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The Figure of the Unknown within Sacco's Theory

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Abstract
The article analyzes one aspect of Rodolfo Sacco's complex and innovative theoretical itinerary as it evolved. While the author's theoretical perspective is often remembered as the theory of the legal formant and of the mute origin of law within a comparatist perspective, it seems to me that another area of his work remains relevant and needs to be explored further, perhaps beyond the very methodological ways provided by the author. From the work on interpretation to the legal anthropology, the implicit copresence of mute and spoken represents one of the most interesting features of the theory, which appears capable of intercepting many contemporary problems of the evolutions of the law. The paper will move toward a different direction: with the aim to show how there are very different theoretical positions within the philosophy of law that can be approached from the perspective of comparative law in the formulation proposed by Rodolfo Sacco, around the central problem of the radical transformations of the concept of law. Thus, a problem is identified, at once epistemological and semiotic, that appears central to the configuration of legal thought in the age of globalization: the epistemological role of the unknown in the construction of knowledge, as a modular methodological problem and its implicit Vichian ancestry.

Keywords figure · nomograms · unintended phenomena · uncanny presence · Vico

1 Introduction: the unknown and its evolution

A combination of both spoken and mute elements is to be found at work. Our legal system is familiar with spoken sources (the written rules, of splendid form and content, produced by legislative assemblies) as well as with unspoken sources (commercial uses, determination of standards of conduct, construction, by an interpreter, of concepts such as fault, reasonableness, bad faith). It is familiar with acts carried out through words (contracts made by fax, deeds, wills) as well as acts carried out

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without words (deliveries, contracts made through devices that allow the buyer to pay and receive merchandise). Some categories include both spoken and unspoken acts: such contracts that can be made by declarations, but also by material acts; such as confirmations, and acceptances of inheritance, which can be expressed or implied. But lawyers are primarily interested in spoken sources and acts and feel uneasy with mute sources and acts ([1]: 464–5).

The article analyzes one aspect of Rodolfo Sacco's complex and innovative theoretical itinerary as it evolved. While the author's theoretical perspective is often remembered as the theory of the legal formant and of the mute origin of law within a comparatist perspective, it seems to me that another area of his work remains relevant and should be explored further, perhaps beyond the very methodological ways provided by the author. From the work on interpretation to the legal anthropology, the implicit co-presence of mute and spoken represents one of the most interesting features of the theory, which appears capable of intercepting many contemporary problems of the evolutions of the law.

While Sacco's thought is often analyzed from the thought of Amedeo Conte, my attempt will move toward a different direction: with the aim to show how there are very different theoretical positions within the philosophy of law that can be approached from the perspective of comparative law in the formulation proposed by Rodolfo Sacco, around the central problem of the radical transformations of the concept of law. Thus, a problem is identified, that is at the same time epistemological and semiotic, that appears central to the configuration of legal thought in the age of globalization: the epistemological role of the unknown in the construction of knowledge, as a modular methodological problem and its implicit Vichian ancestry.

2 An extended formant figure: networks of similarities

The root of the notion of formant comes from the problem of interpretation, and from the juxtaposition that Sacco presents in his recently republished 1947 dissertation [2]. In The *Mute Law*, he points out how the idea that the interpreter must find an objective and unique meaning is devoid of foundation. He relates a personal fact that indicates well, even in controversy, the climate of the Turin faculty at that time: "Is it permissible to speak of personal facts? On February 5, 1946 my dissertation 'The Concept of Interpretation of Law' (later published, in Turin, in 1947) was examined in Turin. There I argued that the objective meaning of the text does not exist (and, at the time, I did not know de Saussure). It was a scandal (Betti's reaction was exemplary). At the last minute, the thesis advisor (Mario Allara) refused to discuss my dissertation. The co-supervisor (Norberto Bobbio) did not open his mouth" ([2]: 48).

Monateri, in the afterword to the text, judges Sacco's position to be innovative and revolutionary ([3]: 179): "Basically, the traditionalist and the revolutionary say the same thing but diverge in their metaphysics, or ontological commitment. For the former there is a tradition that explains commitment, for the latter there are only commitment… I assume, for a traditionalist Sacco's approach would probably be nihilistic. Filippo Gallo's opinion on the point confirms this for me. The

traditionalist and the revolutionary argue about what is there. More things exist for the traditionalist than for the revolutionary. Sacco sees only the 'inkblots' and does not see the Spirit. For Betti he is a 'materialist'. More properly he is a revolutionary… In conclusion, Sacco's work proves to be truly ingenious because it anticipates by decades movements that had not yet arisen when he wrote. Moreover, by his recourse to mute law and the inarticulate production of rules that are then articulated in language, Sacco reverses the general theoretical order: 'programmatic statement-act of execution' as the order 'act of execution-verbalization of the fulfillment of the rule' " ([3]: 179, 182–183).

