IAIC MiBACT DGBIC CREDA

DIRITTO MERCATO TECNOLOGIA

FONDATA E DIRETTA DA
Alberto M. Gambino

COMITATO DI DIREZIONE
Valeria Falce, Giusella Finocchiaro, Oreste Pollicino,
Giorgio Resta, Salvatore Sica

11 agosto 2020

Self-help in civil matters and state justice

Luciana D'Acunto

Nuova
Editrice
Universitaria

La rivista è stata fondata nel 2009 da Alberto M. Gambino ed è oggi pubblicata dall'Accademia Italiana del Codice di Internet (IAIC) sotto gli auspici del Ministero dei beni e delle attività culturali e del turismo - Direzione generale biblioteche e istituti culturali (DGBIC) e dell'Università Europea di Roma con il Centro di Ricerca di Eccellenza del Diritto d'Autore (CREDA).

Norme di autodisciplina

1. La pubblicazione dei contributi sulla rivista "Diritto Mercato Tecnologia" è subordinata alla presentazione da parte di almeno un membro del Comitato di Direzione o del Comitato Scientifico e al giudizio positivo di almeno un membro del Comitato per la Valutazione Scientifica, scelto per rotazione all'interno del medesimo, tenuto conto dell'area tematica del contributo. I contributi in lingua diversa dall'italiano potranno essere affidati per il referaggio ai componenti del Comitato Scientifico Internazionale. In caso di pareri contrastanti il Comitato di Direzione assume la responsabilità circa la pubblicazione.
2. Il singolo contributo è inviato al valutatore senza notizia dell'identità dell'autore.
3. L'identità del valutatore è coperta da anonimato.
4. Nel caso che il valutatore esprima un giudizio positivo condizionato a revisione o modifica del contributo, il Comitato di Direzione autorizza la pubblicazione solo a seguito dell'adeguamento del saggio.

La Rivista adotta un Codice etico e di buone prassi della pubblicazione scientifica conforme agli standard elaborati dal Committee on Publication Ethics (COPE): Best Practice Guidelines for Journal Editors.

Sede della Redazione

Accademia Italiana del Codice di Internet, Via dei Tre Orologi 14/a, 00197 Roma, tel. 06.8088855, fax 06.8070483, www.iaic.it, info@iaic.it

SELF-HELP IN CIVIL MATTERS AND STATE JUSTICE*

Luciana D'Acunto
Università di Napoli "Federico II"

SUMMARY: 1. Self-help in civil matters and its alleged singularity – 2. Growing importance of self-help and relations with State justice

1. Self-help in civil matters and its alleged singularity

Self-help is a broad concept used in different areas of legal practice, and, despite the efforts made by some authoritative scholars, its nature and boundaries have never been fully defined, even when they focused on individual aspects of the legal system[1].

So much depends on the general difficulties encountered when defining the notion of «protection», of which self-help is just an aspect[2], and on the strong interference and interrelations between self-help and private autonomy, which make it difficult to identify their reciprocal relationships[3]. Moreover, another major aspect that has contributed to the consolidation of

---

* *Il contributo è destinato al Liber amicorum in onore del Prof. Mads Andenas.*

[1] With regard to self-help, reference is made especially to E. BETTI, *Autotutela* (dir. priv.), in *Enc. dir.*, IV, Milan, 1959, p. 529 et seq.; L. BIGLIAZZI GERI, *Profili sistematici dell'autotutela privata*, I. *Introduzione*, Milan, 1971; ID., *Profili sistematici dell'autotutela privata*, II, Milan, 1974; ID., *Autotutela* II) *Diritto civile*, in *Enc. giur.*, IV, Roma, 1988, p. 1 et seq.; G. BONGIORNO, *L'autotutela esecutiva*, Milan, 1984; C.M. BIANCA, *Autotutela (diritto privato)*, in *Enc. dir.*, Update IV, Milan, 2000, p. 130 et seq.

[2] L. BIGLIAZZI GERI, *op. cit.,* p. 6; p. 16 et seq.; A. DI MAJO, *La tutela civile dei diritti*[3], Milan, 2001, p. 2 et seq., who, based on the assumption that «protection of rights», in its broader sense, means protecting a right being violated or that is threatened, adds that the term «protection» is usually accompanied by the predicate «legal», as legal protection is used exclusively when resorting to jurisdiction; self-help, on the other hand, means enforcing one's rights without resorting to jurisdiction.

[3] On the other hand, L. BIGLIAZZI GERI, *op. cit.,* p. 6, believes that the solution to the issue related to the relationship between private autonomy and self-help is not an essential condition for providing «a final technical definition of self-help».

these uncertainties seems to be a combination of thrusts and counter-thrusts emerging when trying to identify the phenomenon in question: the need for fast and flexible protection, to ensure its effectiveness, corresponds to a clear concern that being too much open to self-help could pose a risk to the preservation of public order and social peace.

