

In Memoriam

The Legacy of Rodolfo Sacco

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The influence of Rodolfo Sacco will endure. He united an extraordinary breadth of knowledge with a vision that has shaped the work of three generations of brilliant disciples. It has transformed the understanding of many scholars of what legal systems are and what it means to study them. Perhaps the best tribute to his work is to reflect, not only on how much we have learned from him, but on how much we can still learn.

In his vision, a legal system is not a coherent body of rules and doctrine resting on the texts that are authoritative in a given jurisdiction.

‘(L)iving law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges....’ ‘Borrowing from phonetics’,

Sacco called them ‘legal formants’. (‘Legal Formants: A Dynamic Approach to Comparative Law’ 39 *The American Journal of Comparative Law* (1991), Part I, 1-34; Part II, 343-40; I, 22). Some are ‘cryptotypes,’ which are ‘rules’ that one ‘continually follows of which he is not aware or which he would not be able to formulate well’. They are like the unformulated rules a cyclist follows when he rides (ibid II, 384-85). ‘(T)he legal formants within a system are not always uniform and therefore contradiction is possible’ (ibid I, 24). Often, they are borrowed from other legal systems without any thought about how they can be reconciled with prior norms. ‘Several interpretations will be possible and logic alone will not show that one is correct and another false’ (ibid I, 22).

This vision rests on five propositions which were stated formally and famously in a manifesto he sponsored: the *Tesi di Trento*. Comparative law is a ‘science’: its task is ‘a better understanding of law’ just as that of any comparative science is ‘a better understanding of (its) data.’ Comparative law will ‘consider as real that which actually happened (*ciò che è concretamente accaduto*)’. Comparison

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depends on assessing the differences among legal systems. '(T)he comparative knowledge of legal systems' has the 'particular merit' of 'evaluating the coherence of the various elements present in any system...'. It evaluates the 'compatibility' of the 'operational rules' of the system with 'the theoretical propositions formulated to make the operational rules intelligible'. As a consequence, 'the knowledge of a legal system is not the monopoly of the jurist who belongs to that system...'. Although he has the advantage of 'an abundance of information' he 'more than any other' is likely to presuppose that 'the theoretical formulations of the system are fully coherent with (its) operational rules ...'.

We still have much to learn from his program for comparative law. It is a corrective to approaches which credit each legal system with an internal unity based on doctrine or culture. It is also a corrective to the functional approach which I and many other scholars favor. The functionalist approach explains differences among the rules and doctrine of legal systems by underlying similarities in the purposes they serve. That approach is compatible with Sacco's. His approach, however, illuminates the differences. They arise from diverse and often conflicting 'formants' such as 'statutory rules, the formulations of scholars, and the decisions of judges' and also 'cryptotypes.' We will have 'a better understanding of law' if we do not lose track of the differences in the search for underlying similarities.

His work also suggests a far-reaching program for the study of domestic law. Like many other scholars, he observed that legal formalism survives in practice although it cannot be defended in theory. Like the American Legal Realists, the American Critical Legal Studies Movement, the German *Freirechtsschule*, and French jurists since François Gény, he recognized that 'logic alone will not show that one (interpretation) is correct and another false'. Their critiques were primarily negative: they showed that a formalistic approach to law is impossible. The more skeptical concluded that the rule of law is impossible. With the notable exception of Karl Llewellyn, the less skeptical were more concerned with what judges and jurists ought to do than with what they were actually doing. They turned to sociological jurisprudence, *Interessenjurisprudenz*, or *libre recherche scientifique*. Sacco was concerned with 'the various elements present in any system,' with 'law as it actually happens'. Judges and jurists were resolving conflicts, not by logic, but in other ways, often by 'cryptotypes' – by rules that they themselves could not formulate. They were doing so even when they claimed to be doing so by logic alone. Law is not impossible because formalism is untenable.

It follows that to understand their own law, judges and jurists should pay attention to what they have actually been doing. Otherwise they will make the same mistake as a comparative law scholar who 'presuppose(s) that the theoretical formulations of the system are fully coherent with (its) operational rules'. They must acknowledge the limitations of logic, the conflicts among rules and doctrines in their own legal systems, the similarity between the problems they face in

reconciling them and the conflicts judges and jurists face in other legal systems, often in harmonizing the same rules and doctrines.

If that were to happen, they, like comparative legal scholars, would no longer conceive of a legal system in the same way. They could no longer regard national law as a self-contained and coherent body of rules and doctrine grounded on a distinct set of authoritative texts. They could not if rules and doctrines are not derived from authoritative texts, authoritative texts conflict and are sometimes disregarded, judges and jurists implicitly follow rules which they cannot yet articulate, and a legal system is a collage of rules and doctrines, some of them borrowed at various times and places, and many of them resembling those of other legal systems. In discrediting formalism, Sacco discredited positivism. Judges and jurists who accept his conclusions will realize that positivism never has existed in practice. If so, a legal system can no longer be regarded as 'national' in the same sense: as the creation of whatever national authority possesses sovereign power.

It does not follow that if Sacco's insights were accepted, national legal systems would disappear. Sacco observed that although

'(u)niformity is often described as a patently good thing (...) both uniformity and particularity among legal systems have their pros and cons. The greater the number of particular legal institutions existing at a given time, the greater may be the probability of certain types of progress' (ibid I, 2).

Moreover, all rules may not be right for all nations. But if one takes Sacco's approach, national law must be reconceived. Some of its rules and doctrines address universal problems. Some are experiments from which others can learn, and some are adaptations to domestic conditions. Those considerations must be kept in mind when interpreting, harmonizing, and sometimes rejecting the 'various elements present in any system.' The study of comparative law will help one to do so. It has the 'particular merit' of 'evaluating the coherence of the various elements present in any system...'

For the present, and at a minimum, the comparative study of law should be a prerequisite for the study of one's own law. Sacco envisioned a transnational curriculum for the law school of the University of Trento of which he was a founder. It is a dream of others as well, and it has yet to be realized.

Sacco left us more of value than we can readily assimilate. In that, he resembles great scholars of the past.