Such a perspective would lead toward a new paradigm of general theory that need to be explored further. In fact, Hayek had already epistemologically formulated in 'The Sensory Order' (1952) the theme of the primacy of the abstract [4], which is precisely the problem around which Sacco's version of 'mute law' and its anthropology revolves, but it does not matter. Recently the notion of formant has been recalled in relation to the history of law by Gigliotti. The 'extraordinary insight' of legal, doctrinal and jurisprudential formants constitute an epistemological suggestion for the legal historian. While the first formulation of formant is that of "component" in 1964, for Gigliotti it is necessary to identify it "as the 'genetic' element of all Western legal experience, an ethical formant, and, as an epistemic manifestation, a historical formant, that is, the set of legal rules intrinsic to society produced in different historical periods and which informed, in dynamic relation to each other, the medieval legal system" ([5]: 162).

In contrast to the traditional positivist model that calls for a dogmatic and reductivist approach in search of a unitary legal order, the notion of formant allows the pluralistic trait of legal experience to emerge as "a coexistence of experiences of men and women, of corporations, of universal and particular powers, of customs, insisting on a vast territorial area-which we define, by convention, as European…" ([5], 163). The ethical and historical formants "are not, therefore, mere 'factors' or 'components' to be considered abstractly in a cause-and-effect relationship with respect to the legal phenomenon, but constitute the heuristic presupposition of the definition of common law itself, in historical perspective, as the catalyst of European legal-spiritual civilization" ([5], 163).

In fact, here Sacco's formants, when read so broadly, remind us of the informative-normative systems of Sacco's colleague Enrico di Robilant. The latter pursues a goal rooted in the thought of Hayek and Popper, overcoming the naive model of Kelsenian scientific positivism: the development of legal epistemology in opposition to Bobbio's general theory assumption.

We could, therefore, that in the University of Turin, Sacco initially develops the critique of the dogmatic positivist model from a hermeneutic perspective, Robilant realizes this aim in the epistemological sphere, and, despite differences, the scholar in Roman Law Filippo Gallo, especially in his late works devoted to the critique of the positivist method in Roman law, does not move away from that model, although, like Gigliotti, a historical continuity of the 'legal tradition'. In this internal context of the post-Bobbian Turin Faculty, some differences can certainly be traced to a somewhat common dimension, as we will try to indicate. Sacco's legal formant, Robilant's figure and Gallo's reading of custom are closely related. According to

Robilant, law is an 'informative phenomenon'. The contemporary complex society is seen as a pluralistic system, where law is conceived ''as a system, as a flow of informative and operative impulses that circulate in that complex of systems that form the industrial society'' ([6]: 225; [7]: 169), characterized by pluralism of sources of normative production and complexity. Every society is composed of a plurality of competing informative–normative systems, "amongst which those of science, technology, economy and orientation or ethics play a particularly important role" ([8]: 410).

In such a context, the theoretical problem from which Robilant moves to coin the notion of 'figure' is precisely the epistemological need to clarify what a legal theory is. The objective of knowledge of law cannot therefore be the mere objective description of what law is like, but the attempt to render, in the schematic and abbreviated form of a model, certain identifiable connections in legal reality: to configure reality from a given perspective. Robilant notes how "the process of knowledge (…) also comes to stand as an uninterrupted flow of figures attempting to satisfy competing demands for criticality, fecundity, and invention… it can be said that Popper's *Spiel*, Lakatos's research programs, and Feyerabend's frameworks, though with their differences and contrasts, have points of contact and bring out the relevance of what has been referred to here as 'figures'" ([9]:171). The notion of ethical and historical formant referred to by Gigliotti appears very close to Robilant's epistemological notion of figure, which in turn is close to the idea of an epistemologically important author for Sacco, that is, Hayek.

As pointed out by Monateri, if the distinction between 'tradition' and 'revolution' linked the former to the name of the Romanist Filippo Gallo and the latter to Sacco's the comparative work, it is possible to identify a paradoxical relationship between the two authors on the basis of the nexus between interpretation and custom. The Turin-based Romanist notes how the positivist conception of law influenced the way Roman law could be understood: "In civil law countries, law is conceived, in the line of elaboration derived from the Justinian *legum doctrina*, as a set (system) of norms. This conception, in which the very nature of law is seen to be reflected, is attributed to both the phase before and after Justinian. The assumption is not answered in reality." ([10]: 1). Until Justinian, there is a close link between interpretation and custom in Roman law: "*interpretatio* creates law only through reception, and within the limits in which this occurs, by the social environment" ([11]: 3, [12]: 207). Again, Gallo's position is certainly linked to some notion of tradition, understood as *ars*, but one whose concept of custom and that of interpretation are mutually related.

The itinerary on the topic seems opposite to Sacco, who moves from the concept of interpretation to elaborate a pluralistic theory of mute law, which is, however, also close to the notion of custom, or at least to the practice of repetition of behavior.

