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Dispute Resolution Methods, Fundamental or Human Rights and Legal Pluralism

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Abstract. The analysis of modern political-institutional systems, democratic-constitutional of a liberal mold, if it clarifies the reasons for the presence and diffusion of dispute resolution methods (state awards), of fundamental and human rights (general) attributable to the new elites of power and government, therefore to the bourgeois class, in the context of a monistic and statistic conception of legal systems, then does not explain the reasons for the diffusion and progressive multiplication of alternative methods of resolving disputes, such as fundamental or human rights in more recent eras. It is therefore necessary to analyze the processes of change that have affected the State, the law, the judicial systems, therefore the fundamental and human rights and the methods of resolving disputes in the light of the phenomenon of legal pluralism.

Keywords: fundamental rights, alternative dispute resolution methods, legal monism, legal pluralism, sociology of law, philosophy of law, political doctrines.

Riassunto. L'analisi dei sistemi politico-istituzionali moderni, democratico-costituzionali di stampo liberale, se chiarisce le ragioni della presenza e della diffusione dei metodi di risoluzione delle dispute (aggiudicativi statali), dei diritti fondamentali e umani (generali) ascrivibili alle nuove élites di potere e di governo, dunque alla classe borghese, nell'ambito di una concezione monistica e statalistica degli ordinamenti giuridici, allora non spiega le ragioni della diffusione e della progressiva moltiplicazione così dei metodi alternativi di risoluzione delle dispute, come dei diritti fondamentali o umani in epoche più recenti. Occorre dunque analizzare i processi di mutamento che hanno investito lo Stato, il diritto, i sistemi giudiziari, dunque i diritti fondamentali e umani e i metodi di risoluzione delle dispute alla luce del fenomeno del pluralismo giuridico.

Parole chiave: Diritti fondamentali, metodi alternativi di risoluzione delle dispute, monismo giuridico, pluralismo giuridico, sociologia del diritto, filosofia del diritto, dottrine politiche.

1. THE CRISIS OF THE MODERN STATE

The analysis of modern political-institutional systems, democratic-constitutional of a liberal mold, if it clarifies the reasons for the presence and diffusion of dispute resolution methods, of fundamental and human

rights attributable to the new power and government elites, therefore to the bourgeois class, in the context of a monistic and statistic conception of legal systems, founded on the sovereignty and monopoly of each State on its own law in relation to old (nobility and clergy) and new (bourgeoisie) circles of power (Quiroz Vitale 2018); then it does not explain the reasons for the diffusion and progressive multiplication of alternative dispute resolution methods, such as fundamental or human rights in more recent times. A period, it should be underlined, during which these political-institutional systems seem to have maintained, at least abstractly, the initial constitutive characteristics concerning the organizational, structural and functional structure, which characterized them from the very beginning of their constitution.

These are aspects that draw attention to processes and phenomena concerning the themes of the crisis and the comparison of the monist conception of the State, of law, of the administration of justice, of fundamental and human rights with the pluralistic one of legal systems in the light of changes that occurred throughout the nineteenth and twentieth centuries. The analysis of modern political-institutional systems considered in the light of the monistic and statistic conception of juridical systems, based on the sovereignty and monopoly of each State, it would be better to say of the elites of power and government, on its own law and judicial system sheds light on the reasons for the presence, the progressive diffusion of the methods of resolving adjudication disputes and of fundamental or human rights in relatively recent times. But from this point of view it does not appear capable of explaining the phenomena of the progressive diffusion, multiplication and diversification (specification) both of alternative methods of dispute resolution and of fundamental and human rights in favor of silent majorities or even small communities, groups and even individuals, during a period in which modern democratic-constitutional political-institutional systems, born, it is emphasized, to satisfy the needs, purposes and interests of emerging power and government elites (the bourgeoisie), seem to have maintained, at least abstractly, the original characteristics.

These are certainly aspects that draw attention to the theme of the crisis and the confrontation between the monist conception of the State and of law (dispute resolution systems and fundamental or human rights included) with the pluralistic one of law, legal systems, systems judicial, fundamental or human rights, in the light of the changes that affected society as a whole throughout the 19th and 20th centuries.

