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Rodolfo Sacco and the Multiple Relations Between Law and Language

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Abstract
Rodolfo Sacco has devoted much of his research to the relations between law and language. His analysis were focused on the problem of legal translation for comparative law research, on mute law, and on the importance of understanding the dynamics of the different languages in Europe today.

Keywords Comparative Law · Legal language · Legal translation · Mute Law · Multilingualism

1 Rodolfo Sacco and the Multilingualism of his Origins

For those of our generation who were guided by Rodolfo Sacco on their academic path, our Maestro's sensitivity to linguistic phenomena soon became clear.

In his stories, which turned into life lessons for us, echoed his childhood and youth, lived in Fossano until high school age, amidst Piedmontese dialect, Italian, Occitan and French, a language learned from an early age in the family according to a well-established tradition in that area of Piedmont.

From this multilingual environment probably derives the attention for words and for their evolution in different languages: how many times did Rodolfo tell us about the vicissitudes of the circumflex accent found in French words where they lose one or more letters compared to Italian or Latin.

How many times did Rodolfo draw our attention to the phenomenon of the multilingual speaker's choice of the use of a given language with respect to a given context, which in his case involved the use of Italian to do a deed in the town hall, French to attend mass in church, *patois* to address the peasants, Piedmontese to talk to everyone else.

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His attention to language and diction probably also stemmed from his very personal experiences, narrated with suffering mixed with pride, such as the one resulting from an initial pronunciation defect that he had brilliantly corrected on his own, practising pronouncing the *S* in a way that was different from what came naturally to him.

As his students, his lectures—which for those who were attending the *Faculté Internationale de Droit Comparé* in Strasbourg he gave in impeccable French—highlighted how language was the essential tool in the process of getting to know foreign law,[1] emphasising how the salient information for knowledge of another's law is contained in the language of reference, which is an expression of the culture, values, historical evolution and—ultimately—the mentality of the jurists, who represent the legal system under analysis [14, 24, 33].

2 Legal Translation

For these reasons, legal translation has always been regarded by Rodolfo Sacco as one of the key issues in legal comparative law [1, 3, 4, 7, p. 423; 8, 9, p. 279, 23, 24, 27, 32, p. 706, 36, p. 187, 39, p. 722, 45, p. 475, 54–56, p. 207], offering at the same time an opportunity to investigate the multiple relationships existing between law and language as cultural phenomena [2, 17, p. 1, 18, 26, 35, 38, 57].

Ever since the first edition of his *Introduction to Comparative Law*, published in Turin in 1979 [51],[2] the one—to be clear—still with the pale pink cover that those who attended university in the 1980s studied, Rodolfo Sacco had introduced a specific chapter devoted to the problems of legal translation, a problem that was, moreover, neglected both in the work of David [6][3] and in that of Zweigert and Kötz [61], the two manuals of comparative law in vogue at the time.

Rodolfo Sacco researched and wrote seminal works in this regard, also drawing the attention of the international scientific community to the subject. At the conference of the *International Academy of Comparative Law* held in Sydney in 1986, he presented a paper devoted to *Les problèmes de traduction juridique* [50]. On the same subject, he wrote the entry in the *Digesto* on 'Legal Translation', published in 2000 [39] and the essay with the same title published in the volume by the philosophers Scarpelli and Di Lucia *Il linguaggio del diritto* [45].

[1] The importance of legal translation for comparative law—also in the international context—emerged as early as the conference of the International Academy of Comparative Law in Sydney in 1986, which devoted a session to the problem of legal translation. The proceedings of that session were collected in *Cahiers de Droit* 28–4 (1987). Subsequently, at the Conference of the International Academy of Comparative Law held in Bristol in 1998, a session was devoted to the relationship between Language and Law. The proceedings were collected in [21].

[2] Now in its 7th ed., edited by R. Sacco and P. Rossi, in Trattato di diritto comparato, dir. by R. Sacco, Milan, UTET, 2019.

[3] Now in its 12th edition, edited by C. Jauffret-Spinosi and M. Goré; transl. it: I grandi sistemi giuridici contemporanei, 5th Italian edition, 2004, edited by R. Sacco.

