



Panóptica
ISSN 1980-7775

SANT'ANNA LEGAL STUDIES

STALS / PANOPTICA BOOK REVIEW

Sabino Cassese

Il mondo nuovo del diritto. Un giurista e il suo tempo.
il Mulino, Bologna, 2008

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Panóptica - Revista Eletrônica Acadêmica de Direito
<http://www.panoptica.org>

Sabino Cassese, *Il mondo nuovo del diritto. Un giurista e il suo tempo*, il Mulino, Bologna, 2008, 376 pp., ISBN 978-88-15-12535-4, € 28,00.

By Giacomo Delledonne¹

This book is intended to be, according to its author, an “*intellectual biography*”². It has arisen from a series of lectures organized by the Italian Institute of Human Sciences (SUM) in Florence, in which some leading scholars have been summing up their activity and the evolution of their research topics – their “*education, context and prospects*.”³ The author is now a judge at the Italian Constitutional Court, where he has been sitting since 2005.

After deciding not to write “*confessions*” nor “*a critique of myself*” nor “*a chronicle of events which I witnessed*”⁴, this “*intellectual biography*” has three main focuses. The first one is a survey of transformations in law, institutions and understandings of them – it tries to “*describe legal world as it was when I started having to do with it, and as it is today*.”⁵ The second one consists of outlines of people who have somehow been an embodiment of these changes – “*they have symbolized the new turn in events and intellectual history. They have been important to me (so it is pleasant for me to recall them) but also to a wider circle of people, or better still to the whole history of this period*.”⁶ The third one is more similar to a collection of memories. The result is an “*objectified subjective history, mainly seen with hindsight*” – “*not a sketch on myself but on a period*.”⁷ It may be said that the author has fully caught and tried to get over the dramatic alternative which was stressed in two famous iambic pentameters by W.B. Yeats: “*The intellect of man is forced to choose Perfection of the life, or of the work, And if it take the second must refuse A heavenly mansion, raging in the dark*.”⁸

The work is written in a particularly plain, no-frills style, revealing Cassese’s intention of

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² P. 109.

³ P. 103.

⁴ P. 103 and f.

⁵ P. 9.

⁶ P. 105.

⁷ P. 105.

⁸ W.B. YEATS, *The Choice* (1931), in *The Winding Stair and Other Poems*, Macmillan, London, 1933.

drawing the balance of his activity without any embellishments or needless reflections⁹. Moreover, the book is enclosed in a list of more than thousand writings which Cassese has brought out since 1953.

Two landmarks may be found in the basic context of the new world of law – internationalization and globalization. The legal side of globalization is a massive process of ‘juridification’ (*giuridicizzazione, Verrechtlichung*): “*as economic development accelerates, the legal machine ... becomes larger and expands its range of action ... Law penetrates into politics, administration, and society.*”¹⁰ The main actors of this “juridification” are the courts: “*All in all, juridification leads towards judicialisation. Penetration of law takes place basically through proceedings.*”¹¹ “Juridification” also concerns the global arena itself, where “*an elevated standard of institutionalization*”¹² may be observed. Some transnational organizations do not act as agents of the states – their lawmaking can directly affect not only states but also individuals. These developments have triggered serious problems with regard to the traditional concepts of public law, first of all the notions of sovereignty and state. Global and national legal systems now interact in a non-hierarchical way. That is, of course, an effect of “openness to international law” (*Völkerrechtsfreundlichkeit*), a key feature in post-1945 constitutionalism – but the crisis of sovereignty and supremacy, to advantage of such concepts as networks and dialogue, is chiefly a result of the more recent globalization process.¹³

Two guiding threads dominate the survey of the main transformations in legal systems since the 1950s: hidden continuity in the evolution of systems, and similarities between legal traditions beyond self-styled differences. On the one hand, Cassese’s early interests focused on the fascist corporative regime as an unsuccessful forerunner of the post-war welfare systems.¹⁴ Historical approach is crucial in order to enrich legal studies from this side. A meaningful example of the second trend is Cassese’s long-standing inquiry into Tocqueville’s and Dicey’s assumptions about French *droit administratif* and alleged inexistence of administrative law in common law systems: “*my basic argument is that the two trends developed because of mutual contrast but evolved*

9 See p. 196.

10 P. 18.

11 P. 19.

12 P. 30.

13 See also P. CARROZZA, *Constitutionalism’s Post-Modern Opening*, in M. LOUGHLIN AND N. WALKER (EDS.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford University Press, Oxford, 2007, p. 169 ff.; F. LANCHESTER, *Pensare lo Stato. I giuspubblicisti nell’Italia unitaria*, Laterza, Bari, 2004. p. 3: “*Our age is marked by internationalization and globalization. Relations between individuals and public authorities or between individuals and groups are conditioned in ways and forms which are changing intensely and quickly.*”

14 See for instance S. CASSESE, *Corporazioni e intervento pubblico nell’economia*, in “Quaderni storici delle Marche”, 1968, p. 402 ff.

thereafter in the same direction ... problems and solutions are similar. The ways in which problems arise and chosen solutions change in relation to different contexts. Asked whether there were either resemblances in different contexts or differences in similar ones, I suggested that formal or structural differences were offset or exceeded by functional equivalence relations between the two administrative laws. Even if particular legal institutions are still deeply different, legal systems are largely similar by now.”¹⁵ That is why the comparative method in legal studies may help a scholar to clarify the main traits of his own national legal system.

