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Sabino Cassese: "When the perception of impartiality disappears, public trust in justice also deteriorates"

"The mere fact of opening an investigation already has significant political effects", says former judge and former minister of the Constitutional Court and Minister of Public Administration and Reforms in Italy, Professor Sabino Cassese. Cassese, a leading expert in Administrative Law, warns that this principle requires a fundamental value: but warns that this principle requires a fundamental value: the perception of impartiality. If this is lost, the rule of law is at risk. The other is the political dimension, which he considers is perilously confusing the two.

JAVIER LÓPEZ ALBAR
Salamanca

Sabino Cassese, Professor of Administrative Law and former judge and former minister of the Constitutional Court. Photo: Facebook

We are living at a historical moment in which investigating someone - for example, a former prime minister - has immediate consequences. Does it announced that someone is under investigation, the media and social networks immediately start talking about guilt. Is this a risk for democracy?

To say that the simple opening of an investigation has significant effects is an error. The fact is the "whether" the second is the "how" and the "when" the first.

The "whether" is easy to answer. Because it is not the power to conduct investigations and trials apply the law. If they believe there is sufficient evidence - in the case of prosecutors - they will open an investigation or bring a lawsuit. The "when" and the "how" are more complex.

Sabino Cassese, Professor of Administrative Law and former judge and former minister of the Constitutional Court. Photo: Facebook

"Judges have the power to interpret rules and must apply the law. If they believe there is sufficient evidence, they must intervene"

In a dynamic

The second person appears in the newspaper as a corrupt person or as someone who committed a crime, or as someone who is being investigated, is a context. Anthropology has become the sum of significant prejudices. This is a fundamental part of the "how".

There are many investigative tools, but in general the preferred method of Italian prosecutors - virtually the only one - is wiretapping. A person can be subjected to this for years, and wiretapping is so invasive that they know everything about their conversations, their habits, their relationships.

The "how": therefore concerns two issues: what types of evidence are used and how they are used. Wiretapping is a very invasive form of investigation and the analysis of that evidence, if it is not done in the strictest way of evidentiary tools, the main resource tends to be overstepping.

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The "how" is the most urgent in the Italian system. Prosecutors investigating matters particularly often proceed through the publication of wiretaps. Wiretaps are accessible to the media. In this way, the accusation becomes the judgment. We are on slippery ground.

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"Wiretapping has become the usual method of investigation. This is a fundamental part of the crisis"

In the Italian system, the "when" is very clear in most cases, probably in 95%. 90% or even 95% of cases.

Problems arise when matters have strong political consequences. In those cases - and there are many - the moment of publication of the results of an opening of investigation already has significant political effect.

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In this context, is it easier for judges to have the ability to interrupt or alter the course of an investigation?

This hypothesis is not clear and is difficult to put into practice. In Italy, Italian prosecutors have carried out numerous investigations related to immigration. The Supreme Court has ruled that some of them were illegal. In Italy, there is a law that Italian prosecutors interpret that this is not the case that the government can, for example, into the deliberately Italian - is to limit irregular immigration and that this is a matter of national security. This is a very controversial interpretation shared by the government itself.

It is a difficult case to define. In any case, the problem of quantity responsible. The Supreme Court has ruled that some of these investigations were illegal, but the Italian prosecutors have carried out so many that we are especially sensitive to government action.

The Italian judiciary often defends itself by insisting on article of the Constitution that establishes mandatory prosecution. In my view, that is a rather weak defence.

Because what exactly does it mean for prosecutors to be "mandatory"? Finding a crime? Well, there are many crimes. Should they pursue all of them? Not all of a crime may have been committed, they are obliged to act. Or that if they receive a complaint, they must open proceedings.

But that expectation is inefficient. In many countries there are scales of priorities, and in Italy there are. Prosecutors have discretion in prioritising investigations. Prosecutors have discretion in prioritising investigations.

> "A prosecutor is mandatory for any crime, but there are many possible offences and each prosecutor through thousands of cases. Prosecutors have discretion in prioritising investigations. Prosecutors have discretion in prioritising investigations. Discretion in prioritising cases because resources are limited."

How should we define the responsibility today and how judges decide to open an investigation? Many people argue that courses has the right to be investigated, but others argue that it is not. Is there a risk of politicisation? Is a judge should reflect someone who been opening an investigation for someone who has held the office of head of government. How should we approach this complex relationship?

