

In Memoriam

Rodolfo Sacco's Conception of The Comparative Law Method: A Brief Review

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In this contribution to the memory of the world-renowned Italian comparative law scholar Rodolfo Sacco, I have revisited his book *Einführung in die Rechtsvergleichung*, which he co-authored with Piercarlo Rossi in 2017 in its third edition.¹ It was translated from Italian into German and thus belongs to the German-language literature on methodological aspects of comparative law. It is largely based on Rodolfo Sacco's numerous publications in various languages. An abridged version of the most important aspects of the book under review can be found in his article on 'Legal Formants: A Dynamic Approach to Comparative Law' published more than thirty years ago in the *American Journal of Comparative Law*.² It still belongs to the most important publications in this field.

I myself have encountered Rodolfo Sacco on several occasions, as a participant and speaker at numerous World Congresses of the International Academy of Comparative Law, lately in 2014 in Vienna, of which he was a titular member, as well as during the honouring of great comparatists, which was also bestowed upon him by the same Academy in Paris in 2016. Always immaculate in his appearance, a gentleman of the old school, among his entourage were many Italian scholars and students who literally held him high. A truly extraordinary sight to behold.

The *Einführung in die Rechtsvergleichung* is certainly not light reading, especially for beginners. Eclectic in parts, Rodolfo Sacco conveys his extensive experience in and advice on comparative law as well as on dealing with foreign law. His explanations repeatedly contain references to and comparisons with linguistics, and vivid and plausible examples are provided. Topics raised and

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¹ R. Sacco and P. Rossi, *Einführung in die Rechtsvergleichung* (Baden-Baden: Nomos Verlagsgesellschaft, 2017).

² R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' *American Journal of Comparative Law*, 1-34, 343-401 (1991).

discussed at various world congresses, especially those of the International Academy of Comparative Law, are presented in detail, as are views of other comparative law scholars (eg Constantinescu, Gorla, David, Lambert, Strömholm, Ancel) who belong(ed) to Rodolfo Sacco's generation. These examples are refreshing and bring the methodological explanations to life, but they are snapshots from a time thirty to forty years ago.

Sacco and Rossi deal predominantly with well-known topics of comparative law, but supplement them with some focal points that are not found so prominently in other introductions to comparative law. The first section covers the real and perceived problems of comparative law (chapter 1), the subject matter of comparative law – here Sacco's well-known doctrine of fundamentals has been developed – (chapter 3), some areas of application, including contracts and legal transactions, tort liability and the transfer of movable property (chapter 4), the role of comparative law in legal education (chapter 6) and the division into systems and families (chapter 7). Special chapters are devoted to comparative law and legal translation studies, as well as to the results of comparative law, whereby the authors distinguish between the contribution of comparative law to legal scholarship, the change of models, as well as its importance for the unification of law (chapter 5) and, finally, the presentation and discussion of significant models and moments/events in Roman legal systems (chapter 8). There, not only French and Italian law are subjected to an in-depth analysis, but also the Germanic legal system including an analysis of the form and content of the Civil Code of the former GDR. Not to be left unmentioned are the bibliographical references compiled at the end of the book, which include works on comparative law and comparative law studies themselves.

The book contains many important basic rules on comparative law in its first chapter, the content and subject matter of which cannot be emphasized often enough. I have selected five references/pieces of advice that seem important to me and will comment on them on the basis of my own experience.

1. Those who assume that comparative law is a method have too limited a conception of the comparative law method (because they do not understand that several methods can be used for comparative law and that there is not one pure method of comparative law).³

Many comparative law scholars agree with this statement. Nevertheless, a canon of requirements has emerged for the comparative law process, which consists of various elements or steps. A distinction must be made between description, analysis, explanation and evaluation. There is agreement that the comparative law process and the requirements to be met can be described as follows: Comparative law is a scientific method in which the rules of certain

³ n 1 above, 19 no 45.

factual problems from at least two legal systems are set in relation to each other in order to (1) detect their similarities or differences, (2) explain the causes for the similarities or differences and (3) evaluate the respective solutions. Neither vertical nor horizontal comparisons that take place within one and the same legal system fall under this definition, but only those comparisons that are comprised of at least two systems representing national, regional or international legal systems. When talking about different methodological approaches,⁴ there are different views when it comes to the final evaluation. Some are of the opinion that this step is one of the best in the entire comparative law process—⁵ I agree with this opinion – others think that it is rather legal policy that is called for here and that the comparatist should not decide which of the compared legal systems contains the better solution to the problem posed.

