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An International Society of Public Law

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Why create an international learned society in the field of public law?

I shall answer this question in three points. Why a learned society? Why an international society? Why a society in the field of public law?

1. Why a learned society?

Because universities are inadequate for the continuous progress of legal scholarship. During their long history, universities throughout the world have followed cycles, high points and low points.

In the Age of Enlightenment, according to Diderot, French universities hosted only useless and noisy disputes. Later, according to Ernest Renan, they were places where one could not learn very much. In his "*Souvenirs d'enfance et de jeunesse*" (1883), he wrote "*J'ai ouï dire aux anciens de Saint-Sulpice que, vers la fin du XVIIIe siècle, on n'allait guère à la Sorbonne; qu'il était reçu qu'on n'y apprenait pas grande chose*".

Tocqueville, during his two visits to Great Britain in 1833 and 1835, found the University of Oxford to be in poor conditions.

Academies and learned societies were founded in the seventeenth century, to remedy the decline of universities. French scholars established *sociétés savantes*. In 1603, the *Accademia dei Lincei* was created in Rome, in 1666 the *Académie des Sciences* in Paris, followed by other institutions, such as the French *Institut* in 1795. These learned

societies were subject to different degrees of institutionalization and took the place of the universities, or complemented the research and scholarly debates carried out therein[1].

Today, in several countries, universities as research institutions are in decline, as the task of teaching is gaining priority. It is therefore important that new venues and opportunities for scholarly discussion, comparison, and evaluation are created.

2. Why an international society?

Because universities, established in the Middle Ages as international institutions (think of the *licentia ubique docendi*), later became national institutions, with the rise of absolutism and centralization[2].

Some universities are attempting to regain the status of international centers of culture by attracting foreign teachers and students.

However, this is not enough. Generally, in the area of law, national systems are converging, common institutions are being established, and national legal scholarships share some basic approaches.

Legal science, culture, and scholarship cannot remain purely national. Strong national traditions were established only a few centuries ago. The doctrine of natural law took for granted that it was possible to cross national frontiers, to trespass national borders.

Finally, legal scholarship is no longer an isolated field, insulated from the political sphere. Law cannot be studied and analyzed without reference to any other field[3]. On the contrary, the study of law has reestablished its place in the field of social sciences, and has reconstituted its links with history. It requires diversified techniques of analysis: not exclusive (purist or positivistic) methods, but rather, methodological pluralism[4].

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[1] See also L. Boehm, E. Raimondi (eds.), *Università, accademie e società scientifiche in Italia e Germania dal Cinquecento al Settecento*, Bologna, Il Mulino, 1981; F. Waquet, *Parler comme un livre. L'oralité et le savoir XVI-XX siècle*, Paris, Albin Michel, 2003, pp. 113 et seq., 177 et seq., 326 et seq.; L. Pepe, *Istituti nazionali, accademie e società scientifiche nell'Europa di Napoleone*, Firenze, Olschki, 2005.

[2] S. Cassese, *L'università e le istituzioni autonome nello sviluppo politico dell'Europa*, in *Rivista trimestrale di diritto pubblico*", 1990, n. 3, pp. 755 et seq.

[3] T. Lundmark, *Legal Science and European Harmonisation*, in *Law Quarterly Review*, 2014, vol. 130, January, pp. 68 et seq.

[4] S. Cassese, *New Paths for Administrative Law: A Manifesto*, in *International Journal of Constitutional Law*, 2012, vol. 10, n. 3, p. 613.

These are further reasons to establish a new international learned society.

3. Why an international learned society in the field of public law?

This question requires a longer explanation.

Public law was conceived as the branch of law most closely linked to the State. Therefore, traditionally, it was studied as a purely national product. Nineteenth- and twentieth-century nationalism contributed to this entirely national approach to public law.

This too involved learned societies: consider the German "*Vereinigung der Deutschen Staatsrechtslehrer*", established in 1922.

However, in recent decades, many developments have changed this picture.

First, in the area of public law, communication between legal systems is becoming the rule: there are transplants of national law (such as the French "*Conseil d'Etat*"), diffusion of legal principles (for example, proportionality), use of foreign law by legislators and courts (think of the universal influence of the United States Supreme Court's *Roe v. Wade* decision), imitation (for example, the success of the European judicial system in supranational organizations, over the last few years).