There is no doubt that, since the Italian legal system lacks an organic or even sectoral discipline that regulates the phenomenon in question, reconstructing it becomes particularly complex; however, going beyond the consolidated negative representation of self-help as non-judicial protection, and, therefore, as a power to resolve conflicts without resorting to jurisdiction, a notion capable of taking into account its positive essence shall be identified[4]. The broad concept of "negative self-help", as protection of rights without resorting to any judicial authority, could include all forms of agreed settlement of disputes, to which the «de-jurisdictionalization»[5] techniques used for assisted negotiation and mediation aimed at civil and business conciliation should also be added, because with them a dispute is resolved not only without resorting to the state judicial system, but mainly without a decision by a third party (a judge or an arbitrator): the first through

[4] See F. BOCCHINI, in F. BOCCHINI – E. QUADRI, *Diritto privato*[7], Turin, 2018, p. 256.

[5] The term – defined as «unpronounceable» by M. LIBERTINI, *La «degiurisdizionalizzazione»*, in *www.federalismi.it* and aimed at emphasizing a separation from state jurisdiction - appears in a section of Law No. 162 of 10 November 2014, which, converting and amending legislative decree No. 132 of 12 September 2014 that provided "*Urgent de-jurisdictionalization measures and other interventions for the definition of backlog in civil proceedings*", introduced heterogeneous institutions, aimed, with the ultimate goal of a «de-jurisdictionalization» of civil disputes, to facilitate access to alternative dispute resolution processes, before a judgment or during the trial. The same law also contains some measures aimed at making the cognisance and executive stages more efficient and faster. It should also be noted that, with Ministerial Decree of 7 March 2016, the Ministry of Justice has established, within the legislative department, a «*Study Commission for a possible organic discipline and reform of de-jurisdictionalization instruments, especially with regard to mediation, assisted negotiation and arbitration*» (chaired by Prof. Guido Alpa), which produced a complex text and a final report of the work carried out to be submitted to the Ministry of Justice. The full text and report are available in G. ALPA, *Commissione di studio per l'elaborazione di una organica disciplina volta alla «degiurisdizionlizzazione»,* in *Riv. trim. dir. proc. civ.*, 2017, p. 793 et seq.

the negotiation work carried out by the lawyers, while the second through mediators who work to reach a conciliation agreement[6].

The issue related to the "positive aspect" of self-help arises from the protection of legal situations that involve the interests of several subjects when the independent and unilateral protection of the injured party is allowed. Therefore, self-help is commonly and approximately identified with the direct protection of personal and subjective legal situations put at risk or violated by a third-party illicit behaviour[7]. Again, with reference to a possible definition of the phenomenon in question, it should be noted that self-help is basically a direct and unilateral reaction (for purely conservative-precautionary purposes or for the definition of a conflict) by the holder of the legally relevant interest being harmed or threatened[8]. This notion, which seems to be shared – more than others – by the scholars, implies at least three elements as peculiar traits of personal self-help: the absence of judicial intervention, the unilateral exercise of power and the protection of an interest worthy of protection that is harmed or threatened by others. [9]

---

[6] There is now a vast literature on the contractual instruments available for dispute negotiation. See, therefore, among others, in addition to the contribution mentioned in the following notes, E. DEL PRATO, *Fuori dal processo. Studi sulle risoluzioni negoziali delle controversie*, Turin, 2016, to which reference is also made in the bibliography.

[7] E. BETTI, *Autotutela* (dir. priv.), cit., p. 529 defines self-help as «protection of personal interests directly by the interested party», who «is allowed (…), under several specifically determined circumstances, to preserve and take action, in compliance with law, in order to protect a right being threatened or violated». As pointed out by L. BIGLIAZZI GERI, *Autotutela* II) *Diritto civile*, cit., p. 1, a legally relevant interest can be harmed or threatened, and this could require the application of self-help remedies, not only by the unlawful act of another person, but also by «a more generically illegitimate behaviour», that is, «a fact that, by interfering with the legal sphere of a subject, can objectively be prejudicial to others (and among the hypotheses, there could be the objective deterioration of the debtor's financial conditions, pursuant to art. 1461 of the Italian Civil Code)».

[8] According to the prevailing opinion, self-help is the «summary expression of individual situations that allow a subject, whose interest has been (actually) harmed or (only) put at risk, to independently overcome the negative consequences of this fact, by affecting, more or less decisively, the legal sphere of the person who has presumably harmed that interest» (L. BIGLIAZZI GERI, *Autotutela* II) *Diritto civile*, cit., p. 1). Similarly, C.M. BIANCA, *Autotutela (diritto privato)*, cit., p. 132.

[9] A. TARTAGLIA POLCINI, *Modelli arbitrali tra autonomia negoziale e funzione giurisdizionale*, Naples, 2002, p. 260 et seq. does not agree with this approach.

However, each of these elements raises doubts which, as anticipated, make the above definition controversial, since this solution affects the breadth of the concept of "self-help", and, consequently, the particular cases and institutions involved. We should consider, for example, that the above mentioned absence of judicial intervention may or may not be interpreted more broadly, that is, as a necessary exclusion of any intervention by a third party, in this case, a judge/arbitrator or a mediator (conciliator)[10]; as well as the interpretation of the assumed unilaterality, which will reflect the definition of boundaries between self-defence and private autonomy, especially in the presence of conventional powers[11].