The topic of the relationship between language and law was re-proposed by Rodolfo on the 15th Congress of the International Academy of Comparative Law held in Bristol in 1998 [41, p. 223] and the conference held in Milan in 2003 organised by the *International Association of Legal Sciences* and the *Italian Association of Comparative Law* dedicated to the relationship between common language and legal language. In the introductory paper to the conference, entitled *'Law and Language',* Sacco highlighted the parallels existing between the structures of language and the structures of law and the functional relationship between the two. The papers presented there were then collected in a volume entitled *'Ordinary Language and Legal Language',* which then gave rise to the *Le Lingue del Diritto* series [38].

The focus on legal language turned more intensively to those systems such as Canada and Louisiana, which had experienced the confluence of two legal systems expressed in two different languages. Here, Rodolfo recognised that the most active in research had been the Canadians, with their university centres and especially the Centre de traduction et terminologie juridique. He had many connections with the universities of Moncton and McGill, and with the Centre international de la common law en français (CICLEF), with professors Gémar [13], Vanderlinden [58], and Kasirer [22], who remained constant presences in his initiatives on the subject.

In addition to speaking about translation, Rodolfo was a translator himself. In this regard, we recall the translation of Venediktov's work, *The Socialist Property of the State* [59], which appeared in 1953, as well as the translation into Italian of René David's work *Les Grands systèmes de droit contemporains*.[4]

3 European Multilingualism

Rodolfo was also among the first to take an interest in the role of language in the harmonisation process of European law. It was in this context that ISAIDAT's initiatives took place, leading to the organisation of two conferences in Turin and the publication of two collective volumes: the first, edited by Sacco and Castellani, *Les multiples langues du droit européen uniforme* [53], and the second, edited by Rodolfo alone, *L'interprétation des textes juridiques rédigés dans plus d'une langue* 52].

These research were aimed on the one hand at emphasising how a jurist who wants to consider himself European must receive adequate training, thus underlying the role of comparative law and legal translation in university training in order to fully understand the strategies of the legislator in different contexts [12, 34].

On the other hand, Rodolfo's interest in the language of Community law prompted him and his pupiles [10] (Ferreri, 2004) to question the problems of interpreting multilingual law when ambiguities or discrepancies appear between the different language versions of a Community law text, which must be considered

[4] The Italian translation appeared under the title *"I grandi sistemi giuridici contemporanei",* translated on the 7th French edition (1978) by Oreste Calliano, Paolo Cendon, Alba Negri, Rodolfo Sacco, Paolo Zenone, under the direction of Rodolfo Sacco, and what published by Cedam, Padova, in 1980.

equally authentic, enjoining the interpreter to devise specific interpretative strategies to reconstruct the meaning of the legal text [29–31].

In the same years, Rodolfo published an article in the law review 'Europa e Diritto privato' entitled 'Il contratto nella prospettiva comparatistica' ('The Contract in the Comparative Perspective'), a small gem drawn from the vast experience he had developed in the course of his research on contracts. Here the author wittily illustrated how, on the one hand, the concept of contract, easily translatable in the various European languages: contrat, contract, Vertrag…, does not mean the same thing everywhere and that the demarcation areas of the same were different in the various national contexts.

On the other hand, it emphasised how the absence of a definition in the Community texts dealing with contracts would have given the interpreter a hard time, who—in the absence of an omnivalent definition of contract—would have used the conception learned in his or her reference context. A strategy of the Community legislator that would have led to divisive solutions despite the effort at harmonisation.

The research developed by Rodolfo on language, legal translation and the interpretation of multilingual law appear to be seeds that have sprouted in subsequent generations.

His numerous students analysed the difficulties posed by legal translation in the Community context, where language plays a fundamental role in the process of law harmonization [16, 19, 29], since—as we will recall—translation in a multilingual context must pursue the same aims as multilingual law itself, and in particular that of law harmonization [25].

This will then form the basis for further projects in connection with the proposals launched by the European Commission on the harmonisation of European contract law: from the drafting of the Draft Common Frame of Reference to the preparation of the Proposal for a Regulation on a Common European Sales Law.

The formation of categories and terminologies at supranational level and, in particular, of the language of the EU legislator and the international legislator will then be the focus of the 2014 SIRD Conference, dedicated to *Categories and Terminologies of Law in the Comparative Perspective* [15].

It is likely that the results achieved in the analysis of the trajectories of common European law would not be the same today without this attention to linguistic aspects.

4 Legal Transplants and the Circulation of Legal Models

Rodolfo Sacco then devoted attention to the phenomenon of the circulation of models, observing that linguistic imitation in the area of law should be considered a form of circulation of legal models that normally accompanies the transposition of legal models, especially doctrinal ones.