2. (...) no science may predetermine the results of its research. Consequently, comparative research must not determine in advance what it will find.⁶

A comparative legal study is indeed a journey of discovery. What will be detected at the end of the journey is not clear at the very start. However, the traveller should not begin totally unprepared. At the beginning of the adventure a few practical guidelines might be of assistance in order to actually discover something which will be new and valuable for our legal knowledge. Much has been written about how to carry out comparative legal research. If, however, these writings, which usually contain instructions and recommendations, are not consulted before venturing into comparative legal research, the chances are high that the results will be disappointing and unreliable.

3. ... comparability between norms and legal systems of countries with different economic bases (must) be affirmed. The different systems are comparable, not because they are more or less the same or similar, but because the comparison is not afraid of differences, however great they may be.⁷

The fear of differences – however great they may be – does not therefore

⁴ M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research, Sense and Nonsense of "Methodological Pluralism" in Comparative Law' *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 587-588 (2015); M. Van Hoecke, *Methodology of Comparative Legal Research, Law and Method*, available at <https://tinyurl.com/yck8kuwf> (last visited 30 June 2022); E. Örüciü, 'Methodological Aspects of Comparative Law' *European Journal of Law Reform*, 29-42 (2006).

⁵ D. Kokkini-Iatridou, 'Some Methodological Aspects of Comparative Law' *Netherlands International Law Review*, 143-194, 155 (1986). In the same vein: R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' *American Journal of Comparative Law*, 384 (1991).

⁶ n 1 above, 16 no 24.

⁷ *ibid* 29 no 18.

prevent the assumption of the comparability of systems. The *tertium comparationis* is to be determined. It depends on the presence of common elements. The elements may appear at different levels: structure, function and consequences. How big or small the differences or similarities actually are, results from the process of comparison. The answers to the questions to be asked in the legal systems to be compared – the process is synchronous – can first be listed in a table. This facilitates an overview and the subsequent formulation of the findings. When compiling a table, classification problems can arise. To what intensity must a commonality be present? When is the limit exceeded and must a difference be assumed? The table helps with a rough classification of the answers, while the necessary differentiations are made in the written elaboration. The classifications range from same, identical, similar, related, comparable, parallel and analogous, on the one hand, to different, unrelated, divergent, dissimilar, contradictory, diametrical and incompatible, on the other. It should also be noted that other legal systems are not only viewed through the lens of one's own legal system. Not everything that appears to be different at first glance leads to the conclusion, after a thorough investigation, that there are in fact different effects and results or that different effects and results are discernible despite (almost) similar formulations. As a rule, the legal systems examined correspond to each other in the result, even if they achieve this in different ways. Two warning functions are attributed to the *praesumptio similitudinis*. On the one hand, despite differences, commonalities should not be misjudged; on the other hand, established commonalities may ultimately prove to be false. Thus, a thorough investigation is needed to make the right determination. It follows that superficial quick scans covering many legal systems should be avoided. They bear the risk that problems and solutions within the legal culture and system of the respective legal field are not accurately grasped and thus may not be correctly related to one's own legal field.

4. Comparative law must also be aware that there are social and natural sciences that develop through comparison; it must join these sciences and, if possible, benefit from the experience of these comparative sciences.⁸

In our methodological discussions of today the question of combined or interdisciplinary comparative research is becoming increasingly important.⁹ National, European and international research programmes require a multidisciplinary and/or a comparative approach. It is surprising, however, that the issue of combined comparative research has not yet been extensively discussed although the comparative approach has also been employed in other disciplines. A discussion of methodological aspects such as the reason for

⁸ n 1 above, 21 no 58.

