a social conception of private law [8, pp.13-27] [10, pp.3-65].

In certain ways, these are two opposite poles; but the difference between legal theories in this regard is significantly reduced if we consider the position with respect to the *sources of law*. On this point, despite their diversity, the theories share a basic assumption: the indispensability of the legality principle [4, pp.723-727]. The hermeneutic circle, which binds the joint action of «zusammenwirken von Gesetz, Wissenschaft und Richterspruch» ("statutory law, legal science and case law") [3, p.278], is confirmed. The creative interpretation of law does not leave the confines of this circuit; in this way the jurist's interpretation continues and improves the work of the legislator [2, p.23-30].

In other words, these theories serve a *monistic conception* of the production of law, in order that it may be described only in the light of the primacy of a unique fundamental principle, on the basis of which it is possible to build a systematic fabric of relations among the sources of law.

The enhancement of the interpretation does not imply, therefore, the opening of real spaces of legal autonomy on a systematic level. It seems to me that these theoretical approaches, on the contrary, reflect the idea of a *stabilizing function of case law and legal knowledge.*

**3. Historical roots of the monistic conception of law**

Some of the reasons for this attitude are, in my opinion, deep rooted. I refer in particular to the change of paradigm on the conceptions of legal hermeneutics, which occurred in the modern age with the rise of Cartesian rationality in the place of the traditional Aristotelian-Thomistic *ratio*. This transition corresponds to the transition from the problem of the *Ordo* to that of the *Systema* [1, pp.307-358] [7, pp. 239-248.].

It may be useful to dwell briefly on the point. In medieval legal culture, legal production is conceived always as an act of hermeneutical nature; it is a matter of discovering and recognizing the *ordo* (already given by god to the earthly realm). Furthermore, the *interpretatio* is always an evaluative practice that involves a process of understanding (*intelligere*) the nature of things (the *aequitas*), an insight into social facts (6). This is made possible by a dialectic of opinions.

This activity does therefore not aim to pinpoint invariable rules. It aims to a search for the truth but it is able to detect only relative truths (*verisimiles*). The relationship with truth is a permanent feature of the interpretation of law, but it can never be fully resolved; it should instead be tested and upgraded in view of changing historical reality. For this reason, both jurisprudence and case law are tools to change the law (making possible its evolution) rather than to stabilize it. They produce, of course, points of synthesis, but they do not act as *constraints* that aim to prevent future developments; on the contrary they are the starting points from which to launch new processes of synthesis.

In addition, the autonomy of the law takes place on three levels: the *epistemological* level that I have just mentioned, in which the jurist interplay between reality and law takes place through the i*nterpretatio iuris*; the *socio-political* level, in which the law takes shape as an immediate product of social dynamics (think of the importance of customary law); and the systematic level, whereby the legal order is the result of an open field of interactions, not formally predictable, between sources of law [6, pp. 41-52].

In the modern age, especially with the new anthropocentric trend towards natural law, the setting changes profoundly. Modern reason (the *recta ratio*) is in the human being rather than in social facts and the order is describable *sicut mathematici* (7) as a System. This introduces a completely new way of theorizing (8): it proceeds from axiomatic premises; it is developed as a logical-deductive activity, oriented towards the demonstration of the truth (*veritas*). It is no longer a matter of drawing on social facts to build and justify the order; the starting point is to assume a basic, hypothetic, non-historical condition (the pre-social natural condition of human being) to detect, by way of *recta ratio*, fundamental and immutable rules.

In this context, the function of jurisprudence and case law assumes another feature: it tends to set rules and apply formal schemes, rationally identified in the abstract, and is capable of subsuming the reality on which it is based.

This new configuration of legal hermeneutics has produced important effects: it has helped turn legal knowledge into dogmatic knowledge; it has had the effect of rendering the creative hermeneutical circle closed and formal, compatible with a legal system based on statutory law. In this configuration, the space of legal autonomy is reduced to that of pure and self-referential knowledge.