If this appears possible to approach the theoretical context of the Turin law school Sacco carried out his research in the three different paths of the comparatist, philosopher of law, and Romanist, and beyond the relevant differences, at least by the radical critique of a positivist model linked to the concepts of form and practice. The evolution of the concept, as it appears in Gigliotti's use of the notion of formant, opens toward a pluralist conception of the legal phenomenon, but in which the very concept presupposed, whether figure or information-normative systems, formant or

cryptotype, or interpretation-consuetude, allows the notion of law to be understood in a unified theoretical framework.

Even a comparatist Sacco scholar such as Monateri, among others, seems to be moving in the same direction: seeking a philosophical figure for comparative law theory. The philosophical background of the evolution of Sacco's research from interpretation to comparative and legal anthropology appears amenable to further development. And Caterina's [13, 14] work on cognitive science also follows the same trace, albeit adopting an interdisciplinary approach close to neuroscience, in which the work of legal philosopher Amedeo Conte's scholars also finds its place. In this paper, I would like to indicate how other legal philosophical developments, not necessarily in continuity with Sacco's theoretical framework, are also fruitful in showing how Sacco is rooted in a philosophical theoretical context that is properly Turin-based, attentive to the hermeneutic turn and to the notions of form, figure, formant (think of the role of Pareyson and later Eco, Vattimo, Vercellone and so on).

In the vast bibliography on the subject, Monateri's paper *Morphology*, *History and Comparison*, and later other monographic texts [15, 16], allow us to identify an interpretive path of Sacco's thought that leads us even more explicitly to a legal aesthetic perspective, albeit linked not to the notion of figure but to that of style. The article's analysis is interesting because it evokes several authors' names and problems that appear useful in providing another reading of the aesthetic and semiotic destination of Sacco's work, perhaps beyond some of the limitations inherent in the author's own approach. According to Monateri, who takes up the critique of the objectivism of interpretation, "the way in which the law concretely manifests itself appears everywhere very differentiated; different is its style, and different are the modes of its presentation" ([16]: 3). Here Monateri adopts the approach of legal aesthetics of discourse, already present in Robilant and Legendre [17, 18], through reference to a necessity of pluralistic comparison: "a comparison among these multiform appearances of the law therefore becomes necessary, in order to rediscover the original relations between the political, the theological, and the legal, which make representation the formant of all concrete historical experience, as the management of the sensitive threshold of representation, which thus becomes the central problem of all politics" ([16]: 3–4). The inclusion of the space of the political, the theological, and the juridical, together with Gigliotti's reference to the historical and the ethical, allow for the identification of the relationship between formants, informative-normative systems, and Robilant's figures, within the development of the hermeneutic and the aesthetic. This allows for the connection of the notion with the semiotic dimension and the aesthetic anthropology of law: which is a topic apparently neglected by Sacco.

Rather than informative-normative systems, in complex societies, it seems appropriate to talk about communicative-normative systems, and to refer 'style' to the network of figures (considered as a premise for an aesthetic-legal chorology (on legal chorology, 22). The Turin-based philosopher Enrico di Robilant, criticized positivism from an epistemological perspective, but already not without allusions to the aesthetic, understood law in the 1970s as a flow of informative-normative impulses circulating in the complex and technologically advanced society, and the same idea could be used to understand the notion of formant from a legal aesthetic and

liturgical perspective, also referable to both Pierre Legendre's [17] notion of nomograms, and to Peter Goodrich's [19] and Richard Sherwin's [20] legal emblematics. That is, by specifying how the norm is, semiotically, a message, a communicative flow, which presupposes a sender (a fictitious legal person such as the state) and a receiver (the citizen who must obey the norms). A flow in which what semiologist Ugo Volli calls – following Jakobson and distancing himself from Robilant's cybernetic passage of information – a seductive circuit is activated, useful to explain phenomena as diverse as love communication, advertising or fashion, as well as different aspects of political and legal phenomenon. [18] Even in law, in fact, if observed also from an aesthetic-liturgical point of view, we are dealing with a message in which a strong exposure of the issuer and a strong pressure on the receiver coexist, through a particularly emphasized message endowed with a rich formal elaboration, precisely as in the systems of communication or advertising. Which is not, of course, to reduce law to communication, but to understand a relevant aspect that the pure theory of law had left, so to speak, to decisionism and irrationalist or nihilist thought.

