Rodolfo Sacco in my life and teaching

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1. When I studied law and philosophy in Leuven in the years up to 1981, Rodolfo Sacco was not known to me, but this was more the result of a general ignorance of Italian legal scholarship by most of my professors, apart from François Rigaux[1] and some proceduralists. After having studied at Yale, I thought I was in need of original ideas in jurisprudence and there was no better place in the world to get inspiration than Italy; so I spent a year - 1984-85 - in the libraries of the *Universita degli studi di Bologna* during the day, and in the *osterie* of Bologna at night.

It was there, as a researcher in contract theory, considering also legal history, legal sociology and procedural law relevant for my research - not mentioning comparative law because that is evident - that I got acquainted with the work of at least three important Italian masters who influence my thinking until today: Gino Gorla, Rodolfo Sacco and Salvatore Satta, and whose ideas I have tried to convey to my own students.

2. I was so fortunate to be introduced to Gino Gorla by Mauro Cappelletti, a very good friend of my father, who in 1984 in Fiesole gave me a copy of the collected essays in *Diritto comparato e diritto comune europeo*[2]; in the library in Bologna I read his seminal work *Il contratto* (1954)[3]. Sacco was evidently to modest when he wrote that he had only been the notary who had put into writing the new things discovered by Schlesinger, Gorla and René David[4], but in studying Gorla I also discovered Sacco's work on contracts and I bought in 1984 a copy of the 1982 edition of *Il contratto*[5] (with Giorgio di Nova as co-author), if I remember well at Feltrinelli in Piazza di Porta Ravegnana.

I must admit I was at that time only studying his works on contract law and not on comparative law methodology (there was so few method in my work that my promotor Walter Van Gerven suspected me of having read too much *Against Method* by Feyerabend, although I was more into Gadamer's *Wahrheit und Methode* I have to say, even if Gadamer's critics said the book should have been called Wahrheit oder Methode).

I was interested in his critical analyses of definitions - with his "Définitions savantes et droit appliqué dans les pays romanistes"[6] and those of his disciples, especially P.G. Monateri's *Sineddoche*[7], and his articles on the law of evidence - "Presunzione, natura constitutuva o impeditiva del fatto, onere della prova"[8]-. The article that made him known in the Anglophone world - "Legal formants"[9] - was not published yet.

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[1] François Rigaux (1926-2013) was not a professor at the KU Leuven but at the UC Louvain, but he had a Francqui chair in Leuven and gave in the Spring 1981 a course on legal pluralism.
[2] G. GORLA, *Diritto comparato e diritto comune europeo* (Milano: Giuffré 1981).
[3] G. GORLA, *Il contratto, problemi fondamentali trattati con il metodo comparativo e casistico* (Milano: Giuffré, 1954), 2 volumes.
[4] Rodolfo SACCO, *Che cos'è il diritto comparato* (Milano: Giuffré 1992), 284.
[5] Rodolfo SACCO, & Giorgio DI NOVA, *Il contratto*, as part of the *Trattato di diritto privato*, diretto da Pietro Rescigno, vol. 10-2 (Torino: UTET 1982).
[6] *RIDC* 1965, 827 ff.
[7] Pier Giuseppe MONATERI, "Règles et technique de la définition dans le droit des obligations et des contrats en France et en Allemagne: la synecdoque française", 36. *Revue internationale de droit comparé* 1984, pp. 7-57 (see also his *La sineddoche. Formule e regole nel diritto delle obbligazioni e dei contratti* (Milano: Giuffrè 1984)).
[8] *Riv.Dir.civ.* 1957 I, 399 ff.
[9] R. SACCO, "Legal Formants: A Dynamic Approach to Comparative Law", 39. *AJCL* 1991, 1 v. en 343 v.

I used *Il contratto* very much for my Ph.D., officially a work on good faith in contract law, but in fact rather a critical study of contract law theory[10] -, quoting e.g. "Non è possibile definire il contratto in modo unitario attraverso una enumerazione dei suoi componenti costitutivi"[11], using the authority of Sacco to state that a contract only requires the consent of the obliged party[12], that the meaning of silence is not a factual question but a question whether there is a burden (*onere*) to speak[13] and to doubt about the distinction between *erreur* and *erreur-obstacle*[14]. I was especially fascinated by his ideas about cryptotypes, using "Un cryptotype en droit français: la remise abstraite"[15], and the Voce *Crittotipo*, in the *Digesto*[16]: "quelle regole che esistono e sono rilevanti, ma che l'operatore non formula (e che, anche volendo, non saprebbe formulare)".