To some extent it is a process of improvement, but at the same time a process of demarcation: here, the autonomy of the law loses its connection with the engine of social facts, which made it a field of action for legal production; the autonomy of the law will be restricted to a function of enforcement of statutory law.

This pattern unfolds alongside the rise of the primacy of statutory law, with the sources of law structured on a hierarchical paradigm and with the reconfiguration of the jurisdiction I have referred to above.

**3. Conclusions**

Let us however go back to the start. The historical perspective shows us that current case law is different from that of the Nineteenth and Twentieth centuries. The most remarkable novelty is the overstepping of both the *stabilizing role* of case law, and the *monistic horizon* that characterized the Nineteenth and the Twentieth century. This also applies to jurisprudence. History shows that the hermeneutical approach tends to arrange itself in relation to the features of the legal system.

I conclude very schematically questioning what this means for the work of legal scientists today:

In terms of legal theory, we have to obtain a new viewpoint in order to understand the process of law production in the current scenario. Rather than focusing on the *binding elements* (the constraints that make the legal order a System), it seems preferable to look at the features and *mechanisms that can enable developments* and changes in case law.

To this end, we must be prepared to review the analytical tools that we conventionally employ to describe legal production.

The conventional approach considers the issue of legal production as a problem of relations between legal sources. It is a matter of identifying the sites of legal production and of explaining the system of relations among them, and ultimately of describing a configuration capable of *representing the statics* of a legal order.

By contrast, the challenge would be to set aside the issue of *sources* and concentrate on the issue of the *scopes of legal production*, looking at the dynamic scenario of the making of a legal order. This is an approach that focuses on the *processes*, and, without abandoning an interest in systematic profiles, is freed from the problem of the *system*.

Following this path is not a simple task; it requires a renewed discussion on methodological issues regarding the production of legal science, requires interdisciplinary interaction between different legal sciences and between legal sciences and other humanities and social sciences; it asks us to focus our attention on themes that require analysis of interdisciplinary interaction.

It is a complicated task and not an easy one, but, in my opinion, this is the challenge.

**Notes**

1. This essay is a revised version of the paper presented at the conference „La coercizione nel diritto" University of Macerata 19th-20th may 2016 and it is to be published in the proceedings of this meeting

2. See, for example, *Massimo Vogliotti,* Tra fatto e diritto. Oltre la modernità giuridica, Torino, Giappichelli, 2007, pp. 210 ss; *Luigi Ferrajoli,* Principia iuris. Teoria del diritto e della democrazia, Roma-Bari, Laterza, 2007, in particolare pp. 846 ss; *Gustavo Zagrebelsky,* La legge e la sua giustizia, Bologna, il Mulino, 2008, pp. 161 ss; *François Ost, Michel van de Kerchove,* De la pyramide au raseau, Bruxelles : Facultés universitaires Sant-Louis, 2002; *Jürgen Habermas,* On Law and Disagreeement. Some Comments on "Interpretative Pluralism", in «Ratio iuris», 16, 2003, pp. 187-194

3. For example the *Committee on Economic, Social and Cultural Rights* in relation to the enforcement of the *International Covenant on Economic, Social and Cultural Rights* (1996); or the *European Committee of Social Rights* in relation to the enforcement of the *European Social Charter* (1961). See *Francesco Costamagna,* Riduzione delle risorse disponibili e abbassamento dei livelli di tutela dei diritti sociali: il rispetto del nucleo minimo quale limite all'adozione di misure regressive, in «Diritti umani e diritto internazionale», 8, 2, 2014, pp. 371-388; *Lorenza Mola*, La prassi del Comitato europeo dei diritti sociali relativa alla garanzia degli standard di tutela sociale in tempi di crisi economica, in Nicola Napoletano, Andrea Saccucci (a cura di), Gestione internazionale delle emergenze glo-

bali. Regole e valori, Napoli, Editoriale Scientifica, 2013, pp. 195-220; *Amrei Müller,* Limitations and Derogations from Economic, Social and Cultural Rights, in «Human Rights Law Review», 9, 2009, pp. 557-601.