Hence the interest in the emergence and evolution of legal languages and the related modernisation phenomena in the face of the transposition of foreign legal models in different contexts: from the modernisation of Italian legal language in the face of the transposition of Pandett's models to the evolution of legal language in

non-European countries in the face of models imposed by colonial powers in the course of history.

I still remember Rodolfo's lecture at the *Faculté* in Strasbourg, when in front of a class of students from different European countries, he used as a litmus test the possibility of translating the concept of *Rechtsgeschäft* into the different languages of us learners, in order to make us realise that where the German term had been translatable into one of the different languages, one could glimpse an influence of *Pandectists*, where the term had been alien, one could presage a lack of attention to late nineteenth century German doctrine.

On the translation of Western models into non-European countries, Rodolfo Sacco liked to quote an anecdote reported by René David in his memoirs: *Les avatars d'un comparatiste* [5], in which he recounted the events of the drafting of the Ethiopian Penal Code, where Jean Graven's translation of the draft Penal Code from French into Amharic had proved rather difficult. It was often necessary to forge words to express concepts that were unknown in Ethiopia, but first these concepts had to be understood by the translators, who had not received any legal training.

When Graven proposed, out of a spirit of humanity, that judges, in the case of a husband's conviction, could arrange for his wife and children to be housed in a *'foyer'*, i.e. a family home, for the entire period of his imprisonment, the project's translator, Ato Kerubim, implored Graven to renounce such cruelty: he had in fact translated *'placer dans un foyer'* as *'brûler dans un fourneau'*.

If the language of law was the focus of Rodolfo Sacco's attention, its absence was no less so.

5 Mute Law

It is true that in today's society, language and law appear as intimately connected phenomena: law cannot exist without a language that gives it life and serves as its means of expression. In particular, the evolution of legal language draws its life-blood from the progress of language itself and from the vicissitudes of the legal system of which it constitutes a means of expression [20].

Legal rules seem inseparable from verbalisation and 'evaluative fruitions' intimately woven into speech and syntax.

However, we owe it to Rodolfo Sacco to have reminded us that linguistics is only one of the possible forms of expression and manifestation of law and that not always (and not all) law has been (and is) the object of linguistic formulation.

In his essay *Il diritto muto* (Mute Law) [46] translated in English in 1995 [44], Sacco recalled that phenomena of 'mute law' exist, in dimensions that are all the more extensive and pervasive the more we delve into the long and very long periods of history. This theme was then taken up in the 1999 volume *Le fonti non scritte e l'interpretazione* (Unwritten Sources and Interpretation) in which he observed how, from the perspective of macro-history, *"man has been producing written law for five thousand five hundred years and before that has lived for two and a half million years without written sources"* [46, p. 689].

Hence the focus on the legal world of societies without language or with prevailing orality, as populated by silent rules that dictate the basic principles of organisation of social groups (from the family to micro-organisations of a tribal nature), regulate relations between men and things, and define spectrums of sanctions aimed at striking those who violate the common rules.

In this context, the leading role, among the sources of law, belongs to custom, the mute source *par excellence*.

In another essay devoted to de facto *partnership* [42], Sacco recalled that one of the oldest legal relations, the de facto *partnership*, derives from custom, which *'has existed since man began to procure food through collective activity […]. And man has been hunting collectively for a long time, certainly since a time when no written law existed'* [40, p. 46]. The organisation of such an activity and the definition of rules for the division of booty are an expression of a de facto ante litteram society that has survived to the present day.

Thanks to Rodolfo's research, comparatists are now aware that the presence of latent, non-verbalised but extremely incisive elements, starting with custom, is also very relevant in our current law, although the perception of these elements is not always clear-cut.

How else would one explain that in different countries identical laws give rise to different application solutions or, conversely, an identical application solution is found from different legislative rules? [47, p. 43].

Different civilisations and different eras have produced different 'masses of language'. Some cultures speak less than others; some forms of sensibility value silence and elision, while others reward prolixity and semantic ornamentation.

6 Language and Anthropology

It is not difficult at this point to understand why Rodolfo Sacco, linguist and translator, then became an anthropologist. In a certain sense, it is precisely the attention, not to say the love for the linguistic vicissitudes of law, that opens up the world of anthropology to Rodolfo Sacco.

As he himself was to recall: *'The vicissitudes of life had made me appreciate how attractive linguistic comparison was, and from linguistic comparison it was not so difficult to move on to anthropology, let us say from De Saussure it is not difficult to move on to Lévy Strauss…'* [48, p. 38].

