



## *In Memoriam*

### **Rodolfo Sacco: An Intellectual Portrait**

Michele Graziadei\*

Rodolfo Sacco, my academic mentor, was a uniquely talented teacher for generations of comparatists and civilists, in Italy and beyond, over the last fifty years. As a legal scholar he was endowed with such depth of mind and such insightful, innovative creativity that he literally revolutionized the way law should be understood and studied. Keen as he was on the study of legal thought and open to all forms of legal experience on a global scale, he authored more than four hundred publications and made a crucial contribution to establishing comparative law as a curricular subject in every Italian law faculty. His work is recognized worldwide as a vital, path-breaking legacy on the theory of law, notably of comparative law.

Academician of the Lincei, Member of the Institut de France, dr. h.c. of Geneva, McGill, Toulon, Paris II, titular member of the International Academy of Comparative Law, President of the International Association of Legal Science, Rodolfo Sacco received the highest academic honours in his lifetime, particularly on the occasion which saw him celebrated together with other great comparatists in the volume edited by K. Boele-Woelki and D.P. Fernández Arroyo, *The Past, Present and Future of Comparative Law - Le passé, le présent et le futur du droit comparé* (New York: Springer, 2018). His participation in the life of scientific societies has been intense, first in the Italian Association of Comparative Law and then in the SIRD – Italian Society for Research in Comparative Law, which he founded in 2010, and of which he was the first President. For a long time he was President of the Italian Group of the Association Capitant, thus promoting, among other events, the international Capitant days held between Turin and Como in 2016, on a theme particularly dear to him: *Concepts, intérêts et valeurs dans l'interprétation du droit positif* (Travaux de l'Association Capitant, LXVII, Brussels: Bruylant, 2017). He inspired and was the main initiator of *Isaidat - Istituto Subalpino per il diritto degli scambi transnazionali*, an organisation that since 1996 has conducted various

\* Full Professor of Comparative Private Law, University of Turin.

research initiatives related to his studies.

Highlighting the most prominent moments and moves in the intellectual life of a scholar who was the animator and protagonist of such numerous, seminal and widely resonant scientific initiatives, first of all means finding the common threads in his writings, some of the underlying features being deeply rooted in his intellectual background. The discerning reader will indeed find further reasons to explore and appreciate Rodolfo Sacco's extraordinarily rich opus, beyond those presented here. In this short tribute, I shall be content to highlight a few of them, relating to legal theory, comparative law, and civil law.

After participating in the war of liberation against Nazi-Fascism as a partisan fighter and commander in northern Italy, Rodolfo Sacco returned to the University of Torino to complete his legal studies. His degree thesis, dedicated to *Il concetto di interpretazione del diritto* (*The Concept of Interpretation of Law*), published in 1947 (reprinted in 2003, with a preface by Antonio Gambaro) developed ideas that broke with the conceptualism prevailing at the time. So much so that, with an unprecedented decision, Mario Allara, his thesis supervisor, did not join the jury awarding the degree and asked Norberto Bobbio to present the thesis to the commission. Sacco thus earned the law degree with distinction on 5 February 1946. This first work is still revolutionary in several respects. *Il concetto di interpretazione del diritto* turns the means of logic against both the conceptualist method and against the jurisprudence of interests, still in vogue at the time in some academic circles. By adopting a rigorous formal analysis, Sacco comes to reveal the subjective nature of the act of interpreting that is a feature of any interpretation. This conclusion would have satisfied supporters of the most radical variety of legal pluralism: 'every interpretation of law is without exception correct, provided it is not intrinsically contradictory', and therefore: 'every interpreter can create (...) law in his own way' (p 164). With the benefit of hindsight, here we find some of the key ideas presented in a more complete and elaborate manner in the foremost works of his maturity, such as his *Introduzione al diritto comparato* (1<sup>st</sup> ed, 1980, 5 editions with Giappichelli, 7<sup>th</sup> ed UTET, with P. Rossi, 2019). While beginning a career as a lawyer, his academic mentor was Professor Paolo Greco, who was a leading light of commercial law in Turin.