4. See *Maurizio Fioravanti,* Costituzionalismo. Percorsi della storia e tendenze attuali, Roma-Bari, Laterza, 2009, pp. 98-104 e pp. 125-127; *Enzo Cheli, Filippo Donati,* La creazione giudiziale del diritto nelle decisioni dei giudici costituzionali, in «Diritto pubblico», 1, 2007, pp. 155-178; «Ratio Juris», 16, 2003, Constitutionals Courts; *Gustavo Zagrebelsky,* Il diritto mite. Legge, diritti, giustizia, Torino, Einaudi, 1992; «Giornale di storia costituzionale», 11, 2006, Storia, giustizia, costituzione. Per i cinquant'anni della Corte costituzionale; *Paolo Grossi,* Il diritto civile tra le rigidità di ieri e le mobilità di oggi, in Michele Lobuono (a cura di), Scienza giuridica privatistica e fonti del diritto, Bari, Cacucci, 2009, pp. 26-30

5. «Quaderni fiorentini per la storia del pensiero giuridico moderno», 31, 2002, L'ordine giuridico europeo, radici e prospettive; *Maurizio Fioravanti,* Costituzionalismo, cit., pp. 127-133, 156-158; *Mirelle Delmas-Marty,* Le pluralisme ordonné, Paris, Editions du Seuil, 2006; *Giuseppe Martinico,* L'integrazione silente: la funzione interpretativa della Corte di giustizia e il diritto costituzionale europeo, Napoli, Jovene, 2009; *Ombretta Di Giovine,* Come la legalità europea sta riscrivendo quella nazionale. Dal primato delle leggi a quello dell'interpretazione, in «Diritto penale contemporaneo», 1, 2013, pp. 159-181.

6. Among others see *Jesus Vallejo,* Ruda equidad, ley consumada. Concepcion de la potestad normativa (1250-1350), Madrid, Centro de estudios consitucionales, 1992, pp. 267 ss; *Paolo Grossi,* L'ordine giuridico medievale, Roma-Bari, Laterza, 2006, pp. 13-17 and pp. 175-182; *Diego Quaglioni,* La giustizia nel medioevo e nella prima età moderna, Bologna, il Mulino, 2004, pp. 33-42.

7. Think as an exalple to the famous page of *Hugo Grotius,* De iure belli ac pacis, libri tres, Parisiis, 1625, Prolegomena, post medium e ante finem: «Primum mihi cura haec fuit, ut eorum quae ad ius naturae pertinent probationes referrem ad notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat […] "Vere enim profiteor, sicut mathematici figuras a corporibus semotas considerant, ita me in iure tractando ab omni singulari facto abduxisse animum».

8. See *Antonio M. Hespanha,* A Cultura Jurídica Europeia, cit., pp. 307-358 in partic. 307-314; *Giovanni Tarello,* Storia della cultura giuridica moderna, Bologna, il Mulino, 1976, pp. 133-190; *Michel Villey,* La formation de la pensée juridique moderne, Paris, PUF, 2013, pp. 493 ss.