In law theory, the monist conception of the legal order holds that within a territory and a population there is only one legal order, one law and one judicial system exclusive to any other that it may eventually incorporate. In the monist perspective of the legal order, according to which the sovereign State possesses the monopoly of law and justice, the juridical relationship between the holders of political power and those who are subjected to it, the relationship of citizenship, assumes a rather rigid dimension: each individual is subject to a single legal order, to a single legal and judicial system, coinciding with the state one, with the exception of any gaps and disharmonies between legal systems. A vision that contributes to the survival of a monistic-statist orientation in juridical and judicial culture and ideology: the affirmation of a single right necessarily entails the application of a single legal order and a single judicial system to assert rights limited to a few, certain categories, although it could well also be a matter of a national or transnational system integrated by rules and institutions occasionally implemented by another system, even supranational (Ferrari 1997: 57). An option which, on the basis of the characteristics of representative, democratic-constitutional regimes of a liberal mold, has translated, for reasons that are not at all obvious in the context of ideological contexts that are also very different from each other, in the affirmation of both disputes (adjudicative) (Damiani di Vergada Franzetti 2014: 75-102), both of subjective rights, fundamental or human rights, which were better able to satisfy, guarantee and protect the needs of the dominant power and government elites at the time and expression of small minorities, rather than favoring large circles of individuals belonging to silent majorities.

The crisis of statism went hand in hand with the social transformations announced by the nineteenth century and implemented throughout the twentieth century.

These are changes that call into question the very idea of a world divided into delimited and sovereign state units both internally because they monopolize the production, interpretation and application of law, and externally because they are interconnected by an institutional network of relationships according to classical international law.

2. BETWEEN MONISM AND JURIDICAL PLURALISM

In this overall framework, the theme of the pluralism of legal systems, central to the political, cultural and economic debate, has increasingly become a dominant, recurring and particularly interesting theme in reflec-

tion on the state and on law, inevitably affecting that of dispute resolution systems, of fundamental or human rights, referring to legal systems that are contiguous, confused and overlapping and sometimes even opposed.

From this point of view, the pluralist conception of legal systems that has spread in legal theory on sociological assumptions since the last decades of the last century in fact argues that in the same territory and population there can coexist more legal systems, more dispute resolution systems, even in contrasting ways, multiple interconnected fundamental or human rights, however different, even antagonistic, if not actually in opposition to each other.

During this part of the century, an updated version of legal pluralism emerges, which has become central in the most recent sociology of law to the point of founding a "general theory of law based" on the concept of "normative polysystem" (Carbonnier 1972, Arnaud 1981). According to this conception, every society, every social aggregate, is characterized by the existence, by the co-presence within itself of a web of juridical systems, dispute resolution systems and subjective, fundamental and human rights, dependent, ultimately, on the contingencies of social conflict: a plot in any case related to social stratification and the more or less asymmetrical distribution of collective and individual power, consisting not only in the diffusion of alternative dispute resolution systems, but also in a multitude of individual rights, fundamental or human, in fact coinciding with as many as there are reference (juridical) systems.

If the conflict present in society towards the end of the last century arose from social asymmetries referable to a rigid subdivision of groups opposed to each other, then even towards the end of the 19th century the social stratification, unjustified on a juridical level after the abolition of feudal privileges determined by liberal revolutions, was in fact produced and reproduced by concrete imbalances in the availability of material resources, especially the means of production, and symbolic ones: there was an opposition between classes based on a system of ascribed positions or status system, not very different from the Marxist dichotomous conflictualist vision which pitted the bourgeois class against the proletarian class, the new government and power elites against silent majorities.

It is a situation which, in the light of the political-institutional events that occurred between the end of the 19th century and the beginning of the 20th century, allows us to shed light not only on the existence of adjudication dispute resolution systems, considered to be better able to satisfy the needs, interests and goals of the emerging elites, but also on the recognition and protection of subjective, fundamental and human rights, also in this case referable to restricted circles of power, even during the entire first half of the twentieth century: power elites who, through well-selected rights and judicial systems appeared better able to transmit their political influence in the civil society of the time.

Subsequently in the industrialized countries between the nineteenth and twentieth centuries, with acceleration during the second post-war period, a differentiation of individual positions was produced and the original social groups differentiated within them, this being accompanied by a different social stratification.

