COLLABORATIVE LAW: TWO EUROPEAN CASES

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ABSTRACT

Collaborative Law is a new form of Alternative Dispute Resolution in which the parties and their lawyers seek to resolve a legal dispute without going to court. The cornerstone of the collaborative approach is the "collaborative commitment" which requires that, should the case not be settled, lawyers cannot represent their client in litigation concerning the same dispute. Its rapid success is due to the essential role played by lawyers in its process: they manage the whole process without the involvement of a third impartial person, like a mediator. Although mediation remains a good dispute resolution method for many cases, some of its characteristics make it an unacceptable choice for a growing number of lawyers. Through its analysis of collaborative law, this article illustrates the new role played by lawyers in the international justice scene. The origins of collaborative law in the United States and Canada and the translation of its principles in Europe are also discussed. The specific cases of France and Italy, which have both recently introduced forms of negotiation inspired by collaborative law principles, are presented. These two cases are particularly interesting, not only because these nations have a civil law system dominated by a model wherein the decision, and not a negotiated agreement, takes center stage, but also because of the way they have integrated this new tool within their procedural systems. In Italy, the trial is the dominant model of dispute resolution; over the past twenty years, legislators have introduced consensual tools such as mediation and negotiation in an effort to lift some of the procedural burden from the courts. The formalization of these tools, the failure to appropriately train mediators and attorneys, and insufficient awareness-raising with the public are among the causes of the thus far poor success of consensual justice methods. While the growing use of ADR in the international scene has been acclaimed as the advent of a new judicial model represented by novel principles and practices, in Italy its radical innovativeness has yet to be understood.

1. CRISIS OF JUSTICE OR CRISIS OF THE TRIAL?

In their analyses, European legal scholars often refer to a "legal crisis" to underscore how the law has difficulty representing and regulating new phenomena that are radically changing the international scene.[1] One might say this crisis is paradoxical because it appears that the legal field is growing and that there is a new spectrum of actors and institutions that are redefining its content, practice and confines.[2] The multiplication of the sources of law and of national and international institutions as well as the new creative role played by judges reveal that the law is vital and in constant transformation. What appears to be in crisis, however, is a certain way of viewing the law as a rational order centered around the State and legislation as the only source of law.[3]

This particular crisis affects justice understood as a tool for the effective vindication of rights. It has eclipsed the traditional trial as it has become inadequate in fulfilling social expectations. It has also driven a new sense of vitality into the system as consensual and participatory models have brought new principles, practices and actors onto the justice scene over the past thirty years.[4]

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1. Among numerous publications on this subject, see T. Hagan, *The End of Law?* (Oxford: Basic Blackwell, 1984); B. De Sousa Santos, "Law: a Map of Misreading. Towards a Postmodern Conception of Law" (Autumn 1987) 14:3 *Journal of Law and Society* 279-302; in Italian literature, see N. Irti, *Nichilismo giuridico* (Bari-Roma: Laterza, 2005, third ed.); P. Rossi, ed., *Fine del diritto?* (Bologna: Il Mulino, 2009); M. Vogliotti, ed., *Il tramonto della modernità giuridica* (Torino: Giappichelli, 2008).
2. See S. Cassese, who notes that in Italy over the past fifty years, the number of judicial decisions has increased tenfold, the number of lawyers fivefold, and new law school graduates threefold. The conclusion is that the production and delivery of law is increasing. "Eclissi o rinascita del diritto?" in P. Rossi, ed., *Fine del diritto?*, *supra* note 1, 29-36 (p. 29).
3. F. Ost and M. van de Kerchove, *De la Pyramide au Réseau. Pour une théorie dialectique du droit* (Bruxelles: Publications des Facultés universitaires Saint-Louis, 2002); J. Chevallier, "Vers un droit postmoderne?" in J. Clam and G. Martin, eds., *Les Transformations de la Régulation Juridique* (Paris: L.G.D.J., 1998), 21-46.
4. See the chapter in *Journal of Empirical Legal Studies*, devoted to the crisis of the trial, entitled "The Vanishing Trial", November 2004, vol. 1, n. 3, incl. articles by M. Galanter, "The Vanishing Trial: an Examination of Trials and Related Matters in Federal and State Courts", 459-570; M. Friedman, "The Day Before Trial Vanished", 689-703.