These are just some examples, but what should be pointed out is that, especially with regard to private law, the fact that our system – unlike other legal systems[12] – lacks a general discipline on self-help is one of the main

[10] F. BOCCHINI, *op. cit.,* p. 256, among others, opts for a broader interpretation of "exclusion".

[11] Cfr. A. LEPORE, *Autotutela e autonomia privata*, Napoli, 2019, *passim*.

[12] The German legal system provides a discipline on the protection of private interests without recourse to legal proceedings in §§ 227-231 of the BGB, regulating the cases of *Selbstverteidigung* (self-defence). More precisely, § 227 regulate the *Notwehr*, that is, legitimate defence; § 228 the *Notstand*, the state of necessity; while § 229 focuses explicitly on *Selbsthilhe*, that is, *self-help*, and excludes any liability for "a person who, for the purpose of self-help, removes, destroys or damages a thing, or a person who, for the purpose of self-help, arrests an obliged person who is suspected of flight, or overcomes the resistance to an act of an obliged person who has a duty to tolerate that act, does not act unlawfully if help cannot be obtained from the authorities in good time and there is a danger, without immediate intervention (*Hilfe*), that the realisation of the claim will be prevented or be considerably more difficult". § 230 defines the limits of self-help. In particular, it clarifies that "self-help may not extend further than is necessary to ward off the danger; in the case where things are removed, then, unless execution of judgment is being effected, a writ of attachment is to be sought; in the case of the arrest of the person obliged, unless he or she is set free again, an application for his preventive custody is to be filed with the local court; if the application for arrest is delayed or rejected, the things seized must be returned and the person arrested released without undue delay".
The German legal doctrine, moreover, offers divergent ideas on the stricter or broader interpretation of the above mentioned rules and their analogical application. See, in this regard, W.B. SCHÜNEMANN, *Selbsthilfe in Rechtssystem, Eine dogmatiche Studie am Beispiel der §§ 227, 229 ff. BGB*, Tübingen, 1985; T. REPGEN, *§§ 229-230*, in *Staudingers Kommentar zum Bürgerlichen Gesetzbuch*, Buch 1: *Allgemeiner Teil §§ 164-240* (*Allgemeiner Teil 5*), Berlin, 2014; M. DUCHSTEIN, *Die selbsthilfe*, JuS, 2015,

reasons why the prevailing legal doctrine rules out the possibility of referring to self-help as «a unitary (general) "power"»[13]. An assumption that seems to be confirmed by the evident heterogeneity of the cases traditionally linked to the phenomenon of self-help.

The system seems to be associated with «the existence of a series of specific "powers" (rights), arising on the basis of as many specific interests, and finding in the legal system the source of their relevance»[14], a relevance that is linked exclusively to the specific hypotheses admitted, and not to the possibility of a more general categorization or analogical application[15] [16], given the alleged «peculiarity of these "powers" and the consequent singularity of the hypotheses classifiable as self-help»[17].

In legal theory, however, we also find some opposite opinions, which, diminishing the importance of a lack of general rules on self-help[18], consider the particular cases for which the law expressly recognises the possibility for

---

pp. 105-109; H. GROTHE, *§§ 229-230*, in *Münchener Kommentar BGB*, München, 2015; J. ELLENBERGER, *§§ 229-230*, in PALANDT, *Bürgerlisches Gesetzbuch*, München, 2018.

[13] In this regard, see L. BIGLIAZZI GERI, *Profili sistematici dell'autotutela privata*, I. *Introduzione*, cit., p. 46 et seq., who, indeed, points out that «the absolute singularity of a direct intervention in the legal sphere of others for the purpose of protecting a personal interest being harmed or threatened», is basically linked to the very essence of the phenomenon of self-help, regardless of the legal system that admits it. So, even the German legal system, which, as already mentioned, regulates self-help in «apparently general terms», and, in any case, much more organically than our legal system, only admits it in the cases expressly provided for by law.

[14] L. BIGLIAZZI GERI, *op. loc. ult. cit.*

[15] On the other hand, the same doctrine does not exclude the possibility of a broad interpretation of the legal provisions on specific self-help powers, in order to «adjust the (self-help) instrument to the new needs arising due to the progressive evolution of social relations» (L. BIGLIAZZI GERI, *op. ult. cit.*, p. 46, footnote 85).

[16] Among the judgments that exclude the analogical application of legal cases of self-help, see, for all, Cass., No. 12627 of 21 December 1993, (in *Pluris*), on the right of retention.

[17] See, once again, L. BIGLIAZZI GERI, *op. loc. ult. cit.* The opinion expressed by the illustrious scholar is shared, among others, by G. BONGIORNO, *L'autotutela esecutiva*, cit., p. 26.

[18] According to A. SATURNO, *L'autotutela privata. I modelli della ritenzione e dell'eccezione di inadempimento in comparazione col sistema tedesco*, Naples, 1995, p. 234, the absence, in the Italian legal system, of a general rule on self-help is, however, only apparent, since identified with the provision of article 2044 of the Civil Code on self-defence, which would define self-help as a general and atypical power.

private individuals to behave unilaterally to defend a personal interest being harmed or threatened, not as «exceptions» to a general prohibition to resort to self-help, but as «pieces of a large mosaic» outlining the right to self-help in civil matters[19].