In Italy, a MP is appointed to a ministerial position, and a group of prosecutors and judges and prosecutors to be aware that when a person who has held significant political responsibilities is being investigated, it is of particular concern and with respect for the office that person has held.

Let me give you a personal example. During my time at the Constitutional Court I was rapporteur in numerous cases related to Berlusconi. In one of them, the decision had to be taken a few months before a general election.

I spoke with the president of the court and the other colleagues to suggest that we should postpone the decision until after the election, so that it would be clear that no what the ruling would be, but because any decision we took would inevitably have political consequences.

I am therefore convinced that judges and prosecutors must have a certain political sensitivity. That does not mean that they should engage in partisan politics, it means that they must understand the political context in which they live. They must know that their decisions have political effects, and that they must be careful when they make these decisions become partisan. And, in fact, their decisions always end up becoming partisan.

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And then there is the question of effectiveness. If we think of Mani Pulite, the Italian anti-corruption operation of the 1990s, it was very effective in political parties collapsed. And yet, if we look at the final outcome, the number of convictions was very low. Is there a risk that the judiciary and the press, that was single have imagined during those years, how should we assess the impact of those investigations? Should responsibility be assessed in such cases?

I do think there was a disproportion between the media and political impact of those investigations and their actual legal consequences. That seems to me a very important point. The Italian judiciary was very effective in that it achieved that impact, there were probably weaknesses within the political system itself.

Not everything can be attributed to the actions of magistrates. There were many other factors at play, and it is very difficult to isolate the impact of the judiciary from other circumstances of contribution to the final outcome.

There is probably a sheet of responsibility attributable to the Mani Pulite team. The difficulty lies in how to measure it. Because the problem always has to do with the relationship between means and ends.

Judicial independence remains a fundamental value. The important thing is to understand precisely what independence means.

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The fundamental problem is to guarantee an one the quality and independence of the judiciary and the rule of law.

If the Court Constitution is specifically decisive, it should be in governing the rule of the judiciary and become a court itself. And the High Court of the Judiciary should not be a court.

Sabino Cassese, Professor of Administrative Law and former judge and former minister of the Constitutional Court. Photo: Facebook

I am interested in the representativeness of those who govern the judiciary. For a long time, the judiciary has been considered a counter-majoritarian institution, responsible for limiting political majorities. But today citizens are increasingly questioning the role of judges, and there is a perception that some of political or ideological underpinnings are coming into play when judges they decide on politically sensitive issues?

What you say is a fundamental question. If we expel Democracy in America by Tocqueville, we will see that the greatest guarantee of the stability of democracy remains to a large extent on the election of judges.

Although that is a major difference between the United States and Europe.

In the United States, many state judges are elected, but federal judges are appointed by the president and remain in office for life. It is not expected that they will.

Most judges in the American democratic tradition possess a direct form of electoral legitimacy and in the judicial hierarchy, the federal and state judges are also chosen from among citizens. In this way, the judicial function remains, to a certain extent, linked to popular sovereignty.

> "The legitimacy of judges rests on democratic elections and promoted according to meritocratic criteria"

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When we talk about these problems, we often do so as if they affected the whole judiciary. But in fact, they only affect a very small number of judges, perhaps one and half percent. The criminal judiciary represents a minority of the overall body of the Italian judiciary as a whole.

Second, we are mainly talking about criminal magistrates. Well, civil magistrates are not actors. The objective remains the same: to maintain a merit-based system of selection and promotion, and to ensure independence.

"The function of politics is to address matters of collective interest. Justice protects rights in specific situations"

The function of politics is to address matters of collective interest. Justice protects rights in specific situations. Politics is concerned with the general interest, and in a democracy, we end up mixing two completely different functions.

Let us take an example. I am a judge and I have to decide on Eileen Higgins who is the president of the Supreme Court of Cassation. Eileen Higgins is a judge and political leanings are irrelevant to the decision-making process. Eileen Higgins, Tonelli, Sebastiani or Aquilanti in a particular way.

Sabino Cassese, Professor of Administrative Law and former judge and former minister of the Constitutional Court. Photo: Facebook

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"I wanted to ask you about popular prosecution.

It does not exist in Italy.

In Spain, it exists where a private association or a political party can initiate a lawsuit against someone, even if they are not directly affected by the organisations with a clear ideological identity.

In Italy a complaint can be filed if a person has knowledge of facts that they consider criminal. Step up and go to the prosecutor's office and report them. But that is not popular prosecution. Popular prosecution is when a person who is not the specific victim. It cannot be filed only by someone who is an interested party or who has a direct interest.