If in the first industrial society simplified and dichotomous forms of conflict were identified, in the advanced industrial society and in the "post-industrial" and by now "post-modern" one, the existence of a complex and articulated system of relationships was instead revealed, such as to represent society as a field of conflicts of various origins, composite in the identity of the contenders, changeable in the manifestations according to a composite social stratification such as to bring out new global financial elites.

The differentiation of social classes, the adoption of negotiation and mediation strategies such as to determine a dissolution of the fronts, the multiplicity of asymmetries that can be found in social roles, even competitors simultaneously covered by single individuals, have determined the presence in the social sphere of a multitude of communities, of groups, defined by interest and conflict, even of single subjects, oriented towards cooperation and confrontation who relied on various dispute resolution systems to assert their fundamental and human rights (Dahrendorf 1957: 517, Collins 1975).

3. THE PROCESS OF DIFFERENTIATING FUNDAMENTAL OR HUMAN RIGHTS AND DISPUTE RESOLUTION METHODS

These are aspects which, if they have led to the overcoming of the concept of the modern state understood as a centralizing and monopolizing political body of all power (executive, legislative and judicial) with the recognition of alternative dispute resolution systems (facilitation), with the recognition of further subjective rights, fundamental or human, both cases not attributable to state legislation or in any case representing a further specification of those normatively outlined, then produced an irreversible crisis of the modern State which, starting from the beginning of the century, affected the Western concept of liberal constitutional democracy also in the social democratic version.

A periodization that can be correlated with the development of fundamental rights in the light of a "modern concept of freedom" (Marshall 1963), which has inevitably also influenced the very diffusion of alternative dispute resolution systems with respect to adjudication ones. The phase of civil rights which affirms the autonomy of the individual sphere from unjustified interference, which takes the form of a corresponding negative duty of abstention. The phase of political rights that supports participation in the decision-making processes of the community, which takes the form of a corresponding active duty incumbent on anyone. And the phase of economic and social rights which establishes the ability of anyone to enjoy essential goods, materializing in the corresponding obligation to remove the obstacles that prevent satisfaction with the consequent affirmation and expansion of facilitative dispute resolution methods rather than non-state adjudication. There is no doubt that the first phase coincides with liberalism, the second with democracy and the third with reformist socialism leading to the state of well-being which, if it has seen the progressive spread and consolidation of alternative dispute resolution systems in the common law, has instead recorded greater resistance regarding their diffusion in civil law systems (Damiani di Vergada Franzetti 2014).

Thus a complex, changeable environment has emerged, characterized by claims of all kinds based on regulatory systems often not even practiced by individuals or by an identifiable population, but simply conceived, conceived according to the political struggle in which the various legal systems intertwine and conflict with each other: a suitable environment to favor the coexistence, at least in theory, on the one hand, of alternative dispute resolution systems, therefore facilitating, consisting of the figure of the mediator, the negotiator, the conciliator, the arbitrator, with respect to the adjudication ones, of a classic state matrix, consistent with the figure of the judge; on the other, of a jumble of fundamental and human rights, expression of a multiplication or a progressive specification, which appear to be more suited to the needs, purposes and interests of single individuals than to those of large groups or collectivities of reference and belonging, compared to those originally institutionalized in a few well-defined categories and specifications.

The complexity of this situation, in which phenomena of universalism coexist with phenomena of localism and where the delimitations of competences, referable to individual rights, to dispute resolution systems, also blur with the geographical-political borders, if it refers to the theme of the plurality of legal systems, each competing on a physical space, then it also requires a brief analysis of the overall framework in which the crisis of legal and judicial institutions has developed over the last fifty years, in order to be able to correlate it to the presence and progressive diffusion and multiplication not only of dispute resolution systems, but also of fundamental or human rights.

The analysis of the crisis which legal institutions fell into during the 1970s and 1980s highlights a double process: on the one hand, the disappearance of the system of certainties inherited from decades of prosperity, due to the imbalance between expectations and means of satisfaction, resulting in a crisis in the structures of the welfare state; on the other, the unstoppable and ephemeral economic expansion, more speculative than real, characterized by the destruction of consolidated social bonds, by the diffusion of an anomic and asocial culture.

