

APPUNTI DI DIRITTO COMMERCIALE (integrati col libro "campobasso")

Introduzione: nel nostro diritto privato c'è un complesso di norme riferite agli imprenditori (che costituiscono il "diritto commerciale"), soggetti che esercitano professionalmente attività economica finalizzata alla produzione e allo scambio di beni o servizi. Va ricordato che la nostra costituzione riconosce la proprietà privata e la libertà di iniziativa economica e il modello di sviluppo economico si basa sull'economia di mercato avente due caratteristiche:

- Libertà dei privati di dedicarsi alla produzione e alla distribuzione necessaria per il soddisfacimento dei bisogni materiali della collettività;
- Libertà di coesistenza tra operatori economici (pubblici o privati) e libertà di competizione tra loro.

Il nostro sistema è ad economia libera e il fenomeno imprenditoriale costituisce perciò l'asse portante dello sviluppo economico e del processo di razionale utilizzazione delle risorse produttive per il miglioramento del benessere materiale della collettività.

→ Il *diritto commerciale* è quel diritto che fa riferimento alla figura dell'imprenditore, ovvero è l'insieme di regole sull'attività, gli strumenti che utilizza, il contesto in cui opera. Esso, nominato anche "diritto privato delle imprese", è parte del diritto privato che ha per oggetto e regola l'attività e gli atti dell'impresa.

L'attuale diritto commerciale non è solo diritto del commercio e dei commercianti per due motivi: 1) poiché riguarda tutte le imprese giuridicamente commerciali (industriali, bancarie, assicurative, di trasporto...) e non solo quelle dedite al commercio; in questo fanno eccezione quelle agricole; 2) poiché nel sistema vigente tutti gli imprenditori (e non solo quelli commerciali) sono sottoposti ad uno speciale statuto professionale.

Questo diritto è talmente complesso che persino il legislatore ha difficoltà a individuarne le varie norme: bisogna considerare tutte le cose e persone che gravitano attorno all'impresa e all'imprenditore. Ci sono diversi individui portatori di interesse che vanno tutelati secondo questo diritto: l'imprenditore è portatore di interesse per la sua attività imprenditoriale, i finanziatori necessitano di garanzie per il soddisfacimento di crediti, i consumatori che acquistano prodotti e servizi, i lavoratori dipendenti, i residenti vicini agli stabilimenti produttivi tutelati per l'inquinamento atmosferico... Perciò il legislatore deve tener conto di tutti questi interessi, i quali variano a seconda dei settori e del tempo.

Le fonti del diritto commerciale non sono solo quelle "legislative" ma ci sono anche quelle "regolamentari" e "norme internazionali" per poter regolamentare i rapporti tra i soggetti di diversa nazionalità.

La nascita del Diritto Commerciale risale al Basso medioevo (12° secolo), epoca in cui termina il sistema feudale basato su un'economia di pura sussistenza: qui il fondo bastava a sfamare una famiglia e gli scambi limitati erano necessari per ottenere ciò che era impossibile reperire dal feudo stesso per le esigenze di sostentamento dei vari abitanti.

Con la crescita delle città, nascono i mercati, facendo rifiorire l'economia di scambio alimentata dalla produzione degli artigiani e dai traffici dei mercanti. Nasce inoltre la figura del mercante: egli si dedicava interamente agli scambi come una vera e propria professione e non per ottenere ciò che gli serviva ma per trarne un profitto. In questo contesto politico e sociale il diritto commerciale era costituito da due tipi di diritti: quello degli affari mercantili e quello comune (diritto romano + diritto canonico). Quest'ultimo tutelava la proprietà privata e conservava la ricchezza non incentivando la diffusione e gli scambi. Per risolvere ciò la stessa classe mercantile fondò una regolamentazione, lo "ius mercatorum" (= diritto dei mercanti): è un diritto di classe, ovvero un insieme di regole create e amministrato direttamente dai mercanti contrapposto allo "ius civile".

La soluzione delle controversie fra mercanti è affidata a organi di giustizia (i consoli) formati alle rispettive corporazioni che decidono le varie regole consuetudinarie.

Con lo ius mercato rum nascono: - *il principio della libertà delle forme contrattuali*, - *la tutela del creditore* (dove il debitore deve pagare entro la scadenza senza dilazioni sennò i debiti scaduti producono interessi), - *nuovi contratti* (come il contratto di assicurazione, il contratto di cambio), - *nuovi istituti* (scritture contabili), - *forme associative* (come la società in nome collettivo e in accomandita semplice), - *il fallimento* (modo per definire il dissesto dei mercati).

Il diritto commerciale è "un diritto speciale" poiché dotato di proprie fonti e di propri organi di giustizia, e un "diritto di classe" in quanto espressione dello stesso ceto mercantile e della sua autonomia corporativa.

Con la nascita degli Stati Nazionali monarchici (16° secolo) termina l'autonomia normativa delle corporazioni mercantili e il diritto commerciale diventa diritto nazionale e statale: infatti i sovrani dei vari stati iniziano a intervenire negli scambi commerciali per controllare ciò che accadeva nel loro Stato e negli altri.

L'attività economica è concepita come strumento di accrescimento della potenza dello Stato e di espansione coloniale ed è finalizzata al controllo, alla protezione e al potenziamento dei traffici.

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