This approach has been adopted by a minority of scholars, because, as anticipated, according to the prevailing opinion, self-help is subject to a general prohibition[20], whose main cause is usually identified with the repression of forms of private justice, which – like revenge[21] – being typical of primitive culture, are considered as incompatible with the stage of evolution reached by modern social contexts[22]. With the consolidation of the political system and the state authority, indeed, state power has centralised

[19] In this regard, see A. DAGNINO, *Contributo allo studio dell'autotutela privata*, Milan, 1983, *passim*, and, more specifically, p. 66 et seq.; and A. SATURNO, *op. cit.*, *passim*.

[20] It is not only the direction taken by legal doctrine, because jurisprudence, when asked to assess whether the individual concrete cases could be considered as a legitimate exercise of the power of self-help or not, has also constantly reaffirmed the principle of its singularity and the consequent and exclusive admissibility of the self-help remedies provided by law (recently, Cass. No. 17893 of 31 August 2011; Cass. No. 14362 of 6 June 2013; Cass. No. 820 of 16 January 2014; Cass. No. 9060 of 5 May 2016; all available at *www.iusexplorer.it*). However, the judgements, in addition to reaffirming the aforementioned principle, extend to self-help to a greater number of cases that those admitted by law.

[21] H. KELSEN, *Teoria generale del diritto e dello Stato*, Milan, 1966, p. 343 et seq., points out that, in primitive societies, revenge was, indeed, the main, if not the only, procedural tool for managing conflicts and restoring order. With the consolidation of states, private revenge was gradually brought under the control of public bodies. «History», in other words, «teaches us that evolution progresses everywhere from blood revenge toward the establishment of courts and the development of a centralized executive power, that is, toward a progressive centralization of coercion». For this reason, according to the illustrious Scholar, it is correct to «define the decentralised coercive social order typical of primitive societies as a "right", despite its brutal techniques, including self-defence, since this decentralised system is the first stage of an evolution that ultimately leads to state law, and to a centralized coercive system. Just as an embryo in a mother's womb is a human being at a very early stage, so the decentralised coercive system of primitive self-defence is already a right, a right at a very early stage». Similarly, R. VON JHERING, *Lo spirito del diritto romano nei diversi gradi del suo sviluppo*, Milan, 1855, p. 93 et seq., who had already identified self-defence and revenge with the source of protection of rights.

[22] See, C.M. BIANCA, *Autotutela (diritto privato)*, cit., p. 130. For a general historical analysis of self-help, see M. FERRARA SANTAMARIA, *La giustizia privata*, Naples, 1937, p. 14 et seq.

the function of issuing laws and ensuring their observance by providing private individuals with bodies and instruments to protect their interests against external attacks and by precluding them, at the same time, from resorting to self-help. In modern states, the intervention of judicial authority and the application of procedural guarantees to the resolution of conflicts between associates are seen as a guarantee of legal certainty and the exact application of legal rules, and, above all, as a tool to avoid attacks against social peace.

2. Growing importance of self-help and relations with State justice

The opinion according to which our legal system applies a general prohibition to resort to self-help identifies its regulatory references with a broad network of provisions, such as Articles 392 and 393 of the Penal Code, which punish the arbitrary exercise of personal reasons through the use of violence against property or persons; Article 2907 of the Civil Code, which entrusts judicial authority – (as a rule) at the request of a party – with the judicial protection of rights; and Articles 101 and 102 of the Constitution, where it confers the judicial authority the protection of rights[23].

The rationale behind Articles 392 and 393 of the Penal Code – in the section relating to offences against the administration of justice – is usually identified, in fact, with the protection of the so-called judicial monopoly of the resolution of disputes between private individuals, with the consequent protection of public peace, which, otherwise, would be put at risk by private justice[24].

However, for the offenses referred to in the above articles to occur, there must be another element, in addition to the existence – even putative – of a right of the acting party and the possibility of resorting to a judge in order to protect it, that is, violence against property or violence against or threats to

[23] In this regard, see, among others, S. DE SANCTIS RICCIARDONE, *L'autotutela civile. L'esercizio dei diritti. Possibilità e limiti dell'autodifesa*, Naples, 2011, p. 6.
[24] M. MAZZANTI, *Esercizio arbitrario delle proprie ragioni*, in *Enc. dir.*, XV, Milan, 1966, p. 614 et seq..

persons[25]. Therefore, it is evident that the provisions in question do not punish the exercise – although arbitrary – of personal reasons as such, but the violence associated with it: in other words, they aim to prevent the violent replacement of the activity carried out by a private individual with that of a judicial body, with clear consequences for the social order. It is the protection of the so-called material or static public order, as preservation of social peace, which is different from the so-called ideal or dynamic public order, as a set of principles and values of the system.