In this context, the crisis of the State manifested itself first of all with the crisis of legislation, due to the inability to know how to face and solve the problems posed by a rapidly developing society, a phenomenon aggravated by the enactment of a multitude of cumbersome laws which have a negative impact not only on the logical and dispositive unity of regulatory codes (Irti 1986 [1979]), but also on the ability of both the judicial systems themselves to know how to decide between contrasting and opposing regulatory expectations, and to identify fundamental or human rights that do not result from one another paradoxically in contrast.

A phenomenon that of hyper-regulation which, if it has hindered private and public activities in a contradictory and irrational way, nevertheless has appeared instrumental to the needs of political and government elites, as well as global financial ones in need of political legitimacy acquired with the display of mere normative symbols to disaffected and completely dissatisfied electorates: ideally abstractly satisfied with the fact of being holders of some subjective rights and even of being able to ideally assert them. The exacerbation of social asymmetries has spread a profound sense of distrust towards the state and the law, unable to produce any effect other than to legitimize the very elites of power, global finances.

At the beginning of the 1990s, the perception of these phenomena sharpened significantly and appeared to be so widespread and shared as to determine important political-institutional consequences, consisting in delegitimizing entire classes of government.

4. BETWEEN GLOBALISM AND LOCALISM

If the changes that occurred during the last part of the 20th and at the beginning of the 21st century

entailed the introduction and identification of further phases of development of fundamental rights, then they have fully introduced new alternative methods of settling disputes between those object of discussion and evaluation, even within those civil law political-institutional systems which by historical tradition appeared more refractory and reluctant to use them (Damiani di Vergada Franzetti 2014). If the previous phases of fundamental rights expressed a humanist and egalitarian conception, then the fourth so-called phase of cultural or identity rights supports and expresses not only the recognition of diversity (Bobbio 1992: 67) on the basis of claims of equal treatment despite the and claims of differentiated treatments on the basis of differences, but also a pluralist conception of society, split into a multiplicity of different positions, all legitimate on the basis of an indefinite series of distinctive elements which concern and define the identity of each individual by differentiation and due to similarity with other individuals and social groups: it is inevitable that the protection of these multiple positions also entails a diversification of the relative methods of resolving disputes, from adjudicative to facilitative, since it is even possible to foresee the coexistence of both in the same space-time legal framework.

A typical phenomenon of highly differentiated contemporary societies, characterized by a multitude of claims and claims in the name of subjective rights that cannot be denied because they are "human" or fundamental and the object of positive law recognition, in the form of charters issued by national, international and transnational organizations and judicial systems equally necessary to enforce them in practice: a recognition that not only is not accompanied by the indication of the jurisdictional authorities to turn to to enforce the relative claims, of the same criteria necessary to settle conflicts and disputes between opposing positions, but which even produces evident paradoxes consisting in denying the identity of others in the name of the right to one's own identity (Ferrari 2006: 107). The fifth and final phase of the so-called fundamental rights instead it manifested itself towards the end of the twentieth century starting from great scientific discoveries and technological innovations which, if they have changed the context in which men think and act, have even come to endanger it together with mankind. These are rights that do not belong solely to single individuals or groups, but to indistinct generalities of subjects, current or potential, referring to living individuals or those who will be able to live (or not live), future generations not only of men, of animals humans, but also of forms of artificial intelligence that could require the introduction of dispute resolution systems based on algorithms and entrusted to forms of artificial intelligence.

In this globalist perspective, which is associated with the crisis of the modern State and its law, its dispute resolution systems, the original idea that describes fundamental rights as "human" and dispute resolution systems but according to processes of differentiation and unification that do not appear to be taken for granted: losing meaning and consistency of the relative civic and political roots since the national or state, international, supranational and transnational organization referable to relations between states, but also spatial forces, has not yet acquired in definitively the necessary (jurisdictional) tools, both adjudicative or facilitative or both, even cybernetic, not only to balance opposing rights, but also to overcome the opposing resistances to their recognition and enjoyment.