Let us return, however, to Monateri's general reading of formants, to show how "the direction to follow appears to be … that of a new morphology that, in the connection between form and rootedness, allows us to reexamine the uncanny presence of law: its presence, mysterious, elusive but mighty, or even spectral, that informs the political and the economic" ([16]: 5). Monateri, who on the subject of uncanny presence cites a contribution by Sherwin precisely on Vico's methodology [21], develops the argument in the article just quoted. He highlights the connection between Gorla's work and Sacco's approach, pointing out how the latter was elaborating his theory about the difficulties of verbalizing rules in his theory of cryptotypes moving from Gorla's idea of comparison, through the construction of formants: "that is, through the study of law, jurisprudence and doctrine… accomplished without presupposing their logical and systematic coherence" ([15]: 273). Since the famous seminars at Cornell on the 'Common core of legal systems.' Gorla elaborates an idea of comparative law, "as a 'pure knowledge activity,' knowledge by comparison of a 'historical unity,' and of the similarities and differences found between the different epochs of two legal systems" ([15]: 272). This reading by Monateri allows to tie to the perspective identified for comparative law many of the authors and problems essential for the analysis of the legal philosophical trait of Sacco's position: firstly the comparativism linked "to that strand of liberalism from the Scottish Enlightenment to Hayek ([15]: 274), and which is opposed to the 'French form' of the general reordering of society on the basis of legislation": which is, in turn, a perspective common to Robilant's "figure" and information-normative systems theory. Secondly, it approaches, through the notion of morphology *à la* Ginzburg ([15]: 274) the topic of the uncanny presence of law. The presence not linked, as in Robilant and Hayek, to the theory of the primacy of the abstract and the (Humean) unintended phenomena of human action [22], but to be understood as the "third form" of the unknown placed between the natural and the artificial [23, 24]. Secondly, Monateri identifies here the ontological problem referable to global law: a law without borders in which "the fading away of historical differences would affect not only the practical content of law, but its very form, and thus its very ontology, insofar as the form

of an invisible such as law takes place in the age when politics itself struggles to present itself politically" (275) and where concealment of politics and eradication of law appear to be two facets of the same phenomenon. What remains on the ground, here, is the possibility of a new morphology of law that lies between form and rootedness on the basis of its perturbing (aesthetic, figural) presence, which, in the reading proposed by Zwiegert and Kötz [25], refers back to the notion of style.[1] A notion which for Monateri means as 'genealogy' and which leads us precisely to the central point of the article: "we mean here by genealogy the search for those happenings that do not stop happening, but are substantiated in structures of discourse that tend to persist, and thus to conform as a memory, the main purpose of which is that, not of the past's pastness, but of its presence. In this way the past succeeds in dominating the informal behaviors of institutions, which in turn engender and dominate formal behaviors by providing a sense of them which in turn generates other senses and other behaviors" ([15]: 277–278). Precisely this seems to me to be the most interesting point of Sacco's theory: his identification, far beyond his legal anthropology as a theory of origin, in the comprehensiveness of dumb and articulate law legal as a problem in the contemporary scenario which scholars should (continue to) think about.

It is no coincidence that Monateri, when later developing his theory of the 'Political Sublime' [27], in the article cited above, quotes the "pontifical revolution" differently conceived by Berman and Prodi ([15]: 282) as a theory of the changing foundation of law. However, he does not mention, Legendre's aesthetic reading of this Revolution, not coincidentally referred to as the "revolution of the interpreter" ([28]: 20, [18]), linked in turn to another notion that can be superimposed on, and compared with, those of formants: precisely, the category of nomograms. Legendre's comparatist reading is not based on the notion of formant, but rather on that of nomogram, extending the view of formant beyond that proposed by Sacco, Monateri, and Gigliotti, by introducing its legal aesthetic perspective: "My wanderings among medieval Latin manuscripts… the study of dance, of emblems and rituality have opened up to me the comparative field of *figuralia*, (things that give form and shape, but also postures, clothes, dispositions, symbolic machines)" [29]. Following Legendre, "book, dance, emblem, rite (and then cinema) are variants of the same writing phenomenon of nomograms ([30]: 60)", which we can designate as the aesthetic equivalent of the comparatist formant [31], in the act of extending Sacco's insight to the entire sphere of culture, of an aesthetic-legal anthropology ([32]: 504, [17]). The following two quotations from Monateri do not appear then to be far from the aesthetic-legal view of the empty foundation, or can be interpreted in this sense, identifying a problem concerning the dimension of origin in Sacco's theory (well identified by another philosopher of law such as Nerhot: 36): "origin does not apply here then as archaeology of systems of law, but as 'genealogy' of present-day differentiations, that is, as the study of the emergence of the writing devices that determined the great caesura of modernity with respect to the pre-modern conditions of

[1] It does not appear possible here to address the nexus of figure, formant and style in relation to Beauchamp's notion of style and figure: see Heritier [26].