The people's growing dissatisfaction with a slow, expensive system, which does not protect their best interest or rights, has been the subject of discussion by experts. It has drawn attention towards the limits of the trial and the advantages of consensual and participatory conflict resolution practices, which are now widely regulated in European and international legal systems.[5]

We are before the progressive crumbling of a justice paradigm based on the State's monopoly on the law and on judgment. The emerging new one has yet to be fully defined, but is nonetheless beginning to take shape with distinctive features such as belief in legal pluralism and participatory dispute resolution tools.[6]

The ways in which different legal systems have responded to the rise of alternative dispute resolution methods (ADR) sheds light onto the different countries' interpretation of the relationship between two different paradigms of justice and on the strategies they have employed to redefine their delivery of justice in response to the changing needs of their citizens.

The case of the new legal phenomenon on the rise, collaborative law, is the latest addition to the large *Alternative Dispute Resolution* family; it is noteworthy how different legal systems have handled its emergence.

This article illustrates the origins of collaborative law in the United States and Canada and the translation of its principles in Europe. The specific cases of France and Italy, which have both recently introduced

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5. See M. Cappelletti, ed., *Access to Justice* (Alphen aan der Rijn: Sijthoff and Noordhoff; Milan: Dott. A. Giuffré Editore, 1978-1979); J.G. Belley, "Une justice de la seconde modernité: proposition de principes généraux pour le prochain *Code de procédure civile*" (2000-2001) 46 *McGill Law Journal* 317-363; M. Delmas-Marty, "Les nouveaux lieux et les nouvelles formes de régulation des conflits" in J. Clam and G. Martin, eds., *Les Transformations de la Régulation Juridique*, *supra* note 3 at pp. 209-241; L. Lalonde, "Les Modes de PRD: vers une nouvelle conception de la justice?" (2003) 1:2 *Revue de Prévention et de Règlement des Différends* 17-43.
6. See Santi Romano, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (Firenze: Sansoni, 1946 second ed.); R. Macdonald, "L'Hypothèse du Pluralisme Juridique dans les Sociétés Démocratiques Avancées" (2002-2003) 33:1-2 *Revue de Droit Université de Sherbrooke* (*R.D.U.S.*) 135-152. On renewed interest for legal pluralism, see J. Vanderlinden, "Return to Legal Pluralism: Twenty Years Later" (1989) 21 *The Journal of Legal Pluralism and Unofficial Law* 149-157; F. Viola, "Il Rule of Law e il pluralismo giuridico contemporaneo" in M. Vogliotti, ed., *Il tramonto della modernità giuridica*, *supra* note 1 at pp. 96-128; also see essays in V. Ferrari, P. Ronfani, S. Stabile, eds., *Conflitti e diritti nella società transnazionale* (Milano: Franco Angeli, 2001).

forms of negotiation inspired by collaborative law principles, are discussed. These two cases are particularly interesting, not only because these nations have a civil law system dominated by a model wherein the decision, and not a negotiated agreement, takes center stage, but also because of the way they have integrated this new tool within their procedural systems and of the new role played by lawyers in the justice scene.

The Italian example provides food for thought. In Italy, the trial is the dominant model of dispute resolution; over the past twenty years, legislators have introduced consensual tools such as mediation and negotiation in an effort to lift some of the burden from the courts. The formalization of these tools, the failure to appropriately train mediators and attorneys, and insufficient awareness-raising with the public are among the causes of the thus far poor success of consensual justice methods. They have been depicted as exceptions in the judicial system that only serve to reinforce the dominant model instead of bringing about a new conceptual framework in which to resolve disputes and protect rights.

This lack of success is perhaps at the origin of a March 2016 Ministry of Justice initiative: the establishment of a Commission tasked with proposing an organic reform of dejurisdictionalization tools, with particular attention to mediation, assisted negotiation and arbitration. The Commission, which has recently concluded its activities, preserves the initial normative structure and proposes several changes designed to expand access to extra-judicial tools.[7] What is noteworthy, however, is that for the very first time Italian lawmakers have addressed the issue of harmonizing the traditional judicial model with consensual and participatory forms of justice. In the open building yard of the Italian justice scene,[8] this may represent a first real step towards the definition of a new paradigm of participatory justice.

2. A NEW TOOL IN ADR BOX: COLLABORATIVE LAW

Collaborative law has recently joined the list of extra judicial conflict resolution tools based on a consensual and participatory approach.

The term “collaborative law” refers to a consensual dispute resolution method in which the involved parties, assisted by their attorneys, are

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7. This is a quick overview of the Committee’s report, newly submitted to the Ministry of Justice- Study Committee for the development of organic discipline and reform of dejurisdictionalization tools, with particular attention to mediation, assisted negotiation and arbitration. Policy proposals and illustrative notes, January 18th, 2017, <www.https://www.giustizia.it/giustizia/> (20 march 2017).
8. See S. Chiarloni, “Sempre aperto il cantiere delle riforme del processo civile” in *Giurisprudenza Italiana*, Maggio 2015, pp. 1257-1263.