In the most developed societies of the end of the century, the State, the law, the judicial systems, the methods of resolving disputes, the individual rights, the fundamental or human rights, symmetrically with the trends that cross society, the economy and politics, oscillate between «a localistic alternative of a pluralistic destructuring and the opposite globalist alternative, of a unifying restructuring. The traditional legal models inherited from the liberal state and the welfare state, whether or not they were based on formal or material rationality, on autonomy or on responsiveness», do not escape these processes (Ferrari 1997: 310).

The existence of processes of pluralistic destructuring and unifying restructuring is affirmed, central aspects in the analysis of the theme concerning the presence and diffusion of (alternative) resolution systems for disputes and fundamental or human rights, if one considers that these phenomena can be enumerated both in a local legal perspective and in a global legal perspective: aspects that are cyclically reborn alongside the law, the judicial system, the methods of resolving disputes, the theme of fundamental or human rights in relation to an increasingly in crisis.

From the first point of view, the presence, diffusion, multiplication of both alternative dispute resolution systems with respect to adjudication ones, as well as fundamental rights is part of the survival or rebirth of alternative forms of law and justice with respect to the state-inspired ones monistic of the continental political-institutional systems of civil law and beyond the oceanic of common law.

From this point of view, the crisis of the unity of traditional regulatory models concerning both judicial systems and individual rights appears to be determined by a process of pluralistic differentiation, both intra-

systemic and inter-systemic, supported by processes of national, supranational and transnational hyperlegification that have never ceased. Within the individual state systems we are witnessing the claim of differentiated treatments, preferential routes, exceptional shortcuts, in a symmetrical way with respect to the various articulations of social roles and in this perspective, as specifically regards fundamental or human rights and dispute resolution systems the need is affirmed both for the use of alternative legal protection instruments to the classic ones of a state matrix, «sometimes private and sometimes semi-public» (*Ibidem*), and for alternative forms of law with respect to the state one, according to the most diverse , disparate needs and expectations, even and paradoxically such as to base differentiated treatments precisely by virtue of the principle of equality: precisely because I am the same as you, you must treat me differently or you must treat me in the same way precisely because I am different.

It is a phenomenon that can also be described and explained in terms of reflexive law, as a legal system which, while imposing a general framework of reference, structures autonomous and semi-autonomous areas of legal action allowing them to self-regulate (Ivi: 310-311), then it can also be related to the tendency of traditional legal systems to intertwine in completely unpredictable ways since private legal action tends to be channeled where it is most convenient: in a world of constant interconnections, legal action can choose to self-regulate according to different and multiple legal systems (*Ibidem*).

In these terms, the presence, diffusion and progressive multiplication not only of dispute resolution methods, but also of fundamental or human rights is also linked to the strengthening of transnational and supranational, private and public powers. This is the case of the European Union which, as we know, constitutes a legal system distinct from that of the member states and complex internally. A system that is characterized by the power to issue regulatory measures, which the member states must comply with, inspiring and introducing an organic discipline concerning any aspect of the national state, therefore concerning: not only new alternative models of dispute resolution with the affirmation of private or semi-public justice systems, especially arbitration in the transnational trade system (the so-called lex mercatoria), as a system emerging from the multinational juridical interaction of private individuals as opposed to state systems (Ferrari 1997: 242), but also of new fundamental rights or human rights attributable not only to the legislative activity of European standardisation, but also and above all to the judicial activity of the many European judicial bodies capable of having effects also on the national judicial systems.

The tendency towards localism and deconstruction and the opposite one towards legal globalism and restructuring, the opposition between adjudicative and facilitative models, fundamental and human rights and the multiplicity of subjective positions, do not contradict each other in absolute terms, being able to reach a "paradoxical balance" as much towards the restructuring of legal models on a global geographical scale, as and symmetrically on the deconstruction of legal models on a particularistic scale (*Ibidem*) in the light of the particular articulation of social stratification which sees increasingly opposing individuals, groups, referable communities to silent majorities and world power and government elites, including financial ones.

Under the first profile, that of structuring fundamental rights on a global scale and of the judicial forms of protection of the same appears possible on the basis of the observation «that the legal relationships of a growing community of operators, if, on the one hand, can draw inspiration from legal systems different, on the other hand they tend to be more and more similar to each other, regardless of the places and systems themselves» (*Ibidem*) in which they are practiced: due to the characteristics of contemporary society marked by the continuous exchange of information, favoring the adoption of both resolution of adjudicative disputes, both of "fundamental or general human rights", transnational without borders.

