



Legal terminology and comparative law: the role of the operational rules

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Comparative Law

20 th Century

- ▶ «Society of comparative law» (London) and «Société de Legislation Comparée» (Paris)

Italy

- ▶ Comparative law was introduced by prof. Rodolfo Sacco (University of Turin, Accademia Nazionale dei Lincei)
- ▶ Academic chairs in comparative law

Comparative Law

► Science

► Knowledge

► Methodology



Knowledge

Data = legal rules (norms)



The operational rules

Show as the system really works.....

...beyond definitions and legal language



A) Methodology: the Theory of the Formants

Legislation, constitutions, decrees (legislative formant)

Case law (case law formant)

Scholarly writings (doctrinal formant)

R. SACCO, *Legal Formants: A Dynamic Approach To Comparative Law*, in *The American Journal of Comparative Law*, Volume 39, Issue 1, 1 January 1991, p. 1 ff.

The formants

Legal rules can be found in the different formants of the various countries (legal systems)



Example 1: l'erede apparente

A person who believes himself to be heir disposes of property (he has inherited) to a third person, who is in good faith.

The transfer is valid in Italy («trasferimento dell'erede apparente al terzo»)

R. SACCO, *Legal Formants: A Dynamic Approach To Comparative Law*, in *The American Journal of Comparative Law*, Volume 39, January 1991.

The formants

Italy

Code art. 534: yes

Case law: yes

Doctrine: yes

France

Code: X*

Case law: yes

Doctrine: no

Belgium

Code: X

Case law: no

Doctrine: no

*This is a theoretical case. Note that the legislative formant might have changed after the French reform of the law of contract of 2016.

The operational rules

The definition «trasferimento dell'erede apparente al terzo» is present only in the Italian legal language, but the same operational rule exists in France too.

The operational rules

The theory of the **formants** draws a distinction between the operational (working rules), the real practices of a legal system...

.....and the **definitions (legal language)**, the symbolic, linguistic set utilized by the jurists to describe the legal rules.

Example 2: medical malpractice

In American law MP is classified as a Tort, whereas in France it is considered a Breach of Contract.

French law on contractual liability is strict, so that the victim does not need to prove that the doctor was in fault.

In Usa tortious law medical malpractice is based on negligence and so the victims has to prove the doctor's fault.

The two systems are apparently at opposite

Medical malpractice

French case law has introduced a distinction between two different kind of contractual obligations : *obligations de moyen* and *obligations de resultat*:

- ▶ in *routine medical operations* a doctor is under a duty *de resultat* and so the victim of a damage has *not to prove the fault of the doctor*;
- ▶ in non routine operations the doctor is under a duty *de moyen*, which means that he just promised to use his professional skill, and so the victim of a damage must prove a doctor's fault, to be compensated.

P.G. Monateri, *The ABC of comparative law: legal formants and comparison*, at https://www.researchgate.net/publication/290574779_ABC_of_Comparative_Law_Legal_Formants_and_Comparison

Medical malpractice

American courts (case law):

in routine medical operations the courts apply the doctrine *res ipsa loquitur*, so the victim's damage is evidence of the doctor's fault and the victim doesn't have to prove it.

Res ipsa loquitur is not applied in non routine operations, and so the victim must prove that the doctor was in fault.

P.G. Monateri, *The ABC of comparative law: legal formants and comparison*, at https://www.researchgate.net/publication/290574779_ABC_of_Comparative_Law_Legal_Formants_and_Comparison

The operational rules in medical malpractice

The definitions (legal language) are different and

Usa: tort (tortious liability)

France: contract (contractual liability)

.....assume different legal rules:

France: victim has not to prove the doctor's fault;

Usa: victim needs to prove the doctor's fault.

The operative, working rules are the same in Usa and France:

In routine cases victims do not need to prove the fault.

In non routine cases victims have to prove the doctor's fault.

B) Methodology: the Factual approach

How operational rules are collected

- Questionnaires;
- National answers and reports;
- Final reports.

The Factual approach

► Level 1:

Mr. White believes himself to be heir and disposes of property (he has inherited) to Mr. Blue, who is in good faith.

1: Is this transfer of property valid in your legal system?

2. If yes, where is the rule formulated?

3. If no, can Mr. White recover property? If yes, under which conditions?

Operative rules of all the countries (legal systems) involved.

C) Methodology: genotype and phenotype

The Construction of the common system

- ▶ **Genotype**

Elements that are fundamental of a specific category.

- ▶ **Phenotype**

The real characters of the operational rules present in the different countries.

When some of those characters coincide with the fundamental elements of the genotype, the operational rule belongs to that specific category.

- ▶ R. Sacco, Legal Formants: A Dynamic Approach To Comparative Law, in The American Journal of Comparative Law, Volume 39, January 1991.

C) Methodology: genotype and fenotype. Esample n. 1

The Construction of the common system

► **GENOTYPE**

- Transfer of property by someone acting as an heir.
- Good faith of the receiving person.

► **FENOTYPE**

All the countries in which this elements are present.....

....regardless other characters, like the good/bad faith of the pretended heir and other details.

The Factual approach



► Level 2:

In 2017 Mr. Green underwent an appendectomy (routine operation) but contracted an infection during the operation.

1. Can Mr. Green take action for compensation against the doctor?
2. If yes, what is Mr. Green required to prove?
3. Particularly, is Mr. Green asked to prove the doctor's fault?

The Factual approach

► Level 2:

In 2017 Mr. Green underwent an heart transplant (non routine operation) but after the operation needed the support of the heart machine anyway.

1. Can Mr. Green take action for compensation against the doctor?
2. If yes, what is Mr. Green required to prove?
3. Particularly, is Mr. Green required to prove the doctor's fault?



The construction of a common system

► GENOTYPE

Routine operations

no doctor's fault to be proved

Non routine operations

doctor's fault to be proved

► Fenotype

All the countries in which this elements are present.....

....regardless the legal classification of the responsibility is tort or contract, regardless the kind of actions, regardless the prescription....