At the age of thirty-six, after his appointment as a professor in civil law, Sacco began his activity as professor of private law at the University of Trieste, where he also held the course of comparative private law (on this: F. Fiorentini, *Il diritto privato comparato*, in P. Ferretti et al eds, *Giuristi a Trieste, Per una storia della Facoltà di Giurisprudenza - 1938-2012* (Torino: Giappichelli, 2022), 23 ff). In the same year he published the monograph: *L'arricchimento ottenuto mediante fatto ingiusto: contributo alla teoria della responsabilità extracontrattuale* (Torino: UTET, 1959). This is the first work that genuinely highlighted his talent both as a scholar of a renewed civil law and as a comparative

legal scholar. The volume was bound to be the only relevant study on the subject in Italy for a long time, and is still considered an essential reference. His interest in comparative law, however, was already vivid earlier. The Istituto Universitario di Studi Europei (University Institute of European Studies), which had been active in Turin since 1952, was attended by René David, Josef Esser, and other leading leading scholars in comparative law. It was in this environment that Sacco first got in contact with comparative law and showed an interest in the problems relating to the harmonisation of law in Europe, publishing an essay on the subject in 1953 ('I problemi dell'unificazione del diritto in Europa' *Nuova rivista di diritto commerciale*, II, 49 (1953)). In the same years, he worked on the Italian translation of a classic of Soviet law: A.V. Venediktov, *La proprietà socialista dello Stato* (Torino: Einaudi, 1953) thanks to a collaboration with Vera Dridso. This translation had been commissioned by Norberto Bobbio, Einaudi's consultant, and is a first sign of his early interest in socialist law.

Starting in 1960, the *Faculté internationale de droit comparé* (Strasbourg) offered him the opportunity to lecture abroad. He soon became a *regulier* at the *Faculté*, where he was active for more than thirty years. That institution was a magnet for some of the most talented students coming to Strasbourg from all over Europe; there, they were exposed to the ideas of the leading comparatists of the day. A year later, Sacco was called to Pavia, to teach private law and then civil law, and, as a second subject, comparative private law. A few years later, he became Dean of the Pavia Faculty of Law.

A lecture at the University Institute of European Studies on *Définitions savantes et droit appliqué dans les systèmes romanistes* delivered in 1964 (*Revue internationale de droit comparé*, 827 (1965)) gave Sacco the opportunity to draw some general conclusions on the mutual independence of legal propositions, legal doctrines, and operative rules. Thanks to the broader vision of law fostered by comparative studies, he brought to light the dislocations of the various elements of the law. In Sacco's words, it is therefore the task of comparative legal scholars to examine: '*jusqu'à quel point l'adoption de telle formule et l'adoption de telles solutions concrètes se conditionnent réciproquement*'. This statement can be considered the first enunciation of the famous theory of legal formants, which was elaborated in later works and constitutes one of this major contributions to legal theory and to comparative law. This theory rests on the vision of the legal system as something different from a coherent body of rules and doctrines. Rather, the law is best understood as the coming together of a variety of disparate elements, which do not necessarily have much in common if we look at their genealogy, form, legitimacy, etc... . These are the different formants of the law, as he labelled them. Socialist law was one of the fields in which this theory was then applied: R. Sacco, 'Il sostrato romanistico del diritto dei paesi socialisti' *Studi in onore di Giuseppe Grosso* (Torino: Giappichelli, 1971), IV, 737; Engl. transl. in *Review of Socialist Law*, 65 (1988); G. Crespi Reghizzi - R. Sacco, 'Le

invalidità del negozio giuridico nel diritto sovietico' *Rivista di diritto civile*, I, 179 (1979)). These contributions explored the massive permanence of civil law in the law of the Soviet Union despite the claims advanced by soviet lawyers that socialist law represented a complete break away from the law of capitalist countries.

In pursuing his research, Sacco always wanted to acknowledge a debt to Gino Gorla. In his modesty, sometimes he claimed that his task was simply to formulate what Gorla had demonstrated and discovered, but never properly described. In fact, from a very young age Sacco had passionately cultivated wide-ranging interests, and his unflagging curiosity always pushed him into new territories that had never been touched upon by comparative legal scholars in Italy. Until then, subjects such as African law and Islamic law had been entrusted exclusively to specialists in the sector or area. The first attempts to explore these fields were dedicated to Somali law (for a period, he was Dean of the Faculty of Law of Mogadishu, where he taught from 1969, and had pupils there). His research then embraced African law as a whole, with a volume appearing in his *Trattato di diritto comparato* in collaboration with some of his pupils (French translation published by Dalloz, 2009). The encounter with African law was of great importance for Sacco, and his contribution to this field of study was soon recognised by eminent scholars such as Michel Alliot and Etienne Le Roy. As Sacco remarks in the book - interview: *Che cos'è il diritto comparato*, edited by Paolo Cendon (Padova: Cedam, 1992), African law offers the European legal scholar: 'more teachings than any other legal family';

'suffice it to say that there abound systems without verbalization, systems not taught at university, areas of law not assisted by a legal language, all phenomena that we believe to have disappeared in Europe, so much so that our thinking finds it hard to conceive of them... there are so many phenomena in European law that we fail to perceive because we have an idealised, and therefore deformed, view of the legal institutions' (p 7).