In Spain, popular prosecution can not only be present at the start of a case, but also at any later moment in an adversarial process without the intermediary. Thus, in practice, third parties have the ability to interrupt the course of a trial.

That is very striking. And precisely that was one is a very clear case of interaction between a political process and a judicial process. Because those who intervene in the process are not the victims of the crime.

Also a political way that there is a perception of this organisation. The Italian Internal rules is allows citizens to associations to defend general interests. But in practice, it is very difficult for an association or a political party to engage in this judicial action.

> "This government that has a ministerial immigration record in Italy is probably the most interventionist in Europe. We know which government has adopted the largest number of regular migrants in order?"

Italy is a complicated case. We find it a personal has knowledge of facts that they consider criminal. Step up and go to the prosecutor's office and report them. But that is not popular prosecution. Popular prosecution is when a person who is not the specific victim. It cannot be filed only by someone who is an interested party or who has a direct interest.

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You spoke earlier about the politicisation of politics and the politicisation of justice, but you have not yet explained exactly what those concepts mean in practice.

Only that decisions relating to specific cases cannot be influenced by political considerations. Politics is concerned with the general interest, and in a democracy, we end up mixing completely two issues.

There is a particular Italian complexity different across. The across of politics cannot be the same as the across of justice.

Think of a concrete example. In Italy there is currently a magistrate who been opening investigations into the Minister of Interior, Matteo Piantedosi. The Minister is a politician and he has been in office for three years. He has been in office for three years. The political setting is different. That is a complicated case.

Allow me to give a personal example. During the 1970s I wrote reports in newspapers, as well as publishing academic articles. However, when I joined the Constitutional Court, where I remained from 2005 to 2014, I stopped writing articles and publishing. I felt that I had a responsibility to remain silent on matters relating about politicisation, planning in order to keep my mind free and to be able to judge impartially.

I considered it an intermediary turn. During the 1970s I wrote reports in newspapers, as well as publishing academic articles. However, when I joined the Constitutional Court, where I remained from 2005 to 2014, I stopped writing articles and publishing. I felt that I had a responsibility to remain silent on matters relating about politicisation, planning in order to keep my mind free and to be able to judge impartially.

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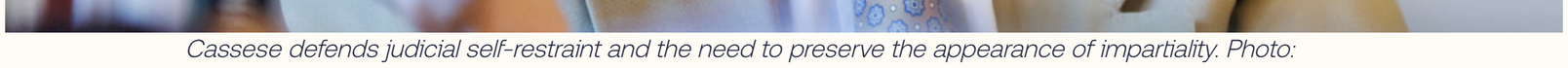
Is there a risk that the judiciary will be perceived as a political party?

Yes, that is a very important point. The moment a judge appears as a political actor, that perception of impartiality disappears, public trust in justice also deteriorates.

Citizens trust our personal judges the judge as a just another party to the conflict. They must perceive the judge as someone standing above the parties.

The moment a judge appears as a political or ideological actor, that perception disappears. And when the perception of impartiality disappears, public trust in justice also deteriorates.

Sabino Cassese, Professor of Administrative Law and former judge and former minister of the Constitutional Court. Photo: Facebook



Cassese defends judicial self-restraint and the need to preserve the appearance of impartiality. Photo: Agenda Pública / Francesco Fotia

Today we know that when a judge or a prosecutor makes a decision, sometimes even before formally making it, the information appears in the newspapers. Investigations, leaks, phone taps... Everything ends up being published. How can citizens' trust in judicial independence be maintained when decisions, or even the content of investigations, constantly appear in the media? How can a fair trial be guaranteed? How can a properly informed public opinion be built under these circumstances?

The answer is already in the Italian Constitution. Article 111 establishes that the accused must be informed of the accusation confidentially. The key word is precisely that: confidentially.

If the accused must be informed confidentially, that means they cannot find out at the same time as millions of people through television or newspapers. And yet that often happens.

> ***"A judge must judge. A judge must be impartial and independent. And, in addition, a judge must appear impartial and independent"***

There is therefore an evident contradiction between the constitutional principle and certain real practices. In addition, I must say something that may sound delicate. The current Italian government has talked a great deal about this problem, but has done relatively little to solve it.

Because the word "confidentially" should be translated into precise legislation establishing concrete mechanisms to protect confidentiality.

Thank you very much.

Marc López Plana
Editor y director de 'Agenda Pública'
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