Second, public law increasingly consists of various different strata. Some of these are purely local or national, while some are common to all mankind[5]. These common layers consist of unwritten and written legal principles shared by all societies. Already Montesquieu, in "The Spirit of Laws", Book 19, Chapter 5, noted that "[i]t is the business of the legislature to follow the spirit of the nation, when it is not contrary to the principles of government" ("*C'est au législateur à suivre l'esprit de la nation, lorsqu'il n'est pas contraire aux principes du gouvernement*"). The spirit of the nation must therefore adapt to the principles of government, which are universal.

Third, there are several revolving doors between public law systems: national law provides norms according to which national systems are open to a higher law ("*Völkerrechtsfreundlichkeit*"); international treaties, or international (or transnational) agreements provide that national legal orders should adapt to a higher law (for example,

[5] J. Waldron, *"Partly Common to All Mankind": Foreign Law in American Courts*, New Haven, Yale University Press, 2012.

the Treaty on European Union (TEU)); foreign or higher laws interact with national legal orders through “dialogue between courts”.

The combined vertical and horizontal effect of foreign or higher law is underestimated. Consider for example the principle of proportionality: since it penetrated vertically into national legal orders from EU law, it has expanded horizontally in all areas, as it was impossible to confine it only to areas directly affected by EU law.

“Diffusion by infection” and by imitation are also underestimated. Legislators and courts use foreign law, for various purposes: usually to persuade, sometimes as precedents. Judicial comparison is spreading. Imitation may be not only voluntary, but also induced, for example through the use of indicators that rank the attractiveness of different legal systems for doing business (such as the World Bank’s “Doing Business” initiative).

Fourth, public law scholars are ever less embedded within the legal system of their country alone. They become aware that public law scholarship is not and cannot be only national: is it possible that the law of thermodynamics is the same everywhere in the world, yet public law is necessarily different in different countries? Is it true that a chemist studies subjects that are universal; that a sociologist or a political scientist studies subjects that are either universal or national; and that a public law scholar studies subjects that are intrinsically and necessarily national? Are there not common structures, a basic common grammar of public law? It is therefore advisable to refrain from studying each legal system in isolation, and to recognize, rather, that frontiers have become porous.

A common reaction to these developments is that the quest for similarities and divergences among nations is the task of the comparative scholar. A more sophisticated reaction is that the public law scholar should himself become a comparatist (this view was shared by those who established the International Association of Constitutional Law in 1981, as can be seen from the documents on its history published in the “*Révue française de droit constitutionnel*”, 2013, n. 95, pp. 527 et seq.).

I believe that it is time to transcend legal comparison. Foreign, transnational, supranational and global law play an important role, which can be either persuasive or normative. Legal systems are open or porous. Treaties and agreements abolish barriers to money transfers and to trade; and money and trade are instrumental to the transplant of legal institutions. Legislators derive “inspiration” from comparison, and adjust national legal systems to the institutions prevailing in the most developed nations. National courts

establish links with foreign legal orders by means of comparison[6]. Legal scholarship is not bound to a nationalistic approach: comparative law experts may not only study comparison, but also suggest or advise on the basis of comparison.

Comparison is not a pure intellectual effort to gain knowledge of each other: it can assume a practical function. As a consequence, legal scholarship can proceed from legal comparison ("*Rechtsvergleichung*") to truly comparative law; comparison establishes a transnational legal discourse, and comparative legal scholarship acts as a "merchant of law". Finally, comparison becomes a "source of law", with donor countries and receptor countries[7].

This legal import–export has given rise to quite a few problems. The establishment of a market for standardized legal items plays the role of a global institutional reservoir, with international consultants ready to prepare the right "recipe" for every legal order, and national legal reformers acting as scholars of comparative law and agents of change.

Higher law and foreign law are both flexible as compared to national law, although in different measures. They often require selection, interpretation, re-interpretation, and contextualization. All these operations may be subject to different degrees of manipulation and rebranding.

An institution changes if it is transplanted into a different environment. The interactions between transplanted and national institutions is a subject of the greatest interest. To understand and study the interaction between context and implanted institutions, the lawyer must ignore the usual purist approach, in which lawyers must use only a purely legal method.

These are all good arguments in favour of the establishment of a new international learned society in the field of public law.

[6] S. Cassese, *Legal Comparison by the Courts*, in *Pielagus*, n. 9, Diciembre 2010, pp. 21 et seq.

[7] I have developed these points in S. Cassese, *Beyond legal comparison*, in *Annuario di diritto comparato e di studi legislativi*, 2012, pp. 387 et seq.