Hence the comparative European scholar who studies African law is enabled to recognise those phenomena where they occur most clearly and becomes better equipped to deal with them when he returns to European law (p 127). The comparative study of law is thus in many ways an exercise in self-awareness that unveils those aspects of the law which elude lawyers trained in a single legal system. The comparative lawyer is then tasked with understanding the law 'as it actually happens', just like the legal historian, who would not exclude from his or her field of studies what deviates from the dominant narrative of the law.

The Italian translation of René David's work on comparative legal systems first appeared in 1967 (5<sup>th</sup> ed, 2004). The decision to translate David's work was to show why the training of legal scholars linked to the almost exclusive teaching of national legal systems was culturally disastrous and anti-historical. At a time when transnational exchanges were multiplying, and international relations were

intensifying, Italian law faculties still conceived legal education as by definition mostly based on the national law, although leading Italian scholars had already broken such shackles. As one could expect from Sacco, the contestation of that narrow approach was then followed by his constant action aiming to open up legal studies to new perspectives on legal education. Under his leadership, the Torino law Faculty launched in 1980 a new syllabus, in which comparative law was recognized as a key component in the formation of every law student (R. Sacco, 'Il diritto degli scambi transnazionali: Un nuovo piano di studi nella Facoltà giuridica torinese' *Foro italiano*, V, 77 (1981), and see for a critical view of subsequent reform initiatives: Id, 'La riforma delle facoltà giuridiche' *Foro italiano*, V, 254 (1986). The Turin syllabus paved the way for similar initiatives at the national level (R. Sacco, 'L'Italie en tête: À propos de l'enseignement du droit comparé' *Revue internationale de droit comparé*, 131 (1995)).

In this context, Sacco was elected by his colleagues to preside over the committee in charge of the organization of the studies at the newly established Faculty of Law of the University of Trento, that opened the doors to students in 1984. The syllabus for the law degree awarded by the new Faculty provided for a legal education largely based on comparative law, where each course on domestic law was matched by a parallel comparative law course. After some initial skepticisms, this new proposal met a huge success. The Trento Law Faculty is regularly among the top law schools in Italy, and one of the reasons for its success is the profound influence of Sacco's vision on the definition of its mission.

By the 1970's Sacco's reputation within the International Academy of Comparative Law was well recognised. His general report on *Le transfert de la propriété des choses mobilières déterminées par acte entre vifs en droit comparé*, delivered at the 10<sup>th</sup> congress of the International Academy (Budapest, 1978, also published in *Rivista di diritto civile*, I, 442 (1979)) was an excellent demonstration of his method. The theoretical problems related to the development of comparative law had in fact been the focus of the Italian report (*Les buts et les méthodes de la comparaison du droit*) prepared for the Tehran congress of the Academy, held in 1974.

Sacco first presented his *Introduction to Comparative Law* as a sort of critical supplement to René David's *Major Legal Systems of the World*. Actually, this work was a true theoretical manifesto for a new phase of comparative legal studies. It was translated into Chinese, French, Portuguese and German and the core arguments were presented to the English-speaking academic community in two famous, highly cited articles published in the *American Journal of Comparative Law* ('Legal formants: a dynamic approach to comparative law' 39(1) *American Journal of Comparative Law*, 1-34. 343-401 (1991)). This work represents a watershed in the field of comparative studies. The comparative study of law is for the first time systematically based on the understanding and description of the different formants that make up the universe of the law,

examined in their reciprocal relations. Within this framework, Sacco explored in depth the mutation and circulation of legal models, which remained one of his favourite themes. Here, the focus on language as a means of expressing the law leads Sacco to study and to critically address the considerable translation problems posed by law, and the linguisticity of legal discourse in itself. In brief, Sacco noted that the law as is practiced and the law as is stated in linguistic propositions may largely diverge, due to the limits of the human ability to describe a practice through the means offered by a language. Comparative law can and must therefore deal with latent phenomena that emerge under the lens of comparative enquiries. These elements – labelled by Sacco as ‘cryptotypes’ – reflect unexpressed cognitive styles, assumptions, expectations, and knowledge, including legal knowledge. Although not verbalised, cryptotypes operate and condition the dynamics of the law. The theories advanced in the *Introduction* soon became the methodological basis of the handbook *Sistemi giuridici comparati*, jointly authored with Antonio Gambaro (Torino: UTET, 1996, 4<sup>th</sup> ed, 2018; translated into French: *Le droit de l'Occident et d'ailleurs* (Paris: Dalloz, 2011)).