This suggests that the provisions in question are not capable of establishing a general prohibition to resort to private self-help, even with a penal sanction: articles 392 and 393 of the Penal Code, in fact – as pointed out – do not aim to completely exclude self-help as a protection of private interests, but to sanction those socially dangerous self-help manifestations that are arbitrary and violent[26].

Based on this shareable observation, some – referring to an idea offered by an illustrious theory, which is, however, obsolete[27] – have come to the conclusion that the articles in question, «by *converse* principle (and by the principle of freedom, according to which everything which is not forbidden is allowed)» express a principle of general admissibility of self-help in our legal system[28] similar to the principle contained in § 229 of the BGB. The

[25] See, among others, A. SANTORO, *Esercizio arbitrario delle proprie ragioni (diritto penale)*, *Noviss. dig. it*., VI, Turin, 1960, p. 812 et seq.; S. ARDIZZONE, *Esercizio arbitrario delle proprie ragioni*, in *Digesto*, *Disc. pen.*, IV, Turin, 1990, p. 311 et seq..

[26] In this regard, see E. BETTI, *Autotutela*, cit., p. 529, who writes that the articles in question are not aimed at criminalizing self-help in itself, but only self-help that «is accomplished with a breach of the peace». Similarly, L. BIGLIAZZI GERI, *Profili sistematici dell'autotutela privata*, cit., p. 38 et seq..

[27] Reference is made to L. BIGLIAZZI GERI, *op. cit.*, p. 48 et seq., who initially overshadows the possibility to deduce from articles 392 and 393 of the Penal Code, by converse principle, the rule stating «that, apart from cases of legitimate defence, anyone who is objectively unable to appeal to a judge, is legitimately entitled to protect their rights, even by damaging, transforming or changing the intended use of property, or by exerting violence against or threatening a person». But, then, the Author seems to believe that the aforementioned rules, interpreted from the opposite point of view, are just an integration of the cases falling into legitimate defence, pursuant to article 2044 of the Italian Civil Code and article 52 of the Penal Code, without giving self-help a much greater latitude.

[28] A. DAGNINO, *Contributo allo studio dell'autotutela privata*, cit., p. 25 et seq.

argument is weak and justifies the observation according to which Articles 392 and 393 of the Penal Code, although not providing the legal basis for sanctioning a general prohibition to resort to self-help in our legal system, do not even provide the basis for its general recognition, as, clearly, not all behaviours to which penal sanctions are not applied can be considered, on the basis of this alone, as legitimate[29].

The fact remains that the prohibition to resort to self-help is usually seen as the inevitable implication, the "other side" of the principle of the state monopoly of justice: the protection of rights, in modern states, is judicial protection, in the sense that «protection can only be achieved by resorting to judicial proceedings, that is, by exercising the judicial function»[30]. And, in our legal system, the positive foundation of the principle in question, to which the idea of the singularity of self-help as private justice is linked, can be identified with Article 2907, paragraph 1 of the Civil Code, according to which «judicial authority is responsible for the judicial protection of rights at the request of a party, and, when required by law, also at the request of a public prosecutor or ex officio». This provision, in fact, in addition to affirming the so-called «upon motion of a party principle»[31], sets the precept, also contained in the Constitution under articles 101 and subsequent, of the allocation of the judicial function to the State, from which the corollary of the consequent exclusion of any form of self-help is derived, except in some exceptional cases admitted by law[32].

---

[29] According to A. SATURNO, *L'autotutela privata*, cit., p. 234, however, it is the provision of article 2044 of the Civil Code that can be identified with «that general rule on self-help that we are looking for».

[30] See A. DI MAJO, *La tutela civile dei diritti*[3], cit., p. 2 et seq.

[31] Among the relevant codes, reference should also be made to article 99 of Code of Civil Procedure, according to which anyone who wants a court to assert their rights shall turn to a competent judge. In legal doctrine, L. MONTESANO, *La tutela giurisdizionale dei diritti*, in *Tratt. dir. civ.* Vassalli, XIV, 4, Turin, 1985, p. 206 et seq.; S. LA CHINA, *La tutela giurisdizionale dei diritti. Disposizioni generali*, in *Tratt. dir. priv.* Rescigno, vol. 19, Volume I – *Tutela dei diritti*, Turin, 1997, p. 3 et seq.; G. MONTELEONE, *Commento all'art. 2907 c. c.*, in G. BONILINI – A. CHIZZINI (by), *Della tutela dei diritti. Artt. 2907 – 2969*, *Commentario del Codice civile* by E. Gabrielli, Turin, 2016, p. 3 et seq.

[32] See F.D. BUSNELLI, *Titolo IV. Della tutela giurisdizionale dei diritti. Capo I. Diposizioni generali*, in L. BIGLIAZZI GERI – F.D. BUSNELLI – R. FERRUCCI, *Della tutela dei diritti (Artt. 2900-2969)*, in *Commentario del Codice civile*, Turin, 1980, p. 201,

The best doctrine, however, points out that the provision in question does not affirm any exclusivity of state justice with regard to matters regulated by civil law[33], as, based on the «upon motion of a party principle» and on the relevant rights, Article 2907, paragraph 1 of the Civil Code, it does not require private individuals to resort to state judicial protection, but offers it as a state service to its citizens[34].