Euro-European societies. Therefore, the difference between common law and civil law reappears as a genealogical difference of the modern, with respect to the different dislocation that law and jurisdiction assume there as elements at once structural, political, and cultural" ([15]: 280). While Monateri's (and Sacco's) conclusion is grounded, albeit with different understandings of the reference to history, in the duality of the genealogies of the West (an element that Nerhot would decisively contest: 36), what is of interest to me is the simultaneity of the presence of these forms within the same context, within a common conception of the void foundation of the law aesthetically grounded. It is precisely this transformative element that makes it possible to specify the legal philosophical interest of Sacco's perspective in identifying a conception that is admittedly pluralistic and perhaps even materialist and nihilistic, but aimed at providing a comprehensive understanding of the legal phenomenon and its meaning from the notion of referral to the empty foundation of the legal: "the common law not only administers a deferral, but indeed the very existence of this deferral to the "uncanny presence" of the law, and its inclusion in ordinary decisions, constitutes its essence: its "form-of-law," in the sense that the law produces itself in a given form. Even the neo-classical ideal of perfect political legislation does not deny this postponement, but assumes, by virtue of the perfection of political sovereignty, that legislation can realize it fully in the ontology of a positive law without residue: whereby this residue, this original reserve of meaning, returns to manifestation only in the suspension of that which is constituted as the actual political mechanism of its government. Instead, the position of the "pure government" of the world—as distinct from sovereign glory, and a mere technical factor of efficacy—is that of the very negation of the existence of any referral: it is the realization of a purely and uniquely immanent order, to which no representation is necessary, since there is nothing that is absent to be made present. Hence, all representations become fictions with respect to the operational" ([15]: 286).

The theoretical movement of comparative law theory traceable in Sacco thus seems to need to flow into a "revolutionary" conception of law, which develops a conception of law that poses a specifically theoretical, if not metaphysical problem: the problem of the representation of the foundation. This topic, while carefully avoided in the Sacco's explicit goals, in many of the readings of his work

3 The unknown and the co-presence of the mute and the verbalized as an interesting problem. Toward a Vico's mute law (Italian: *diritto mutolo*)

It thus appears possible to arrive at a figure of Sacco's work that is certainly not neutral, but aimed at indicating the theoretical value of the project, to be understood not so much as a revolutionary theory of the origin of law, but as a tool that is still useful in understanding the evolutions of law, particularly in the recognition of the parallel features of mute law and articulated law. Moving from the contestation of the objective character of normative interpretation with regard to comparative law (formants, cryptotypes, mute law), Sacco thus arrives at the construction of a true legal philosophical anthropology and philosophy of law, beyond the legal technicality

of its contents. Not without contradictions and aporias, as is natural, but a position undoubtedly capable of indicating a path and a line of research that can be fruitfully continued and that, in any case, continues to help interpret the evolution of law and its rootedness in culture, beyond the technicality of its language.

It has already been seen how Sacco's reading of Gorla's work implies recognition of the category of "history," and how this must be understood differently from the positivist notion of history: "Comparison recognizes that the "legal formants" within a system are not always uniform and therefore contradiction is possible. The principle of non-contradiction, the fetish of municipal lawyers, loses all value in a historical perspective, and the comparative perspective is historical *par excellence*" ([33]: 24). The opposition of the notion of formant is directed toward the dogmatic version of legal knowledge[2] and legal positivism that denies the invisible character of legal decision-making.[3] As the formant extends to historically different eras and systems, it seems difficult not to consider a transcendent notion of empty foundation, similar to Legendre's: "The statements which are "legal formants" of the system, hortatory or not, may not be strictly legal. They may be propositions about philosophy, politics, ideology, or religion. It would be as difficult to explain canon law without the notion of God as it would be to explain Soviet law without ideas taken from Marx or Engels or Lenin." 37:32). However, the operative feature of the notion is pragmatic: "The comparative importance of a legal formant depends upon its capacity to influence the others. It is a characteristic of a legal system that is hard to verbalize, hard to quantify and patently of enormous importance" ([33]:32–33). Sacco's polemical target is thus the principle of the unity of the legal system and the fact that the various rules (legal, doctrinal, jurisprudential) would be identical: "if a dissimilarity exists, it would be due to an error of the interpreter" ([34]: 58). The critical part of the theory is accordingly directed at the equating of the judicial decision, which is always explicit and enunciated by the judge, and the *ratio decidendi* i.e. "the set of factual circumstances in the presence of which the judge enunciates a certain decision" ([34]: 63). The common law system, by inducing the judge to "enunciate the relevant circumstances, and clearly state the '*ratio decidendi*,' with clear opposition to *obiter dicta*, tends to narrow this gap" ([34]: 63; [35]). The notion of formant is thus aimed at solving on the one hand the problem of changing ("Law is not static. It changes incessantly" 39: 390), on the other to extend the scope of source theory to include the beliefs of the jurist: "the doctrine of sources is not complete unless it extends to all the sources that create individual formants" ([34]: 74), including "the instinctual, (genetically or culturally transmitted) irresistible motivations present in

[2] "The comparative method is thus the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic method is founded upon analytical reasoning ([33]: 25).