Doing so, traditional assumptions on immutability of law and legal nationalism and positivism – a typical product of national states – are going, if not to collapse, to be inevitably seen with a sense of proportion. The recent vicissitudes of administrative law are typical of this state of things: the allegedly purest expression of state power is now “contaminated” by cooperation with norms coming from other state-centered legal systems or supra-national authorities. All these processes have finally rebutted Otto Mayer’s famous adage, according to which administrative law was impervious to legal and social evolutions – “*constitutional law goes by, administrative law persists.*”¹⁶

Passing from words to deeds, as far as legal studies are concerned, the increasing “*diversity of topics calls for diversity of methods.*”¹⁷ In order to do so, “*dialogue with other social sciences and history is necessary. Cooperation with other social scientists is indispensable, as well.*”¹⁸ That is the premise of a reflection on the role and duties of a contemporary law scholar.

A convenient starting point is a reflection over the personalities which are recalled throughout the book. Their common trait is a sort of eccentricity, since they cannot be classified in a conventional way. John Henry Merryman is a comparative lawyer at Stanford Law School who did not turn his attention to France or Germany but to the less studied Italy. Carlo Azeglio Ciampi is an Italian central banker who became prime minister and president without ever running for elective offices – “*a democratic oxymoron.*”¹⁹ Luigi Sturzo, a priest and a politician from the Sicilian countryside, introduced interests and methods of Anglo-American social scientists into the outmoded Italian culture of mid-20th century. Massimo Severo Giannini, Cassese’s “*mentor*”²⁰, was a leading administrative law scholar who had a major part in debunking the founding myths of his

15 P. 167.

16 „*Verfassungsrecht vergeht, Verwaltungsrecht besteht*“ – see O. MAYER, *Deutsches Verwaltungsrecht*, Duncker und Humblot, Berlin, 1924, p. 11. See also the title of an article by G. VEDEL, *Discontinuité du droit constitutionnel et continuité du droit administratif: le rôle du juge*, in *Mélanges offerts à Marcel Waline. Le juge et le droit public*, LGDJ, Paris, 1974, p. 777 ff.

17 P. 197

18 P. 62.

19 P. 54.

20 P. 44.

field.

When he sketches a brief intellectual profile of his “mentor”, the Author also traces an ideal model for law scholars and intellectuals in general in the beginning of the 21st century: “[Giannini] performed a great variety of functions: he was a prolific researcher, an academic, the leader of a considerably diverse school, an active lecturer, a contributor to newspapers and a public intellectual, a lawyer and a consultant, member of a number of ministerial commissions, in charge of important public offices.”²¹ A really rigorous and useful intellectual should be able to influence academic circles and, if possible, public opinion – this is the only way of affecting events. This should also imply his willingness to digress from his restricted research interests to contribute, for instance, to newspapers and magazines. On the other hand, the Author is conscious of the risks which have been denounced by judge Richard Posner²². “Celebrity professors” are often defrauders because “*their reputation depends on a very small academic field but they pontificate about everything.*”²³

As far as these questions are concerned, another very interesting feature of the book is the emphasis on the role of history of law and legal thought, which are paramount to understand the broader legal order: “*there are ideologies, values, prejudices, and myths which seep into the work of courts and legal scholars, and whose force is greater than positive law ... history [is] an essential part of legal studies.*”²⁴ In the Author’s opinion, however, another qualitative leap is necessary: history of legal thought must become a history of organized legal culture. Following Gramsci’s lesson, law is instrumental in “*spreading civilization*” because of its “*educative, creative, formative nature.*”²⁵ – that is why self-conscious lawyers must become proper intellectuals. Quoting a major Italian legal historian²⁶, it could be said that a scholar needs an intellectual project, a school, and control of a scientific journal. This has become more important in the last four decades or so: legal journals are no longer mere “collections of articles”. They are now used to transmit the ideas and assert the interests of their leading organizers. Sabino Cassese can hold up his own experience as an example of this evolution. He is the editor of the illustrious *Rivista trimestrale di diritto pubblico* and the founder of a Rome-based research institute focused on public administration (IRPA).

Furthermore, this ‘program’ is seen by the Author as a way of partially eluding the crisis

21 P. 44 and f.

22 R. POSNER, *Public Intellectuals. A Study of Decline*, Harvard University Press, Cambridge (Mass.), 2001.

23 P. 97

24 P. 77.

25 A. GRAMSCI, *Note sul Machiavelli, sulla politica e sullo Stato moderno*, Einaudi, Torino, 1949, p. 155.

26 P. GROSSI, *Scienza giuridica italiana. Un profilo storico 1860-1950*, Giuffrè, Milano, 2000, p. 29.

which is gripping universities in Italy and the West in general. In his opinion, universities can hardly go back to their Humboldtian, 19th-century roots – university as “*a community of students and scholars, who cultivate research and education together.*”²⁷ The Author admits that the model which has inspired him is not free from “*Socialism-in-One-Country*”²⁸ risks of “splendid isolation”.

To conclude, in spite of its tripartite structure the book contains very homogeneous and unitary remarks over a changing reality and the methods of approaching it. “*A unifying force in my studies is attention to reality. Norms may deceive if they are not take into account with people, interests and the context where they operate ... You do not have to look for internal consistency in each scholar’s thought, but consistency between methods and topics with which you are dealing, in an incessant effort to suit methods to topics.*”²⁹

27 P. 101.

28 P. 190.

29 P. 196 and f.