

The Forgotten Roberto Vacca

Horacio Spector

Collegiate courts face the so-called *doctrinal paradox* when they have to reach reasoned collective decisions. If the premises and conclusions of the reasonings made by members of the court have a certain profile, the majoritarian result differs depending on whether we count the premises or the conclusions. The paradox has affinity with Condorcet's paradox. It used to be generally accepted that Lewis Kornhauser and Larry Sager presented for the first time this paradox in a well-known paper published in 1986, though they never claimed paternity.¹ Geoff Brennan and Philip Pettit have called the paradox *discursive dilemma* and extended it to all kinds of judgment-aggregation.² Today the paradox is studied both by legal scholars and political scientists.

One evening in the winter of 2008 I was reading a book published in 1945 by the Argentine legal philosopher Carlos Cossio, *El Derecho en el Derecho Judicial*. To my great surprise, I found in this book a detailed presentation of the doctrinal paradox, almost identical to its modern formulation.³ How was this possible? It was already known in 1945? For a moment I thought that Cossio had discovered the paradox but soon reached the footnote in which the author credited someone called Roberto Vacca. In 1921 Roberto Vacca had discussed a clear version of the paradox in his essay “Opinioni individuali e Deliberazioni collettive”, published in the first issue of the *Rivista Internazionale di Filosofia del Diritto*, with charts that are only graphically different from the ones used today.⁴

Who was Roberto Vacca? We do not know much about him. All the information I was able to gather has come from his nephew and namesake, an engineer and writer who devotes himself to science popularization. Roberto Vacca was born in Genoa in 1876 and died in the same city in 1924. He was an Italian lawyer with philosophical interests, but, as far as I know, he never held a university position. He spoke German and Russian and published two

¹ Lewis A Kornhauser and Lawrence G Sager, “Unpacking the Court” (1986) 96 *Yale Law Journal* 82-117.

² Philip Pettit, “Deliberative Democracy and the Discursive Dilemma”, (2001) 11 *Philosophical Issues*, 268; Geoffrey Brennan, “Collective Coherence?” (2001) 21 *International Review of Law and Economics* 197-211.

³ Carlos Cossio, *El Derecho en el Derecho Judicial* (Buenos Aires, Guillermo Kraft, 1945), 160-64.

⁴ Roberto Vacca, “Opinioni individuali e Deliberazioni collettive” (1921) 1 *Rivista Internazionale di Filosofia del Diritto* 52.

papers on psychology and judicial decisions before the First War.⁵ During the war he wrote a book while being held prisoner at Mauthausen in Austria.⁶

Roberto Vacca's pioneering paper had fallen into oblivion, even in Italy. Or perhaps we should say that it was overlooked all the way down since its publication, as no one but Cossio had made any reference to it. In 2008 I informed various colleagues working in the field about my "discovery" of Vacca's paper. Among others, I corresponded with Geoffrey Brennan, Bruce Chapman, Jon Elster, Lewis Kornhauser, Christian List, Philip Pettit, and Wlodek Rabinowicz. None of them had even heard the name of Vacca. It was amazing. How could such a good paper be ignored for so long?

In 2011 Christian List and Philip Pettit recognized in their *Group Agency: The Possibility, Design, and Status of Corporate Agents* that Vacca's paradox is an early formulation of the doctrinal paradox/discursive dilemma.⁷ List and Pettit acknowledge and confirm my first scholarly report done in private in 2008 and in print in 2009.⁸ Jon Elster has recently acknowledged Vacca's pioneering contribution as well.⁹

Roberto Vacca presented the paradox in its modern form for the first time and sought to introduce it for debate in the legal philosophical literature of his day. He obviously failed in his project to call attention. The period between the two world wars was doubtless unfavorable for the dissemination of ideas. I am very pleased that he is given today the credit he deserves, and that I have made a contribution to this cause. The scholarly profession should cherish justice, because it is recognition that scholars centrally work for, and, though it took many years, scholarly justice has finally been served and Roberto has today the recognition that he has long deserved.

⁵ "Sull'importanza psicologica della "motivazione" nelle sentenze dei giudici, (10 pages), *Psyche* 1912; "Su alcune tendenze particolari dei giudici nelle sentenze collettive", (10 pages) *Psyche* 1914.

⁶ *Il Diritto Sperimentale*, Torino: Fratelli Bocca Editori, 1923, 253 pages.

⁷ Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011), 217.

⁸ "The Right to A Constitutional Jury", *Legisprudence*, Volume 3, Number 1, July 2009, 111-123.

⁹ Jon Elster acknowledges the contribution of Roberto Vacca but reports that the paradox had already been hinted at by the French mathematician Siméon Denis Poisson in a work of 1837. Yet Poisson's example offers neither a systematic formulation of the paradox nor its standard matrix representation. See: Jon Elster, *Securities against Misrule, Juries, Assemblies, Elections* (Cambridge: Cambridge University Press, 2013), 63.