After all, the assumption that the exclusive exercise of justice is a prerogative of the state is immediately denied by the numerous opportunities offered to individuals to resolve their disputes with arbitration[35]. Our current legal system has come, in fact, to guarantee the freedom to resort to arbitration for all matters for which the legal system does not expressly and reasonably require that the dispute be resolved by the state jurisdiction, and, in any case, for all those disputes that do not involve a qualified general interest which – at least as a rule – can be inferred from the required

---

according to whom the first consequence of the allocation of the judicial function to the State – expressed in Article 101 of the Constitution and in the heading of Title IV of Book VI of the Civil Code, opening with art. 2907 – is the exclusion of any form of self-help, which should be admitted exclusively in the cases provided for by law.

[33] See, for all, C.M. BIANCA, *Autotutela (diritto privato)*, cit., p. 131.

[34] See also Cass., joint sittings of all divisions, No. 24883 of 9 October 2008, in *Giur. it.*, 2009, p. 406 et seq., according to which «the evolution of the legislative system, both ordinary and constitutional, shows that the centrality of the principle of jurisdiction understood as an expression of state sovereignty has become weak, and this has been accompanied by the symmetrical emergence of the need to de-bureaucratise justice, no longer seen as an exclusive expression of power state, but as a service offered to the community, whose reference power should be the efficiency of the solutions and the rapidity of judicial decisions, in a changed global context where even justice shall adapt to the rules of competition (referred to as competition of legal systems)».

[35] See, among others, C.M. BIANCA, *op. cit.*, p. 131. The same legal doctrine, however, points out that «the issues related to the notion and lawfulness of self-help shall not be resolved on the basis of the regulatory recognition of the institution of arbitration, since this is not a form of self-help», based on the fact that the latter is opposed to both state and private jurisdiction (p. 131 et seq.). On the contrary, another illustrious legal doctrine (F.D. BUSNELLI, *op. loc. ult. cit.*) - which, as pointed out, considers the principle of the state monopoly of justice as implemented in our legal system - sees ritual arbitration as the main exception to the principle in question, as resulting in «a sort of self-help controlled by the state through the definition of limits to the freedom of the parties involved».

presence of the public prosecutor in a trial[36]. This confirms the functional equivalence between arbitral justice and state justice[37], and, above all, the fact that, when dealing with civil matters, jurisdiction is not a prerogative of the state.

All things considered, therefore, the attitude of those who continue to support, a priori, the singularity of self-help based on the idea of a state monopoly of law and justice – which, for matters regulated by civil law, has now become obsolete – should be considered as inadmissible.

The ascertained non-existence, in our legal system, of a prohibition to resort to self-help is not associated, however, with the recognition – by the most authoritative legal doctrine – of a general admissibility of self-help for matters regulated by private law.

The greatest obstacle to this conclusion is the general principle of respect for the legal sphere of others, which would exclude the admissibility of self-help as a form of protection that implies interference with the legal sphere of others[38], while allowing the application of the numerous provisions authorising self-help found in the legal system also to other cases, where, in practice, the same reasoning applies[39]. In other words, according to this approach, self-help «is not lawful in itself, as taking justice into your own hands implies the violation of a third party's right, that is, an objectively unlawful fact, and there is no rule that authorises, in general, private individuals to interfere with the legal sphere of others for the protection of their rights»[40].

---

[36] P. PERLINGIERI, *La sfera di operatività della giustizia arbitrale*, in *Rass. dir. civ.* 2015, p. 608 et seq.

[37] Recently, the Constitutional Court, No. 233 of 19 July 2013, in *Giur. cost.* 2013, p. 3296, affirmed, based on Article 24 of the Constitution, the freedom of the parties to resort to arbitrators to protect their own reasons in civil matters. In legal doctrine, P. PERLINGIERI, *op. ult. cit.,* p. 584, points out that «from a hermeneutic point of view, in our legal system, there is an equivalence between arbitral justice and state justice».

[38] C.M. BIANCA, *op. cit.*, p. 133 et seq.

[39] See, once again, C.M. BIANCA, *op. cit.*, p. 134, who affirms that the many «situations in which, according to the legal system, the protection of a personal right prevails over the interest of the perpetrator of the offence (…) contribute to the definition of an open system in which the provisions authorising self-help can also be applied to other cases when the rule requires the same application».

[40] See C.M. BIANCA, *op. cit.*, p. 133.

Recently, however, a critical review of the principle of the intangibility of legal spheres has been requested, in order to re-assess it, based on the observation that «only the non-patrimonial sphere tends to be intangible, while the patrimonial sphere, when there is a prevailing legally protected interest, can legitimately be harmed».[41] Especially when it comes to contracts, therefore, the overcoming of what is now called the "dogma" of the intangibility of patrimonial spheres should lead to progress towards broader recognition of self-help as part of the general system of protection of rights.