[3] "The statutes are not the entire law. The definitions of legal doctrines by scholars are not the entire law. Neither is an exhaustive list of all the reasons given for the decisions made by courts. In order to see the entire law, it is necessary to find a suitable place for statute, definition, reason, holding, and so forth. More precisely, it is necessary to recognize all the "legal formants" of the system and to identify the scope proper to each. One must avoid the optical illusion caused by magnifying the more general statements of law, the large definitions, and neglecting the specific operational rules that courts actually follow. By the same token, one must avoid the error of perspective that makes the more abstract legal conclusions invisible" ([33]: 27).

human reality, called (in the humanities) feelings of justice, reasonableness, principles, values, sometimes ethics (e.g., bioethics), and embryonically identified, in ethology, as dictated by DNA or imposed by social pressure" ([34]: 75). Moreover, the extension of source doctrine is certainly also, variously, the goal of Goodrich's legal emblematics, which coins the notion of *obiter depicta* to indicate the relevance of iconic sources in common law, Legendre's nomograms, Robilant's figures and information-normative systems, Monateri's genealogy, Gigliotti's ethical formant.

Emerging in this sphere is the area of mute law, in relation to the notion of cryptotype, of Hayekian primacy of the abstract and correlative to the identification of the centrality of the "particular circumstances of time and place" in the work in economics of the 1930s, which later earned Hayek the Nobel Prize and was later developed from an epistemological perspective [36–38]: "Of the legal formants we have considered, some are born explicitly formulated such as the formulas of scholars whereas others are not. As we have seen, those which are not can be immensely important. We shall describe them as "cryptotypes." Man continually follows rules of which he is not aware or which he would not be able to formulate well" (39: 384). Precisely in relation to this extension of the source system, Sacco is compelled to try to develop a macro history or anthropology (but also an explanation of notions such as obedience to laws as opposed to fidelity, 3: 43), in order to clarify a cultural perspective that is broader than the legal-positive or normative one, and which has been widely criticized from a legal-philosophical point of view by Nerhot in relation to the conception of temporality that underlies it [39]. Without going into the subject, we could indicate that Sacco does not claim to construct a philosophical theory capable of avoiding contradiction, but rather to try to explain observed facts, according to a supposedly empirical method. However, Nerhot (but also Monateri himself in the article cited above, although in a different manner) has no difficulty in identifying the contradictory nature of the philosophical notions about history, particularly with regard to the notions of history and origin, fidelity and custom, in the setting of mute law. In criticizing Sacco, he actually critiques, at the same time, Hayek, Robilant, Legendre according to the notion, termed metaphysical, of the concept of the unknown (different from the Hayekian notion of the primacy of the abstract, and the Lacanian notion of the empty foundation used by Legendre), which is based on the phenomenological connection between a 'before' and an 'after' and a theory of temporality that denounces the tautological nature of the explanation of the origin of language and law: "*C'est toujours le non-su qu'un après intérroge et l'avant n'est sollecité que pour permettre cela*" ([39]: 273). But it is precisely the reference to the origin of language that allows Sacco's theoretical move to be traced back to Rousseau's.[4]

[4] According to Nerhot, the mute is comparable to the unknown, and the question of origin must be understood in relation to the thought of custom and tautology "L'indicible s'écrit comme le "muet" … Le sens relève plus, sans doute, de l'élaboration de cette "macro-histoire" qui ouvre à une pensée de l' "origine du droit", "origine" qui montre la non différenciation d'une pratique sociale et de son expression symbolique, un peu comme si la pensée ne se distinguait pas encore de l'agir à l'aube de l'humanité. … En tout cas, ce mode de penser est tout à fait similaire, précisément, au mode de penser la coutume, ([39]:166). One thus finds the 'revolutionary' character of Sacco's thought, except that this 'anthropological' revolution is far more traditional than one might think, or at any rate linked to a thinker like Rousseau:

Without, therefore, being able here to enter into the debate concerning Sacco's legal anthropology in detail, I would simply point out that, regardless of the success and the alleged 'revolution' in legal thought that Sacco's work sought to achieve as well as its coherence as a philosophy of history or its reversal, an element that seems to me to be highly topical is the theme of the co-presence of the 'mute' and the 'articulate' in contemporary law (and cultures). According to Sacco, if law has been silent for millions of years, this was because nonverbalized rules were 'instinctive.' Today, in a radically different context, silent law is nevertheless very much alive: "in every legal system alongside the spoken rule, there survive, barely visible but efficient lattices of latent norms, called hermeneutical means, scientific concepts, general principles, values, cryptotypes, living law, law in action, and so on" ([32]: 148).