On the other hand, a local destructuring appears possible on the basis of the observation that the juridical relationships of a community of operators, fundamental or human rights, the same methods of resolving disputes if, on the one hand, undergo the push towards transnational unification supported by the action of large supranational political entities including the European Community, on the other, suffer the effects of the continuous conflict between centripetal and centrifugal thrust between the member states due to conflicts deriving from reciprocal power relations, with the consequence that the supranational entity could achieve the issuance of mere framework rules which, leaving the task to each Member State to specify them on the basis of specific guidelines, could favor the affirmation of "special fundamental rights" and alternative dispute resolution methods different from those of the state matrix (*Ibidem*).

A process of globalistic structuring and particularistic destructuring which, as regards the systems for resolving disputes and fundamental or human rights, fits well with the operational logic of restricted power and government elites, global finances dedicated to the accumulation of resources scarce on a global scale.

5. SHORT CONCLUDING REMARKS: FOR NEW HYPOTHESES ON DISPUTE RESOLUTION METHODS AND FUNDAMENTAL RIGHTS

In the perspective of the dual propensity towards the pluralistic destructuring and the unifying restructuring of the law, towards the affirmation of general and/or special fundamental rights, towards the use of adjudicative and/or facilitative dispute resolution methods, it is necessary to ask today where locate the frontier that separates these tendencies. We need to ask ourselves whether in the future the diffusion of universal fundamental rights or of special fundamental rights, of alternative facilitative methods of resolving disputes or of adjudication, public or private, will prevail. In essence, it means questioning oneself, in the light of what has been reported so far, about who, individual, group or community, private or public, holds the power in a given space-time analysis unit, or rather about who is best able to bring into effect in a social sphere, a project of action, or rather of deciding between conflicting alternatives of action, in short means questioning oneself about who actually holds power.

In this perspective, a plausible hypothesis about the trend towards the unification or differentiation of fundamental rights, of dispute resolution models could derive from the analysis of the evolution of contemporary European legal systems considered in the light of the fundamental principles that inspire the Treaty institution, the European Community, aimed above all at guaranteeing the freedom of movement of goods, services, capital and people (Ferrari 1997: 314).

If the unifying drive has concentrated above all on the first three of these sectors, as far as individuals are concerned, the limitations certainly appear to be multiple, rather rigid and decidedly increasing: the limitations placed on the freedom of movement of people are instrumental to the circulation of goods, services and capital, the proceeds of which are concentrated among the few belonging to restricted circles of individuals who constitute elites of power and government, financial if not global, certainly transnational or supranational.

From this arises the main hypothesis that, as far as the personal sector is concerned, on the one hand, the affirmation of fundamental rights can incur a differentiating thrust with the affirmation of "special fundamental rights" rather than a unifying one, since the recognition and the diffusion of legal pluralism in the form of alternative rights to the fundamental ones, understood as their specification on the basis of alleged differences, in favor of individuals, groups and communities, can represent the counterpart of a centralized transnational policy oriented towards the preservation of the power in to those few individuals, groups or communities, private or public, in which world financial power is concentrated. It is a hypothesis that necessarily introduces and entails a further corollary in relation to the use of dispute resolution methods which, also in this case, can incur a differentiating rather than a unifying thrust: the recognition of alternative forms of law and justice localism in favor of individuals and groups can once again represent the counterpart of a centralized transnational policy oriented towards the preservation of power in the hands of those few individuals or communities, private or public, in which if not global, at least transnational financial power is concentrated or supranational.

Instead, as far as the sector of goods, merchandise and services is concerned, it can be hypothesized that the affirmation of fundamental rights as well as the use of dispute resolution methods may run into a unifying rather than differentiating drive: the recognition of globalistic forms of law or "general fundamental rights", as well as a unitary justice entrusted to facilitative dispute resolution methods in favor of members of the world power elites, in a renewed monistic vision of law, could ensure the implementation of the aforementioned centralized transnational policy oriented towards the maintenance and growth of power in the hands of increasingly restricted elites, consisting of only those few individuals or communities, private or public, in which world economic and financial power is concentrated.

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