On the other hand, as anticipated, according to part of our doctrine – although quite small – self-help should «be permitted, in principle, as it is socially useful, and even necessary, as an integration of state legal protection (…)»[42], whereas the state often fails to intervene quickly or effectively enough in the resolution of conflicts, with consequent and inevitable frustration of the interests worthy of protection involved.

According to this approach, therefore, the general and atypical power of self-help – as defined so far – would be limited by subsidiarity with respect to state protection, in accordance with the provisions of Articles 392 and 393 of the Penal Code on the offence of arbitrary exercise of personal reasons, and implicitly assumed by Articles 5252 of the Penal Code and 2044 of the Civil Code on self-defence. In our system, therefore, similarly to what is expressly provided for in the German legal system under § 229 of the BGB,

[41] P. PERLINGIERI, *Relazione conclusiva*, in C. PERLINGIERI and L. RUGGERI (by), *L'incidenza della dottrina sulla giurisprudenza nel diritto dei contratti*, Naples, 2016, p. 441.

[42] See, in this regard, A. SATURNO, *L'autotutela privata*, cit., p. 248. The author seems to follow a line of thought that is particularly developed in Germany, according to which the power of self-help is justified by the very dynamics of the legal system for its evident social utility: the State, in fact, would benefit from allowing, in principle, private individuals to directly protect the existing violated or threatened order, because it could not, in fact, always ensure such protection. Therefore, according to the Author (ibid., p. 249), «since self-help supports the legal system, it is not, contrary to popular belief, in contrast with the "essence" (or, we should say with the constitutional characteristics) of the rule of law, but is, indeed, an element capable of objectifying those characteristics». See also A. DAGNINO, *op. cit.*, p. 62 et seq., who also considers self-help as a general power, as in the existing legal systems, it is a socially useful instrument. Similarly, M. FERRARA SANTAMARIA, *op. cit.*, p. 199.

subsidiarity would also be the minimum requirement for compliance with the system of (atypical) self-help powers[43]. Moreover, albeit with perplexities, the idea is expressed that this general power of self-help finds its constitutional foundation in Article 24 of the Constitution, since, according to the currently prevailing interpretation, this provision not only recognises the right to resort to judicial authority to defend personal legal positions, but «includes all the activities required for the effective and concrete protection» of these positions[44].

The foregoing, the increasingly wide range of situations recognised by legislators for the application of self-help remedies, and the reasons and principles behind this legislative choice seem to result – but this thesis can only raise doubts – in the configuration of a general self-help power subject to the restrictions and obligations established by the legal system as a whole, and dependent, in terms of scope and contents, on a wide range of variables, such as the specific (self-) protection function performed by the remedy and its operational context (e.g., contract or non-contract law)[45].

---

[43] A. SATURNO, *op. cit.*, p. 242 et seq.

[44] In this regard, see A. SATURNO, *op. cit.*, p. 248, who points out that, in Germany, according to the constitutional doctrine, among State's obligations towards its citizens, there is «not just a simple organisation of justice, or a general obligation to protect the rights, but the provision of a rapid and efficient legal protection system».

[45] So, for example, where the self-help remedy has a sanctioning function, it could be assumed that a legal provision shall necessarily apply, granting private individuals the power to sanction other private individuals, in compliance with the fundamental principle of equality and the principle of legality, to which – with Article 25, paragraph 2 of the Constitution, or, more generally, with article 23 of the Constitution – reference shall always be made when the punitive dimension of law is at stake (see, among others, C. SALVI, *Risarcimento del danno extracontrattuale e «pena privata»*, in F.D. BUSNELLI and G. SCALFI (by) *Le pene private*, Milan, 1985, p. 330). On the complex relationships between punitive remedies and the principle of mutual equality of subjects in private law, see C.M. BIANCA, *Le autorità private*, Naples, 1977, p. 20 et seq.; and ID., *Autotutela (diritto privato)*, cit., p. 135; and, from the perspective of an «institutionalization» of private sanctions, R. CAPRIOLI, *Consenso e istituzionalizzazione nella determinazione delle sanzioni di diritto privato*, in ID., *Argomenti di diritto civile*, Naples, 2014, p. 169 ss., especially 175 et seq..

Again, in order to exemplify the concept, it should be noted that, in the contractual context, the power to unilaterally determine, as a self-help remedy, the dissolution of a contract is granted, in addition to the internal and supranational constitutional principles of solidarity, proportionality, reasonableness, etc., also by the limit provided for by art.

The interpretation of such a solution, as is evident, is a complex task assigned to legislation interpreters that carries a lot of responsibility, as it does not consist only in verifying the balance between the opposing interests outlined by the legislator with regard to individual cases of self-help, in order to establish the legitimacy of the concrete exercise of the related power or the possibility of identifying, by analogy, other hypotheses of private self-help. Those who interpret the legislation are asked – referring to the now numerous self-help remedies provided by the system, to the logic behind them, to their requirements and recurrent mechanisms of operation – to identify the boundaries of a general and atypical power to defend personal interests without resorting to any judicial authority, constantly trying to balance the power of the party resorting to self-help to demand effective protection of its own interest and the interest of the other party, who shall also be protected from any misuse of the instrument.

