



***TU SOLUS SANCTUS***  
**TULLIO ASCARELLI AND THE QUALITY OF MERCY**

Christopher Heath\*

---

*Tullio Ascarelli in his article Antigone and Portia contrasts Antigone's ('Calvinistic') and Portia's (probabilistic) perception of justice. This contribution argues that perceptions of justice in the ancient, polytheistic world were probabilistic rather than absolute, making Antigone an exception in her time. Monotheism liberated mankind from oppression and lawlessness at the price of becoming subject to justice. The perception of justice as divine has led to self-empowerment, but brought about intolerance towards non-believers, in addition to a rigour that has not led to peace. The perception of justice as oppressive is a leitmotiv both for Shakespeare and for Mozart who both contrast justice with mercy. Recognising that in Christianity, justice is not a divine quality but a human task helps to accept the probabilistic and discursive nature of justice that is the most promising formula for harmonising peace with justice, impersonated by Portia who pleads for mercy and who ultimately brings about justice by discourse without upsetting the social or legal order.*

---

---

\* Dr. iur (Salzburg), Judge at the Boards of Appeal, European Patent Office and Professor at Maastricht University.

Tullio Ascarelli, arguably the most gifted Italian legal scholar of the 20<sup>th</sup> century, had seen a lot in his life: Professor at Ferrara at the age of 23, he was sent into exile by the Fascist government in 1938, made a successful second career in Brazil (where to this day he is revered as an authority on unfair competition law),<sup>1</sup> returned to Italy to an all but warm welcome, became Italian delegate and chair to the negotiations of the Lisbon Agreement on Appellations of Origin 1958, and finally professor for commercial law at his alma mater in Rome - only to pass away weeks after assuming this position.<sup>2</sup> His legal theories are expressed in his works, while his character and Weltanschauung are expressed in a rather short article on Antigone and Portia.<sup>3</sup>

Ascarelli sought examples in literature in order to demonstrate how legal conflicts can be resolved. Sophokles' Antigone and Shakespeare's Portia in his view represent two extremes: While Portia manages to laugh the case out of court, Antigone pays her uncompromising stance with her life:

'Portia's intelligence, combined with a hint of probabilism and, morally speaking perhaps even ambiguity, is set against what could be defined as Antigone's Calvinist Puritanism. The human triumph of interests, defended through a winning interpretation that presents itself as a remunerable professional activity, is set against the death of Antigone who only asserts the victory of her truth by sacrificing herself'.

The above is an expression of Ascarelli's belief that justice must be arrived at in a discursive manner and is not subject to an absolute truth. Antigone is suspicious to Ascarelli because she regards justice as non-negotiable. There is no room for negotiation because Antigone is convinced she has God on her side. Her justice is not one that is arrived at in a discursive or interpretative manner, but through the conviction that the commands of her God are higher ranking than Kreon's worldly decrees. In the following, four classical dramas will be explained and analysed in further detail: Orestes by Euripides, Antigone by Sophocles,

<sup>1</sup> J.K. Pela, 'Rethinking Unfair Competition Justifications in Brazil' *GRUR International – Oxford Academic*, 28, 30 (2020): 'One of the most influential jurists who shaped Brazil's commercial doctrine was the Italian Tullio Ascarelli, who became a professor in the Law School of the University of São Paulo in the 1940s. His work *Teoria della concorrenza i dei beni immateriali* is repeatedly quoted by Brazilian authors, especially on unfair competition matters'. On the impact of Tullio Ascarelli on Brazilian legal thought, see D. Borges dos Santos Gomes Araújo ed, *Direito Empresarial contemporâneo: Tullio Ascarelli no século XXI* (YK Editora: 2018) and A. Junqueira de Azevedo et al, *Princípios do Código Civil brasileiro e outros temas: homenagem a Tullio Ascarelli* (Quartier Latin: 2008). The University of Sao Paolo in 2020 held a workshop on 'Nas Trilhas de Ascarelli' (May 25 - 29, 2020).

<sup>2</sup> M. Stella Richter, 'Tullio Ascarelli' *Enciclopedia Italiana. Il contributo italiano alla storia del pensiero (ottava appendice). Diritto* (Roma: Treccani, 2012), 707. Also K. Duden in *RabelsZ* Bd. 25, 396; Bd. 25, 343; F.A. Mann, *Archiv für die civilistische Praxis* (AcP) vol. 160, 462; vol. 161, 470.

