

SABINO CASSESE AND EUROPEAN LEGAL CULTURE

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I AM very grateful to the European Public Law Organization for inviting me to take part in such an important academic event. It is a great pleasure, and a honor, to be here.

My earliest memory of Sabino Cassese was when I was a student, a quarter of century ago. He was teaching administrative law at the Law School at the University of Rome “La Sapienza”. I have to add that he was not my teacher - at that time students were so numerous at the Law School, that several chairs had been established. However, in a day of late November Cassese had organized a lecture with two colleagues, Yves Mény and (the late) Vincent Wright, about the origins and paths of administrative law in national legal orders. I still remember many of my fellow students asking themselves why we had to be lectured about an old French precedent, the famous arrêt *Blanco* (*Tribunal des conflits*, 8 February 1873). But that lecture was not simply much better than the average of the Law School. It was something completely different, a sort of seminar in critical thinking about public law, or law *tout court*. It was followed by a series of talks about the history of administrative law and the rationales of the principle of legality (Some of such issues were considered in the first edition of his *Le basi del diritto amministrativo* (1989), that has many common aspects with the innovations introduced by Eberhard Schmidt-Aßmann and the ‘*Neue Verwaltungsrechtswissenschaft*’ in recent years). It was an implicit invitation not to consider history and culture as aspects separated from the legal environment. That explains why I chose to follow Cassese’s course of administrative law and asked him to supervise my thesis for the law degree (the thesis did not regard national administrative law, but that of the European Community, but this is another story).

Some years later, I became a lecturer in the same Law School and had the opportunity to work with him in the Department of Public Law. It is also a great honor for me that my first formal appointment to a chair of administrative law, in Urbino, regarded the chair that he had held some years

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earlier, before moving to the University of Naples, where I, too, have spent some years, before returning to Rome. All this, I hope, together with Spyros Flogaitis and Gérard Timsit's kind invitation, authorizes me to take part in this important academic event.

The lecture that I mentioned earlier, in my view, provides us with a key to understand the importance of Sabino Cassese not simply for the legal culture of his country, but for a wider area, that of Europe.

Going back to the decades following the arrêt *Blanco* is helpful, from this point of view, for three reasons. First, in that epoch, at least the most eminent scholars were very interested in the public law of the other countries. Consider, for example, the interest shown by Otto Mayer, the founder of German administrative law, in that of France.

Second, when public law doctrines of other countries were taken into account, it was done almost always exclusively for building theories. Consider, for example, Albert Venn Dicey, the great Victorian constitutionalist, who opposed to administrative law, which he polemically called "*droit administratif*" (Sabino Cassese, *La construction du droit administratif: France et Royaume-Uni* (2000)). In the same way, in Italy, after Vittorio Emanuele Orlando succeeded in imposing a new paradigm, heavily influenced by German public law doctrines (Sabino Cassese, *Culture et politique du droit administratif* (2008); Martin Loughlin, *Foundations of Public Law* (2009), 439), such doctrines were mentioned practically in every monograph, without any reference to the underlying legal institutions. In other words, the legal materials of other countries were hardly taken into account, because they were considered simply as "foreign" law.

Third, there was no lack of contacts between the great European scholars: Cassese himself has shed light, in particular, on the letters exchanged between Santi Romano and Maurice Hauriou, who underlined the similarities between their theories of the legal order as well as the differences with the theories of Léon Duguit (Sabino Cassese, *Ipotesi sulla formazione de "L'Ordinamento giuridico"* di Santi Romano, in: *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 1972, I, 243). However, there were neither associations or regular meetings, such as those organized by international lawyers, that have gradually produced what a commentator has recently called the "invisible college of international lawyers" (Oscar Schachter, *The Invisible College of International Lawyers*, 72 *Northwestern University Law* 2 (1977)).

After the tragedies of the first part of the twentieth century, for the whole world and particularly for Europe, as the political ideals of integration replaced nationalism, public law, without abandoning its roots, entered a much different phase. I will briefly mention now the contribution

of Sabino Cassese from all the points of view just taken into account. First, while only few scholars of the previous generation, such as Jean Rivero, had showed adequate awareness of the importance of the common legal heritage, Sabino Cassese has greatly contributed to the rediscovery of such cultural substratum, as well as of the common functional needs of European States since the end of the nineteenth century, that Dicey himself had to recognize in his lectures on "*Law and Public Opinion in England*".

Second, while comparative legal analysis had been used, as it was observed earlier, in order to build theories about public law, Cassese has convincingly emphasized that the European Community, and now the European Union, has broken the borders between the legal orders of the Member States. In other words, we need to study new legal materials - codes and case law - because they can be used to solve the legal problems that continuously arise in our life. The theme of the opening of the national legal order, that is connected with the rediscovery of the common legal substratum, is a distinctive hallmark of Cassese's contribution to the more recent phase of European legal culture (see his *Diritti amministrativi nazionali e diritto amministrativo comunitario*, in: Mario Chiti / Guido Greco (eds.), *Trattato di diritto amministrativo europeo* (2007, 2nd ed.), p. 17, where he mentions Gino Gorla's essay on the *lex alius loci* at the epoch of *jus commune*. For further remarks, Giacinto della Cananea, *Sur le droit administratif européen*, *Revue française du droit public*, 2008, 145).

It also explains a third important aspect. Sabino Cassese has not simply kept alive the tradition of exchanges between great scholars that characterized the *belle époque*, the golden years before the Great War. He has, rather, either founded or promoted the creation of systematic meetings between scholars. I will mention only four of them: the bilateral meetings with Spanish, German and French scholars, and, of course, the Spetses meetings. Such examples could be easily multiplied. But the general point is that these meetings have permitted to at least two generations of younger colleagues to know and establish closer connections, as it was in the spirit of the steps taken by the founders of the first European Community, in the 1950's. God only knows how much we need to draw inspiration from those enlightened men in the difficult years that we are living. Whether, and to which extent, a 'new legal order', such as that of the EU, needs a change of mindset, that cannot be accomplished by a 'national' school, is another question, and a very important one.

I ought to add, at this point, that Sabino Cassese has not been only, in academic terms, one of the leading public lawyers of his generation in Europe. Although many know him only for his studies, he has also been Minister for public administration, in the years 1993-94. In this capacity,

he promoted the most systematic reform of the Italian administration in a period in which it seemed possible that our country could fill at least part of the gap accumulated during the previous two decades. More recently, he has been appointed constitutional judge, and in this capacity he has been *rapporteur* of several fundamental judgments of the Court, including those concerning the spoils system and the partial immunity from jurisdiction for the highest ranks of the State. In sum, he has cumulated the three roles of the lawyer that R. van Caenegem analyzed in his essay about the history of European law - those of professor, legislator, and judge (*Judges, Legislators and Professors: Chapters in European Legal History*, 1992). He has done excellent work in all these areas.

I am very glad, and really honored, that so many years after that joint lecture given in Rome in the late 1980's, years characterized by many works carried out together with Sabino Cassese as well as by some dissents, I have been able to contribute to this *laudatio*, which unlike the homage paid to Hector in the last verses of the Iliad (to pay tribute to one of Greece's greatest contributions to world culture), is neither the first, nor certainly the last homage to Sabino Cassese: "Such burial the illustrious Hector found" (*The Iliad of Homer*, b, XXIV, 1011, Translator: William Cowper).