In 1975, Sacco published his masterpiece on contracts – *Il contratto* – first included in the *Trattato Vassalli* (Torino: UTET, 1975) 1-1019, published in subsequent editions with Giorgio De Nova's contribution in the *Trattato di diritto civile* edited by Sacco himself (4<sup>th</sup> ed, 2016). The volume on possession (*Il possesso*) in the *Trattato di diritto civile e commerciale* by Cicu and Messineo (1988), is also a classic on the subject. In the subsequent editions that quickly followed, Raffaele Caterina joined as co-author of this book.

Both works originate from a close comparison with a variety of foreign models, and represent powerful contributions to the renaissance of European private law on a theoretical level. Both works profoundly influenced judicial developments and academic thinking in Italy. Among the volumes published in the *Trattato di diritto civile*, Sacco's volume on *Il fatto, l'atto, il negozio* (Torino: UTET, 1995) is perhaps the least known. Some of the themes of that volume were first announced in an important essay entitled: ‘L'occupazione, atto di autonomia (Contributo ad una dottrina dell'atto non negoziale’ *Rivista di diritto civile*, I, 343 (1994)). The decision to further deal with themes that are no longer fashionable among Italian *civilisti* reflects Sacco's intention to sail against the wind. The break with the classic civil law approach to legal concepts and categories such as *negozio giuridico* is evident, as is the distancing from the purely ideological critique of the intellectual legacy linked to that notion. The volume explores how some fundamental scholarly categories are put to the test by social interactions happening in real life, and how those forms fail to capture the complexity of social life, due to their idealistic foundations. The underlying thesis is that the theory underpinning those categories is an *ex post facto* rationalization of forms of decision-making and autonomy that at the beginning

of the origins of humanity were implemented without resorting to concepts or words. *Fatto, atto e negozio* is full of examples that illustrate the operation of living law, and its ways, far removed from the dry bones of dogmatic thinking. Sacco does not give up the possibility of bringing analytical order to this context, but he does not believe this can be done with the worn-out paraphernalia at the disposal of the dogmatist, or with less than credible word games. The work draws heavily on historical, linguistic, anthropological and ethological knowledge in a skilful and disruptive manner, which goes directly to the heart of the matter.

In the meantime, since 1986, Sacco had taken over the editorship of the *Digesto Italiano*, the oldest Italian legal encyclopedia. The new edition of the *Digesto italiano* as conceived by him was to contribute to the renewal of Italian legal culture. Therefore the new edition of this fundamental work, now running in over a hundred volumes is

‘... for an Italian jurist who is curious about all the rules of the legal system, including those of non-national production, who is curious about foreign data, interested in the rules governing transnational legal relations, aware of the contribution offered by comparative law to the knowledge of law and to a more adequate search for axiological data’ (from the introduction to the first volume of the *Digesto - Discipline privatistiche* (Torino: UTET, 1987)).

From the late 1990s onwards, and as long as his strength would assist him, true to himself, Sacco cultivated the frontier themes that had always fascinated him. In the first place, he dedicated himself more intensely to the study of the problems related to the relationship between language and the law. These were addressed by producing research dedicated to the interpretation of multilingual law and the theory of legal translation (eg: R. Sacco, ‘Lingua e diritto’ *Ars interpretandi*, 117-134 (2000); Id, ‘Riflessioni di un giurista sulla lingua (La lingua del diritto uniforme e il diritto al servizio di una lingua uniforme)’ *Rivista di diritto civile*, I, 57 (1996); within the International Academy of Comparative Law he dealt with this theme at the Sidney World Congress, 1986). Multilingual law, that is the foundation of uniform and European law, most evidently shows how a plurality of linguistic devices conveys the same law to interpreters. The discussion of this problematic issue was the occasion to draw upon research conducted on multilingual legal systems, from Switzerland to Québec. Indeed, relations with Québec legal scholars, from the late Paul-André Crepau to Nicholas Kasirer, now a justice of the Supreme Court of Canada, were intense at the time, as were those with Jacques Vanderlinden and Olivier Moréteau, who both cultivated interests in similar subjects. The pioneering edited work: *L'interprétation des textes juridiques rédigés dans plus d'une langue* (Paris: L'Harmattan, 2002) brought into focus the theoretical importance of this research. The brief remarks first devoted to legal translation in the *Introduction to Comparative Law* are thus developed organically, focusing on all the aspects of the linguistic and legal