**References:**


1. *Antonio Manuel Hespahna,* A Cultura Juridica Europeia. Sintese de um Milénio. [Legal Culture of Europe. Experience of the Millennium.]. Coimbra, Almedina, 2012.
2. *Biagio Brugi,* L'abuso del diritto nel progetto di codice delle obbligazioni e dei contratti, in Studi in onore di Alfredo Ascoli pubblicati per il XLII anno del suo insegnamento [The Abuse of Rights in the Draft Code of Obligations and Contracts, in Studies in Honor of Alfredo Ascoli Published for the XLII Anniversary of his Teaching Work]. Messina, Principato, 1931, p. 81; *Lodovico Mortara,* Istituzioni di ordinamento giudiziario [Judiciary Institutions]. Firenze Barbera, 1896.
3. *Joseph Kohler,* Ein "juristischer Kulturkampf"! // Archiv für Rechts- und Wirtschaftsphilosophie» [ Legal Kulturkampf. The archive of philosophy of law and economics]. and VI. 1912-1913.
4. *Massimo Meccarelli.* Diritto giurisprudenziale e autonomia del diritto nelle strategie discorsive della scienza giuridica tra Otto e Novecento [Jurisprudential law and autonomy of law in the discursive strategies of legal science in the nineteenth and twentieth century] // Quaderni fiorentini per la storia del pensiero giuridico moderno [Florentine Notes on the History of Modern Legal Thought]. 40. 2011.
5. *Massimo Meccarelli.* Le Corti di cassazione nell'Italia unita. Profili sistematici e costituzionali della giurisdizione in una prospettiva comparata [The Courts of Appeal in the United Italy. Systematic and Constitutional Profile of the Jurisdiction in a Comparative Perspective]. Milano, Giuffrè, 2005.
6. *Massimo Meccarelli.* The Autonomy of Law and the Statutes of the Cities in the Legal Order of the Late Middle Ages // Željko Radić et alii (Eds.), Splitski Statut iz 1312. godine: povijest i pravo, , Split, Književni Kurg, 2015.
7. *Paolo Cappellini,* Storie di concetti giuridici [History of Legal Concepts]. Torino, Giappichelli, 2010.
8. *Paolo Grossi,* Scienza giuridica italiana [Legal Science in Italy]. cit.
9. *Giulio Cianferotti,* Storia della letteratura amministrativistica italiana [History of Literature on Administrative Law in Italy]. Milano, Giuffrè, 1998.

10. *Giovanni Cazzetta,* Scienza giuridica e trasformazioni sociali in Italia tra Otto e Novecento [Legal Science and Social Changes in Italy in the Nineteenth and Twentieth Century]. Milano, Giuffrè, 2007.
11. «Quaderni fiorentini per la storia del pensiero giuridico moderno» [Florentine Notes on the History of Modern Legal Thought] . 40, 2011, Giuristi e giudici. Il problema del diritto giurisprudenziale fra Otto e Novecento [Lawyers and Judges. The Problem of Case Law in the Nineteenth and Twentieth Centuries].
12. Stefano Solimano, 'Il letto di Procuste'. Diritto e politica nella formazione del codice civile unitario. I progetti Cassinis, (1860-1861) ['The Procrustean bed'. Law and Politics in the Formation of the Unified Civil Code. The Cassinis Projects]. Milano, Giuffrè, 2003; Id., Il primo codice civile italiano: vicende e contenuti [The first Italian Civil Code: Vicissitudes and Content] // Stefano Solimano, Marco N. Miletti (a cura di), Codice civile Codice di procedura civile del Regno d'Italia 1865 [Civil Code: Civil Procedure Code of the Kingdom of Italy]. Padova, CEDAM, 2010.

## ПРАВОВАЯ СИСТЕМА И АВТОНОМИЯ ПРАВА: ВЗГЛЯД С ТОЧКИ ЗРЕНИЯ ИСТОРИИ ПРАВА

Если мы рассмотрим роль, которую прецедентное право играет в последние годы, мы, как «континентальные» правоведы, будем поражены той значимостью, которую оно приобрело в генерировании права (1). Это новое прецедентное право, де-факто, кажется, работает в контексте, отличном от отношений между обычным судьей и статутным правом в так называемой правовой системе гражданского права (2). Этот новый формат заслуживает изучения и исследования.

Здесь автономия права выступает как существенный теоретический вопрос, который следует рассматривать и понимать на фоне исторического опыта. Используя лемму «автономия права», я хочу изучить диапазон генерирования права, в котором нормы являются результатом опыта самоорганизации или институциональной динамики (например, те, которые связаны с судебными органами), без участия или привлечения политической власти.

Массимо Меккарелли,
профессор юридической истории,
юридический факультет,
Университет г. Мачерата, Италия;
партнер-исследователь в Институте Макса
Планка по истории европейского права;
Франкфурте-на-Майне.

**Ключевые слова:**
прецедентное право, автономия закона, толкование закона, верховные суды, правовые источники.

**Keywords:**
case law, autonomy of the law, interpretation of the law, Suprem Courts, legal sources.