⁹ Very illuminating: J. Husa, *Interdisciplinary Comparative Law, Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd* (Cheltenham: Edward Elgar, 2022).

comparative research, functionality, comparability, typology, the accessibility of data, the selection and classification of cases, countries or jurisdictions, the explanation, assessment, measurement and evaluation has not yet taken place on a large scale. For this exercise the term comparative sciences has been coined. Exploring some methodological aspects of combined comparative research requires further definitions. How can different studies be connected?

In my view basically two approaches can be distinguished:¹⁰ If combined comparative research consists of comparative legal research which includes at least two legal systems and research into the same problem from another or various other disciplines which is conducted in *the same countries* that have been selected for the comparative legal study, we can speak of a totally *synchronized comparative research*. This approach is time-consuming and requires expertise in not only legal research. If, however, combined comparative research consists of comparative legal research which includes at least two legal systems and research into the same problem from another or various other disciplines conducted in *only one of the countries* that have been selected for the comparative legal study or that has been undertaken in other countries, the term *restricted comparative research* might be appropriate. Due to time constraints this approach is often undertaken. In this case the interdisciplinary research only focuses on one's own jurisdiction.

In facing the high demands which are posed today as regards comparative legal studies and the involvement of or cooperation with other disciplines, we should be realistic. A great deal is possible but not everything. There are limitations and doubts. A too ambitious research design jeopardizes the quality of the research. Restricted comparative research is increasingly undertaken, but synchronized comparative research should be our ultimate goal. This can only be achieved through cooperation between the various disciplines resulting in large European and international research teams.

5. The comparison can measure the greatest and smallest differences. In doing so, it must not harbour any preferences, neither for one nor for the other. It must also not hunt exclusively for the Common Core of the various countries. Neither should it hunt exclusively for the particularities of the various legal systems.¹¹

In respect of the unification and harmonization of in particular the law in Europe, 'hunting for the common core' has been one of the main points of discussion. Should, for example, the harmonisation or unification only be common core-based or is the use of the better law approach indispensable in order to achieve positive results that represent the highest standard of modernity? During

¹⁰ K. Boele-Woelki, 'Combined comparative research in the field of family relations: Some reflections from the legal perspective' 10 *Journal of Family Research*, Special Issue, 238-256 (2015).

¹¹ n 1 above, 29 no 19.

the drafting process of harmonizing instruments such as the Principles of European Family Law, however, it became apparent that, to a certain extent, it is not obligatory to make a choice between the common core and the better law approach.¹²

After comparing the national solutions several approaches can be taken. If it was possible to elaborate a common core for a significant majority of the legal systems, this solution can be followed. However, should it be taken for granted that this common core reflects the best solution? Certainly not. One can be accused of short-sightedness if the common solutions are not assessed upon their merits. Hence, the comparative process does not consist of a simple adding up or deletion of the answers given in the national systems. In some cases an evaluation can lead to the final conclusion that the common core should be followed – in these cases the common core thus reflects the best solution; in other cases, however, this is not the case and deviating from the common core and choosing the better law approach instead must be justified. In those areas where it is not possible to derive general applied solutions, the decision as to which solution should prevail (the better law) is obviously also to be based on an evaluation. Hence, all approaches invoke the necessity of justifying the choices that are made. Nonetheless, when deviating from the common core or when no common core can be found and the best solution is to be selected more arguments based on certain values than in the case of following the common core are required.

The *Einführung in die Rechtsvergleichung* has not been written as one piece. The eight chapters each form an independent whole. This does not detract from the substantial content of the explanations. The problem areas addressed testify to a comprehensive knowledge of many legal systems, while the occasionally reproduced discussions with other professional colleagues complement Sacco's personal commitment to comparative law, his eagerness to debate and his engagement with and interest in other legal systems. Rodolfo Sacco has had a decisive influence on comparative law. He has provided important food for thought also for the future generation of comparative legal scholars. His work is aimed at all those who dare to look beyond their own legal system and embark on the exciting voyage of discovery.

¹² K. Boele-Woelki, 'The Working Method of the Commission on European Family Law', in Id ed, *Common Core and Better Law in European Family Law. European Family Law Series No. 10* (Cambridge: Intersentia, 2005), 14-38; also published in M.C. Andrini ed, *Un nuovo diritto di famiglia europeo* (Padova: CEDAM, 2007), 197-224.