3. Given my occupation with contract and property law, Sacco helped me see things in my own French-based legal system that officially do not exist but are nevertheless there: contracts without acceptance, abstract transfers, consensual acts of conveyance to be distinguished from the underlying contract, and from my own discovery cryptotypes as set-off by unilateral declaration, direct actions hiding rights of pledge, etc.

It was only later that I paid more attention to cryptotypes in the wider sense, not only hidden operative rules, but also pre-understandings and practices of lawyers that in fact play a determining role in the way law functions, but are rarely described in the law in the books, leading to Sacco's idea of *diritto muto*, mute law[17].

Already in those years Gorla and Sacco thus helped me to develop the types of observations that characterize comparative studies according to the comparatist in anthropology Alan MacFarlane: "distancing the over familiar, familiarizing the distant, making absences visible"[18].

4. It was finally in May 1992 that I met Rodolfo Sacco in person, at the *Journées Louisianaises* of the Association Capitant, when I was practicing "distancing the over familiar, familiarizing the distant" by teaching at the University of Amsterdam the new Dutch law of property and obligations (since September 1989), which again gave me a different perspective to look at my own property law. It was the first of many more occasions to listen to and speak with him, often walking, in Trento, Torino or places like Taiwan (2012), or narrating his life (as during my last visit to him in 2019).

In Louisiana, Rodolfo Sacco was - as often - accompanied by young scholars, listening in full admiration to his analyses. But he was equally honestly interested in their work and analyses, and probably also in mine, as he invited me to come to Trento in June 1994. More precisely, it was Ugo Mattei who invited me, on recommendation of Rodolfo Sacco, for a brainstorming meeting on

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[10] M.E. STORME, *De invloed van de goede trouw op kontraktuele schuldvorderingen* (Brussel: Story 1990), online @ https://bib.kuleuven.be/rbib/collectie/archieven/boeken/storme-goedetrouw-1990.pdf.

[11] *Il contratto*, 11-13; M.E. STORME, *De invloed van de goede trouw,* 42-43.

[12] *Il contratto*, 19; R. SACCO, "Contratto en negozio a formazione unilaterale", in *Studii in onore di Paolo Greco* (Padova: CEDAM 1965), II, 866 ff.; M.E. STORME, *De invloed van de goede trouw,* 84.

[13] *Il contratto*, 29-31; M.E. STORME, *De invloed van de goede trouw,* 42-43.

[14] *Il contratto*, 131-132 (errore distruttivo del consenso / errore viziante); M.E. STORME, *De invloed van de goede trouw,* 56.

[15] in *Études offertes à René Rodière* (Paris: Dalloz 1981), 273 ff.

[16] *Digesto discipl. priv. Sezione civile* (Torino: 1989), 39

[17] See R. SACCO, 39. *AJCL* 1991, (343) 384 ff.; R. SACCO, "Le droit muet", *Rev. trim. dr. civ.* 1995, 783; R. SACCO, "Mute law", *AJCL* 1995, 455 ff. For an interesting recent study on cryptotypes or hidden factors in modern Chinese law, see Lihong ZHANG, "A Brief Analysis of Cryptotypes in the Chinese Civil Code: Legalism and Confucianism", in M. Graziadei & L. Zhang (eds.), *The Making of the Civil Codes. A Twenty-First Century Perspective* (Springer), 365 ff.

[18] A. MACFARLANE, "To contrast and compare", V.K. Srivastava (ed.), in *Methodology and Fieldwork*, (Delhi: Oxford Univ. Press), 94 ff., also @ https://www.alanmacfarlane.com/FILES/Contrast.htm. See also his unpublished manuscript *The comparative method. Preliminary thoughts* (1992), http://www.alanmacfarlane.com/TEXTS/COMPARISON.pdf.

June 18 to prepare the Trento common core project, present i.a. also Mauro Bussani, Reinhard Zimmermann, and Sjef van Erp. And this Trento project has been the main alley through which Sacco's ideas have arrived also to other scholars in the Low Countries.

