

ISTITUZIONI DI DIRITTO PRIVATO

CAPITOLO 1

1. IL DIRITTO PRIVATO

Il diritto è un sistema di regole per la soluzione dei conflitti fra gli uomini senza ricorrere alla violenza, ma applicando regole predeterminate che stabiliscono quale soggetto sia degno di protezione, quale debba prevalere e quale soccombere. Nel loro complesso le regole formano un sistema: ognuna concorre con le altre a risolvere i casi assolvendo una funzione complessiva. Questi sistemi di regole mutano nel tempo e si diversificano nello spazio.

Organizzazione giuridica. Per ordinare una società c'è bisogno, in primo luogo, che ad una superiore autorità sia riconosciuta la preliminare funzione di creare diritto, in secondo luogo una autorità con il potere di applicare il diritto. Nella società attuale si distinguono tre ordini di autorità. Ma in altre società del nostro tempo ci sono forme molto diverse di organizzazione giuridica. Nel sistema di Common Law l'autorità giudiziaria è essa stessa un organo che crea il diritto.

Altri sistemi. È necessario distinguere il sistema di regole del diritto da altri sistemi che governano la convivenza umana, come i principi della morale (distinzione tra bene e male), del costume (corretto e scorretto), della religione (regole di fonte sovranaturale). Questi sistemi possono coincidere con il diritto (es. uccidere, rubare) oppure no (es. matrimonio, pagare debiti di gioco). A questi sistemi (talvolta con una forza obbligatoria superiore al diritto) si ubbidisce per adesione interiore; il diritto invece si distingue per il carattere di coercitività (è un sistema che impone l'osservanza delle regole, attraverso azioni materiali o sanzioni).

Legittimazione. Ci sono due punti di vista: formale (si legittima in forza del potere che ha l'autorità che lo emana o che lo applica), sostanziale (si legittima con il consenso in quanto il diritto è espressione della società ed è accettato dalla maggior parte dei cittadini). Dibattito tra concezione volontaristica: il diritto è espressione della volontà sovrana; e concezione organicistica: il diritto è un'autorganizzazione spontanea della società.

2. NORMA GIURIDICA

L'unità elementare del sistema del diritto è la norma giuridica; il sistema nel suo complesso è definito ordinamento giuridico. L'istituto indica più norme tra loro coordinate per assolvere una funzione unitaria.

Le norme giuridiche sono:

- generali: si rivolgono a una serie di persone e non al singolo;
- astratte: riguardano una serie ipotetica di fatti;
- precostituite: sono create prima che il conflitto sia insorto a scopo preventivo. Sono precostituite per due motivi: assicurare l'uniformità di soluzioni e per il principio della certezza del diritto, il cittadino deve sapere in anticipo quali sono i fatti leciti e quelli illeciti;
- precettive: le norme impongono un comportamento che deve essere rispettato, sebbene alcune si presentino in forma descrittiva.

Il grado di generalità e astrattezza delle norme può essere più o meno elevato:

- norme di diritto comune o di diritto generale: quando si rivolgono a chiunque o si riferiscono a qualunque fatto (grado più alto);
- norme di diritto speciale: delimitano la serie di soggetti a cui si rivolgono o di fatti a cui si riferiscono; riguardano specifiche professioni o situazioni sociali, temporali o locali.

La sentenza è un provvedimento del giudice, un comando individuale e concreto (opposto quindi alla norma).

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