A combination of spoken and mute elements can also be found today: "Our legal system is familiar with spoken sources (the written rules, of splendid form and content, produced by legislative assemblies) as well as with unspoken sources (commercial uses, determination of standards of conduct, construction, by an interpreter, of concepts such as fault, reasonableness, bad faith). It is familiar with acts carried out through words (contracts made by fax, deeds, wills) as well as acts carried out without words (deliveries, contracts made through devices that allow the buyer to pay and receive merchandise)." ([1]: 464–465). The problem is that legal science mainly tends to focus on verbalized aspects, and when it takes an interest in silent acts, it does so by analogy to spoken acts. It is precisely on this point that semiotics and interculturality represent an essential contribution to the theory of legal sources, to be understood in a humanistic and intercultural sense. While Wagner specifies the first aspect [41] by reconnecting legal semiotics and emblematics (law and image), Ricca reads the notion interculturally: "'Mute' is everything that law does not say, but which is nonetheless indispensable for it to speak to its addressees." ([42]: 98). Hence, he tries to fit the 'mute dimension of legal experience' into this perspective

Footnote 4 (continued)

"Penser la coutume, c'est penser un autre monde, c'est-à-dire à l'opposé du nôtre. L' "anthropologue" alors.

naît. Il faut savoir penser un autre monde, un monde différent, tout différent.([39]:153); "la philosophie des Lumières avec Rousseau, est une anthropologie qui définit l'homme "par le bas" et c'est à cette anthropologie qu'il faut relier Rodolfo Sacco. Tout comme Rousseau, il élabore une pensée critique, critique de notre monde comme Rousseau était critique du sien, parla représentation d'un "bon sauvage" dont la vie "naturelle" n'est pas "sauvage" mais une transcendance". ([39]: 254).

The notion of fidelity, which for Sacco is a corollary of subordination but different from obedience ([40]:167) remains in this model of revolution only apparent: "Cette notion de "fidélité" est intéressante à plus d'un titre… L'exercice de droits signifie l'accomplissement de devoirs: ceci est le naturel inscrit au coeur même de la société constituée. La "fidélité" comme l' "intérêt général" de Rousseau est le principe transcendant par excellence qui efface la distinction entre l'animal et l'humain, entre le naturel et le social". ([39]: 264).

The unknown placed at the principle of mute law thus becomes a metaphysical structure, according to Nerhot, capable of providing explanation of Sacco's method, which helps, through his critique, to pose the question of method of reasoning.

"Le non-su, c'est-à-dire ce qui est au principe de ces raisonnements par lesquels nous disons connaître et démontrer la vérité, implique une "métaphysique", ce qui veut dire que connaître implique l'accession par la pensée à une présence". ([39] 272).

that seeks to extend, although in an inter-cultural sense, the theory of the sources of law within a semiotic framework. For Ricca, "in the universe of linguistic communication, the mute parts are thus the other signs that make each word a sign. This is an inescapable complementarity" ([42]: 99): where it is precisely through the defectiveness of the word that the production of meaning can emerge in an inter-cultural sphere-in which, by definition, there is a lack of common traditions and customs – whose structure, like the notion of the mute origin of law, appears tautological and dogmatic, as pointed out by Nerhot. Thus, it is precisely from the inter-cultural context that the interest of the cohabitation of mute and articulate emerges: "To make the mute parts emerge along the process of translation is to broaden the cognitive bases about the experience of the Other and its judgments. To make the mute parts of the Other's experience of language speak is to create a gateway toward the understanding and symbolic reproduction of the interlocutor's qualitative perceptions. What the Other does will then be able to acquire meaning within a discursive path articulated in narrative form and, above all, containing elements of continuity and at the same time of difference from the translator's universe of meaning. In confronting a narrative, that is, the objectifying exposition of a life experience, the hermeneutic resources of the receiver-translator are mobilized and projected into a kind of symbolic mirror. The mute parts of his cultural/personal knowledge will then begin to speak to him, endowing themselves with new potentialities and meanings" ([42]: 124). Again, according to Ricca, the function of interculturality is specular and represents the possibility of reading the co-presence of the mute and the articulate while eschewing its contradictions in the philosophy of history and temporality: "Confrontation with the Other takes the gag off the mute parts of culture and unmoors culturally acquired knowledges from the abysses of unconsciousness. The very fact of knowing and making those silences speak inscribes them in a new frame of meaning" ([42]: 126). The outcome, then, of an analysis capable of drawing lessons from the attempted revolution of Sacco's work requires a passage for a socio-semiotic, intercultural, generative gaze: "The co-generative dialogue between the expressed and silent parts of law can thus remain concealed from an observer placed within the legal experience. Instead, a sociosemiotic gaze is able to focus attention on the process of semantic settling that accompanies the legal-social making in the intimacy of its production" ([42]:105). The close intertwining of culture is the inescapable condition of the interpretation of written law in contemporary societies: "That a lawyer or a judge can focus their attention on regulatory contents and separate the categorization of facts as an implicit and relatively unproblematic task depends on the communicative and pragmatic efficacy of legal imperatives, which in turn rely heavily on cultural ground. Precisely, the cultural components of the law are treated as 'invisible/mute parts'and are regularly overlooked" ([43]: 146).