The brainstorming and succeeding meetings in Trento gave me the full opportunity and pleasure, but also the moral duty, to get acquainted with Sacco's methodological writings and to discover the theory on legal formants. This brings me to a second important lesson learned from Sacco (the first being the cryptotypes), in relation to the notion of common core and the different ways to study similarities and differences.

5. In order to simplify, let me oppose two opposite visions of a common core. On one hand, there is a classical, harmonizing vision of "common core": the idea that when we set aside the technical subtleties of legal systems, the contingent ballast, in short the periphery, we find a common core at least in European private law[19]. Thus e.g., Rudolf Schlesinger argued in 1957 that the time has come to substitute the goal of one law for the more realistic aim of crystallizing a common core of legal principles, recognizing that outside of that common core the detailed legal rules differ[20]. It is also illustrated by a quote from Reinhard Zimmermann, even if it would not do justice to him to reduce his vision to this: "most of the basic concepts and evaluations informing the law of contract have not been deeply affected by legal developments under the auspices of legal nationalism. The differences between the national legal systems are largely on the level of technical detail"[21].

A raher nuanced version of this was expressed by Hein Kötz at the Maastricht conference on *The common law of Europe and the future of legal education* in 1991: 'finding a European common core of principles (...) is simply to mark out areas of agreement and disagreement, to construct a European legal *lingua franca* that has concepts large enough to embrace legal institutions which are functionally comparable"[22].

Without denying that there may be some truth in these positions, there is clearly a difference with another vision of the common core much closer to Rodolfo Sacco, combining his ideas on *traduttologia*, legal formants, and *sistemologia*.

6. First, *traduttologia*: Rodolfo Sacco so often warned us against the misleading idea that the use of the same term, or of a literal translation of it, in different legal systems, refers to the same content. Sure, there will be an overlap, but it is an optical illusion to believe that those words also have the same boundaries and thus the same meaning[23].

And, yes, also Hein Kötz knew this, as he more recently stated: "There is nonetheless evidence showing that such general principles are susceptible to widely differing interpretations which depend on lawyers' traditional patterns of thought and frames of mind, on their working styles and

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[19] See for various examples of this vision my overview in M.E. Storme, "Common core projects", in J.M. Smits, J. Husa, C. Valcke and M. Narciso, *Elgar encyclopedia of comparative law* (Elgar 2023), https://doi.org/10.4337/9781839105609.common.core.projects.

[20] Rudolf SCHLESINGER, "Research on the General Principles of Law Recognized by Civilised Nations", 51. *AJCL* (1957), 734-753. See also Rudolf SCHLESINGER en Pierre BONASSIES, "Le fonds commun des systèmes juridiques - Observation sur un nouveau projet de recherches", 15. *RIDC* 1963, (501) 512-522.

[21] R. ZIMMERMANN, "Ius Commune and the principles of European contract Law: Contemporary renewal of an Old idea", in Hector MacQueen en Reinhard Zimmermann (eds.), *European Contract Law. Scots and South African Perspectives* (Edinburgh: Edinburgh University Press 2006), (1) 3.

[22] H. KÖTZ, "Legal education in the future: Towards a European Law School?", in Bruno De Witte & Caroline Forder, *The common law of Europe and the future of legal education* (Deventer: Kluwer 1992), (31) 42.

[23] See A. GAMBARO, "Rodolfo Sacco: l'intellectuel le juriste le comparatiste", in K. Boele-Woelki en D. Fernàndez Arroyo (eds.), *The Past, Present and Future of Comparative law - Le passé, le présent et le futur du droit comparé*, (107) 109; R. SACCO, "Le passé, le présent et le futur du droit comparé", *ibidem* (103) 104.

methods of interpretation, on the different procedures applied by the courts in various countries, and on the type of contract usually litigated before the higher courts of a country"[24].

This comes closer to Sacco's need for a *sistemologia*: a study of the characteristics of a system that influence the law in action and its development. But first a word on the relationship between legal formants and that other vision of common core, where the periphery is as important as the centre, with a wink to the way these words were used by Carlo Ginzburg[25].

7. When we see that within legal systems there are oppositions and even contradictions between different formants, we may detect that often formants that are dominant in the sense of determining the operative rules today in one legal system, are not absent in other systems that have a different operative rule today, but rather minoritarian or dormant, and vice versa. Many of the differences in operative solutions between different systems are not so much differences *between* these systems, as *within* these systems. One could even formulate it as a different form of *praesumptio similitudinis:* not that the law of different countries is the same in its solutions, but that the same formative elements for a solution will be found in the different systems, but more dominant in the one and more dormant in the other.