problems raised by legal translation. Legal translation poses problems related both to the law and to language. The law poses translation challenges, as the different formants emerging within a legal system convey different notions and concepts through the use of the same word (thus, for example, the notion of nullity in book one of our civil code is not the same notion in book four of the same code). Such differences in meaning become obvious when one considers words such as 'contract' or 'possession' in the different European languages. Other difficulties arise from the domain of language, since the language of the law in each jurisdiction usually evolves to express locally known concepts, unless the influence of foreign law brings in new concepts, and a new terminology. Hence the difficulty of translating into Italian terms or expressions referring to concepts unknown to Italian law (such as, for example, 'equitable interest'). Translations of similar terms nearly always require the creation of neologisms. Furthermore, the relationship between language and the law is not constant across borders, so that the degree of precision with which eg a legislative provision is formulated is not the same everywhere. The silent sources at work in the making of the law are silently at play here as well.

The research conducted on the relationship between language and the law was part of broader intellectual preoccupations. The title of the Lincei conference on *Le nuove ambizioni del sapere del giurista: antropologia giuridica e traduttologia giuridica* (proceedings edited by R. Sacco, Rome, 2010) bespeaks them. The research programme outlined in that conference went back to the insights first developed by Sacco through the study of law in an African context and in several other areas of the globe. This design was enriched by forays into cultural and social anthropology, ethology, and the cognitive sciences, since human behaviour, when studied on an evolutionary basis, brings in the contributions of these specialised fields of learning. *Anthropologia del diritto* (il Mulino, 1987, French translation, Dalloz, 2008, Spanish translation, 2018), subtitled as 'A contribution to a macro- history of law', outlined the key features of the law in contemporary societies. This study includes both those societies where the law works with concepts and a language of its own, thanks to the presence of huge apparatuses securing its administration and transmission, and those societies where lawyers do not occupy the central place they traditionally have in Western societies, and where writing, if known, is not used to lay down the law, in which power may be diffuse rather than centralised. This book explored what, in the domain of the law, pertains to nature, rather than culture. Culture indeed evolves and changes with a rapidity unknown to the biological constitution of human beings. The last chapter in this line of research is represented by the volume *Il diritto muto: Neuroscienze, conoscenza tacita, valori condivisi* (Bologna: il Mulino, 2015, a first, partial version of this study was made available in English, by the title *Mute Law* in the *American Journal of Comparative Law*, 43, 453 (1995), and in French, in the *Revue trimestrielle de droit civil*, 783 (1995); the

Spanish translation of the book appeared in 2016). This is a profound work, in which the reflections and research of a lifetime are brought together. The volume develops a multidisciplinary research approach on law by drawing upon findings made available by the life sciences, linguistics, and anthropology. *Mute Law* intends ‘to lift the veils that conceal from today’s man the survivals of that mute law that for two million years has dominated the social life of human beings’ (from the preface to the Spanish edition of this book). The understanding of law as a social phenomenon is thus finally enriched by the study of that dimension of humanity which is rooted in nature, to be understood not as an invariable and invariant entity, but as a reality knowable through scientific enquiries dedicated to the study of all human groups, such as those linked to anthropology, linguistics, psychology, or biology.

It is not possible to remember Rodolfo Sacco and to pay tribute to his intellectual work, or in any way to speak of him, without mentioning the lasting impression he made on those who came to know him better. A generous personality, rich in humanity, capable of passions, he approached both students and younger colleagues with curiosity. As a teacher, he paid close attention to the learning needs of each one of his students. He quickly understood the difficulties of his younger colleagues and, whether they had grown under the influence of his teachings or not, often offered them the means to overcome them. Apparently inclined to seriousness, he showed a fine sense of humour in the more relaxed and informal conversations (see, eg, R. Sacco, ‘Organizing a Scholarly Congress’ 40 *Journal of Legal Education*, 279 (1990)); these were animated by an unparalleled capacity for observation, and by boundless knowledge, worn lightly, with a pinch of irony.

He left us with un *saluto allegro*, as he liked to say in his later years.