Basically, self-help, in the narrowest and then "positive" sense of the term, recalls the important issue of protection of freedoms and rights, but also of respect for otherness and solidarity. The impossibility of resorting to self-help often leads to a violation of rights, as a protection of rights that is provided, through a trial, after a long time from the damage suffered is, indeed, equivalent to a denial of justice. Consequently, the protection of a private individual who is subjected to self-help, through a process that assesses its foundation and rituality, is also denied justice when it is provided long time after the unjustified application of a self-help remedy.

It is clear, therefore, that the issue of self-help involves two different observations and aspects: on the one hand, the effectiveness of the protection of rights through direct defence by the injured party; on the other hand, the

---

1372, paragraph 1, of the Civil Code, according to which a contract «can only be dissolved by mutual consent and for reasons admitted by law». A limit that, if correctly interpreted, applies to "cases" of contract termination, preventing private individuals from creating atypical cases of termination of a contractual relationship, but that does not seem to be, an obstacle to the determination of hypotheses of atypical extrajudicial termination, where the reason for termination of the contract is admitted by law (see, in this regard, S. PAGLIANTINI, *La risoluzione per inadempimento del duemila*, in *Persona e Mercato*, 2018, p. 85; and, above all, ID., *Eccezione (sostanziale) di risoluzione e dintorni: appunti per una nuova mappatura dei rimedi risolutori*, *ivi*, 2015, p. 87).

strength of the guarantees aimed at protecting the other party subjected to the power of self-help against its improper use. Between these two aspects, the model of a judicial system able to withstand the opposing tensions emerges and becomes crucial. A more responsible exercise of self-help and a more effective protection of the rights of the party subjected to self-help can be possible if the judicial system is efficient. The awareness that a judicial control can be activated to promptly confirm the legitimacy or illegitimacy of a self-help remedy, in fact, is the greatest obstacle to its illegitimate or abusive exercise[46].

Contrary to popular belief, the self-help dilemma does not concern the alleged opposition between state justice and "private justice", but between state justice and its individual functions. Resorting to self-help does not mean promoting private freedoms at the expense of others and vice versa: it is not a choice between self-help and state justice. Where state justice works, it is possible to expand the area of self-help by making it a general clause of the system, because abuse – as is evident – is part of the justice system. Where the justice system does not work, and getting justice is exhausting (as it happens in our country), on the other hand, self-help can surely protect individual freedom, but often at the expense of others; and is not even a powerful economic lever, as self-help remedies, applied without timely checks, would not even guarantee the enhancement of a virtuous market. From this perspective, as is evident, constructing self-help as a general and atypical power, or, on the other hand, admitting it in those specific cases allowed by law is not a decisive factor, as, in any case, it is the impossibility of actually verifying its legitimate exercise that promotes its abuse.

So, self-help and state justice are not antagonistic or incompatible; on the contrary, they are allied powers. Only where state justice works, self-help is

[46] The idea is clearly expressed, with regard to alternative dispute resolution, by E. QUADRI, *L'arbitro bancario e finanziario nel quadro dei sistemi di risoluzione delle controversie*, in *Nuova giur. civ. comm.*, 2010, II, p. 309, who points out that «the function of *ADR*, on closer inspection, ends up depending precisely on the efficiency of the ordinary justice system, since the need for an "alternative" definition of the dispute can only derive from the parties' awareness of the existence of an ordinary judicial system, which can still decide on rights and torts, when resorting to it».

efficient and can support state justice, by allowing to reassess it, only if exercised responsibly[47].

[47] As seen with regard to alternative dispute resolution, E. QUADRI, *op. loc. cit.*, identifies the optimal relationship between ordinary judicial protection and *ADR* «with a virtuous process, through which the efficiency of justice in determining the necessary conditions for the success of ADR processes, chosen by the interested parties for their peculiar characteristics, is improved by its application and its positive effects».

Diritto Mercato Tecnologia

Numeri Speciali

2016 Lo Statuto Etico Giuridico dei Campioni Biologici Umani
a cura di Dario Farace

2017 Il Mercato Unico Digitale
a cura di Gianluca Contaldi

2018 La Ricerca su Materiali Biologici di Origine Umana:
Giuristi e Scienziati a confronto
a cura di Alberto M. Gambino, Carlo Petrini e Giorgio Resta

2019 La Tassazione dell'Economia Digitale tra Sviluppi Recenti
e Prospettive Future.
a cura di Alessio Persiani

La rivista "Diritto Mercato Tecnologia" intende fornire un costante supporto di aggiornamento agli studiosi e agli operatori professionali nel nuovo scenario socio-economico originato dall'interrelazione tra diritto, mercato e tecnologia, in prospettiva interdisciplinare e comparatistica. A tal fine approfondisce, attraverso studi nei settori privatistici e comparatistici, tematiche afferenti in particolare alla proprietà intellettuale, al diritto antitrust e della concorrenza, alle pratiche commerciali e alla tutela dei consumatori, al biodiritto e alle biotecnologie, al diritto delle comunicazioni elettroniche, ai diritti della persona e alle responsabilità in rete.

ISSN (Online Edition): 2239 -7442