One might ask whether this vision of mute law and Rodolfo Sacco's theoretical itinerary, which extends its scope in a cross-cultural, semiotic, and generative sense [44], is compatible with the vision of legal anthropology constructed by the author. The hypothesis of a Vichian mute law (*diritto mutolo*) seems to be able both to go beyond the question, showing how the initial citations of the Vichian *verum factum*, later abandoned by the author, and to allow for the prospect of a New Science of Law capable of moving from a philosophical foundation that, starting from a mute

law in the Vichian sense, can broaden the theory of the sources of law in an intercultural and chorological sense. While Nerhot identifies Rousseau as the source of mute inspiration for Sacco's thought, it is perhaps in a Vichian reading declined in a semiotic sense [44–46] that interesting developments can be found for an intercultural philosophy of law that anticipates the theme of mute "law" in a "right", according to a Vichian mute pun. Quotations from Vico appear in the article on Legal formants primarily in relation to the casuistic dimension of the comparative method ("Comparative law is a historical science concerned with what is real. It conforms to the criteria of Gian Battista Vico: '*verum ipsum factum*' 37: 26), and, secondly, to the possibility of overcoming the principle of contradiction as a presupposition of the principle of unity of the system and the objective determination of meaning through interpretation ("'*verum ipsum factum*' is the criterion that inspires the comparativist in his analysis" 37: 25). Later in his work, Sacco does not elaborate on the connection of mute law with the Vico's *Scienza Nuova* and drops the analysis of the relationship between mute law and the Vichian philosophy of language. The Neapolitan philosopher, for one, seeks to construct a new discipline aimed at explaining both the origin of language and the mind of man according to a peculiar method, which Sanna summarizes with the following formula: knowledge for Vico means 'to imagine what is not present', history signify 'to imagine what is far away in time and space', and the metaphorical other, that here is to be interpreted in a cross-cultural sense, stands to 'imagine what is different' [47].

According to Valagussa, Vico's philosophy, before the unknown in Hayek and his primacy of the abstract, eschews the dichotomy between nature and convention placed at the origin of language in Western philosophy since Plato and Aristotle: "the gesture is the place where Vico discovers the original unity of word and thing, that is, of signifier and signified, before the split could even be thought of" ([48]: 76–77). In *Scienza Nuova*, the mute (*mutolo*) character of language is related precisely to legal emblematics and the science of hieroglyphics and fantastic universals: as dignity LVII states "Mutes make themselves understood by gestures or objects that have natural relations with the ideas they wish to signify." This axiom is the principle of the hieroglyphs by which all nations spoke in the time of their first barbarism. (I *Mutoli* si spiegano per *atti*, o *corpi*, c'hanno *naturali rapporti* all'*idee* ch'essi vogliono significare. Questa Degnità è 'l *Principio de' geroglifici*, co' quali si truovano *aver parlato tutte le Nazioni* nella loro *prima barbarie"*. ([49]: 875, 68).

It should be made clear that 'mutolo' does not mean 'mute,' but derives from mythos: as Cantelli points out, "the first men were *mutolus* insofar as they lacked articulated language" ([50]: 77), not deprived of language. As I have indicated elsewhere, Vico proposes a theory of the origin of the mind starting from the body: "In imagining nature as a tremendous animated body dominated by passions and emotions, the first poet-theologians thus invented the first divine fable crystallized in an image, that of Zeus, king and father of men, in the act of hurling lightning and giving rise to religion and civil order" ([44]: 1138): at the same time, the origin of mind, of language, of law, of what Hayek, in his eschewing of the nature/artifice dichotomy, called unintended phenomena, the result of man's action but not design [22, 23]. This is precisely the area of the

poetic origin of the law that Sacco seeks in his legal anthropology and would perhaps have found in Vico's philosophy if only he had continued the initial insight of the reference to *verum factum* in defining the notion of formant, as dignity LVIII makes clear. "Mutes utter formless sounds by singing, and the tongue-tied by singing teach their tongues to pronounce. I *Mutoli* Mandan fuori i suoni informi *cantando* e gli scilinguati pur cantando spediscono la lingua a prononziare ([49]: 875,69). The transition from the sound emanating from the body and gesture to the articulation of reason and language is expressed by the famous dignity LVIII: "Men at first feel without observing, then they observe with a troubled and agitated spirit, finally they reflect with a clear mind. This axiom is the principle of the poetic sentences, which are formed. with senses of passions and affections, in contrast with philosophic sentences, which are formed by reflection and reasoning. The more the latter rise toward universals, the closer they approach the truth; the more the former take hold of particulars, the more certain they become" (Gli *uomini* prima *sentono* senza avvertire, dappoi *avvertiscono* con animo perturbato, e commosso; finalment *riflettono* con mente pura. Questa *Degnità è* 'l *Principio delle Sentenze Poetiche* che sono formati con sensi di *passioni* e d'*affetti*; a differenza delle *sentenze filosofiche,* che si formano dalla *riflessione* con *raziocinj;* onde *queste* più s'appressano al *Vero*, quanto più s'innalzano agli *Universali*, e *quelle* sono più certe, quanto più s'appropriano a' *particolari*" ([49]: 873–874, 67–68).

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