What's dormant today may be awake tomorrow. If there were only one idea from Sacco I have to teach to my students, it is that comparative law should not only study how legal systems solve concrete questions today, but also how they may solve them in the future. He called it a dynamic rather than static vision of comparative law, we could also call it a diachronic rather than mere synchronic vision. That requires a study of the way in which a case is solved. It helps us to see how contingent or well-entrenched conceptions and rules are in a given system, and thus to what extent or at what speed they may change. As Antonio Gambaro stressed[26], Sacco obliges us to pay attention to "la durée", long term phenomena, a vision he shares with e.g. James Whitman[27]. Formants that may now be hidden or suppressed may come back in the long run. In this way, Sacco has partially corrected the famous, for legal science pessimistic, *dictum* by Julius von Kirchmann: „Drei berichtigende Worte des Gesetzgebers und ganze Bibliotheken werden zu Makulatur"[28].

An analysis in the line of Sacco's *legal formants* is thus not only relevant for retrospective jurisprudence, for the question of how future judgments will deal with present or past facts, but also eminently practical for prospective jurisprudence, as to the advice to be given by lawyers to their clients. With the words of Kurt Lewin: „There is nothing more practical than a good theory". A theory of legal formants is a good theory, which is also relevant for practice.

This also means that we need more than a simple factual method. A lot of relevant knowledge cannot be deduced from a first level factual method. Whereas comparative law 50 years ago did not devote enough attention to case law, today there is a risk that attention is too exclusively

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[24] H. KÖTZ, "Comparative Law: A Veteran's View", in *The Past, Present and Future of Comparative law - Le passé, le présent et le futur du droit comparé*, (25) 34

[25] See E. CASTELNUOVO and C. GINZBURG, "Centro e periferia in storia dell' arte italiana", in *Storia dell'Arte italiana, vol. 1 Questioni e metodi* (Torino: Einaudi 1979), 285 ff., reprinted as a separate boek *Centro e periferia nella storia dell'arte italiane* (Milano: Officina Libraria, 2019).

[26] A. GAMBARO, " Rodolfo Sacco : l'intellectuel le juriste le comparatiste", in K. Boele-Woelki en D. Fernàndez Arroyo (eds.), *The Past, Present and Future of Comparative law - Le passé, le présent et le futur du droit comparé*, (107) 108.

[27] See my laudatio for prof. Whitman at his doctorate honoris causa at the KU Leuven 26 february 2015, @ https://www.academia.edu/11790461/Laudatio_Dr_h_C_Prof_James_Whitman or https://www.kuleuven.be/communicatie/congresbureau/corporate-evenementen/patroonsfeest/overzicht-eredoctoraten/laudatios/2015-laudatio-james-whitman.pdf.

[28] Julius VON KIRCHMANN, "Die Werthlosigkeit der Jurisprudenz als Wissenschaft" (Berlin: Springer 1848), @ https://sammlungen.ub.uni-frankfurt.de/1848/urn/urn:nbn:de:hebis:30:2-21092.

directed towards case law, especially if one limits its analysis to the "*massima*" of judgments, without a critical analysis of the elements that may explain the outcome in the specific case, and that may or may not be found in the judgment itself, but nearly never in the *massima*.

8. This brings me to the *sistemologia*, study of the characteristics of a system that influence the law in action and its development. I refer to the quote from Kötz *supra*. Also for Sacco, these formants embraced much more than the traditional elements of legislation, case law and doctrinal scholarship. In his *Introduzione al dititto comparato*[29], Rodolfo Sacco refers to Gorla again to stress the importance of such general characteristics, which may be well-known or mute cryptotypes: general modes of legal thinking: interpretation methods; models of legal education; mode of formation of legal professions; factual functioning of professions; styles of legislation, judgments and doctrine; factual relationships between legislator, judges and professors; factual authority of precedents.

When teaching this to me students, they may be frightened by the task, but soon understand the incredible enrichment of their analysis when trying to follow it.

Now that Rodolfo is *muto*, he still speaks loudly through his ideas. May he do so during the next 100 years.

[29] R. SACCO, *Introduzione al dititto comparato* (Torino: UTET, 5a ed. 1992, last edition by Sacco alone), 129.