And in this sense, we are given testimony in several essays on African law in which the leitmotif is precisely the analysis of the relationship between law and language.

How can we forget the fresco that Rodolfo Sacco has given us of sub-Saharan Africa, in which there are heterogeneous legal layers: a traditional layer, sometimes a religious layer, mostly Shiaritic, a layer with a European, colonial model, and finally the layer of independence [43].

Sacco emphasised that the problems of language were different for the four strata and that it was important for the comparatist to understand the hiatus between the

first stratum, the traditional one, and the last one, the layer of independence [37, p. 37].

Of traditional African law, Sacco pointed out that it did not involve writing, emphasising its orality. The rule, the judge's decision, the transmission of that little bit of legal knowledge, takes place or operates without writing. But on the subject of orality, Sacco emphasised that this had to be enriched and, if necessary, overturned, by a more important observation. One should not simply assume that there was a lack of writing, or that a verbal discourse comparable to the written present in other cultures was simply present. No. Rather, the reduction of the rule into a precise discourse was missing. The traditional African rule had not undergone any verbalisation until the arrival of the Europeans.

Hence the reflections on the link between the presence of a technical language and the presence or lack of a professional jurist.

Lack of jurist, lack of technical language, lack of verbalisation of the rule led to further reflections with the Western world.

In African cultures, the resolution of the case depended, as in Europe, on the rule.

But in Europe, the rule defines the case with mathematical precision, listing its constituent elements, which are always few in number.

In traditional Africa, numerous and disparate elements, often subsequent to the event that triggered the conflict, affect the resolution of the case. The judge, at the time of the decision, keeps the strength of the group in mind, and acts with the future in mind rather than the case, which belongs to the past. At this juncture, the human qualities of the parties—the charismatic power of a person, the ties between the judge and the adjudicator, the halo of sympathy or antipathy surrounding the party, the litigant's behaviour before and during the adjudication—may play a role.

From this perspective, the Europeans who came to Africa, who worked hard to reduce African custom to writing, would have recast it by means of cases seen in European terms.

The linguistic problems of the written law of independent Africa are quite different.

In Africa south of the Sahara and west of the Horn of Africa, no state corresponds to an originally unique and uniform linguistic area. An immense number of different ethnic languages are spoken in each state. A linguistic glue is most often represented by the written language of the former coloniser, which is not always understood by all, but nevertheless geographically spread throughout the country (with a few exceptions).

In this context, the law will be made in the European language. The problem of language thus becomes the problem of its understanding by the people. And here Sacco resorted with a certain sense of humour to the following practical example: One could, for example, have provided for this by broadcasting legislative summaries by radio in the many local languages. This would have worked in an acceptable way if the two ministers—the chancellor and the radio minister—had been close-knit, which could also have been the case. But if the fellowship had been lacking, the radio minister could certainly not have been asked to state the ideas of the keeper of the seals, which he did not share.

7 Language and Cryptotypes

Attention to linguistic and translating phenomena did not only lead to surprising results in the field of legal translation, to an in-depth study of the use of language in mixed jurisdictions, to an analysis of the paths taken by the EU legislature in the creation of a common European law, and to a viaticum for legal anthropology.

The contribution of linguistics to Rodolfo Sacco's theories as a jurist and comparatist has been even more fundamental, perhaps aided by the presence of his brother Giorgio, a trained linguist.

Rodolfo himself admitted in an interview *'when I first spoke of cryptotypes I used, among jurists, a word that I had seen used by Whorf, who is a linguist. I used a word that was not new to express an idea that was not new'* [48, p. 5].

Knowing not only the work of Prof. Sacco, but also the person of Rodolfo, I tend to understand well how Benjamin Lee Whorf [60], an American linguist recognised as the proponent of the idea that the differences between the structures of different languages are the cause of the speaker's different way of perceiving and conceptualising the world, could have attracted the attention of the Maestro.

Sacco is the first to employ the concept of cryptotype in law, to indicate *'those rules that exist and are relevant, but which the operator does not formulate (and which, even if he wanted to, he would not know how to formulate)'*; these are rules *'that man practices without being fully aware of them'* [49, p. 39].

And we all know how fundamental this discovery was in Rodolfo's research, not only in the sphere of comparative law, but also in understanding legal phenomena more generally.

I would go so far as to say, that without linguistics and legal translation, Sacco's work would not have had that "force subsersive" that we all recognize [11, p. 695, 28, p. 505].

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