<sup>3</sup> T. Ascarelli, 'Antigone e Porzia' *Rivista internazionale di filosofia del diritto*, 756 (1955). An English translation has been provided by C. Crea, 'T. Ascarelli, Antigone and Portia (1959)' *The Italian Law Journal*, 167 (2015). The quotations of Ascarelli's essay have been taken from this translation.

Measure for Measure and the Merchant of Venice (both by Shakespeare).

### PROLOGUE:

‘and when he awoke, the others were either asleep, or had gone away; there remained only Socrates, Aristophanes, and Agathon, who were drinking of a large goblet which they passed around, and Socrates was discoursing with them. Aristodemus was only half awake, and he did not hear the beginning of the discourse; the main thing which he remembered was Socrates compelling the other two to acknowledge that the genius of comedy was the same as that of tragedy, and that the true artist in tragedy was an artist in comedy also’. (Plato, Symposium).

### ACT I - ORESTES: RIGHT AND WRONG AS RELATIVE CATEGORIES OF JUSTICE - ‘FIND APOLLO GUILTY OF THE CRIME, SLAY HIM; HIS WAS THE SIN, NOT MINE’

When looking at ancient examples in literature that concern the solution of legal conflicts, *Antigone* was an atypical drama in regard of ancient perception and belief. The reason for this is that to the ancient world (Egypt, Greece and Rome), perception of law and religion was one of contrasting, but ultimately relative values. In a world of cosmic unity, Gods and mortals are parts of the same universe, Gods mingle with mortals and Gods at times may even get it wrong. Legal conflicts were resolved (or not) by shifting patterns of values and aspects, rather than by recourse to fundamental values.

A good example is the Euripidean drama ‘*Orestes*’:

Orestes slays his mother Klytemnaestra and her lover Aegistos, as both of them earlier on had killed father Agamemnon when returning from his military excursion to Troy after ten long years. Orestes is helped in his deed by his sister Elektra and his friend Pylades. The citizens of Argos (Mycenae) after a public trial condemn Orestes and his sister to death by stoning, later commuted to suicide. Things are complicated by the arrival of uncle Menelaos (brother to Agamemnon), his wife Helen (yes, *the* Helen) and their daughter Hermione. As Menelaos refuses to help his nephew, Orestes, Elektra and Pylades plot to kill Helen and threaten the same to Hermione, at which point Menelaos finally sees the need to negotiate. Apollo commands a truce and orders Orestes to be tried before the Areopagus in Athens.<sup>4</sup> Most remarkable in this ancient drama is the question of guilt and the blame game between the characters, dead or alive:

---

<sup>4</sup> ‘There to be absolved’ - a prime example of premeditated justice.

Agamemnon's father Atreus, Orestes's grandfather, had killed brother Thyestes' three sons, had them cooked and served to their father. Thyestes thereupon cursed Atreus' offspring for all eternity.

Aegistos, with whom Orestes' mother Klytemnestra had a relation, was the son Thyestes had fathered when raping his daughter Pelopia. Thyestes made Aegistos later kill Atreus in order to reign Mycenae. Aegistos had to flee when Atreus' son Agamemnon claimed Mycenae as his own, but did not partake in the Trojan war in order to plan his revenge.

Klytemnestra had to marry Agamemnon when the latter killed her husband Tantalos and their newborn child. One of the children she had with Agamemnon, Iphigenie, the eldest, was sacrificed for the Greek ships' safe passage to Troy. On Agamemnon's return, Klytemnestra learnt that her husband had taken the Trojan princess Cassandra as bounty and lover with whom he already had two children.

So much for the background of this family.

Orestes is accused of killing his mother before the city assembly of Argos by Tyndareus, father to both Klytemnestra and Helen:

'If someone murdered his own wife, whose son in turn would kill the mother, and then again some offspring of the wife reciprocated death with death, where would it end?'

Tyndareus, far from being impartial in this matter, is at pains to point out that, yes, his daughter was no saint, but that he would 'defend the law as best as I can do and tame this bestial lust for human blood'.

Orestes' defence to killing his mother (Aegistos death was nothing the Argeans were very concerned about) was that he had been ordered to do by Apollo, so:

'Find Apollo guilty of the crime, slay him; his was the sin, not mine! Accuse the divine order of Apollo, tis him whom I accuse: He ordered matricide! - While guilty I may be of my own mother's death, yet as my dad's avenger I am free of guilt! - Should women be allowed impudently to slay their husbands, disregarding and betraying marriage's holy bond?'

He also accuses Tyndareus ('You've spawned this wretched daughter and with her my fate'), Menelaos ('my father went to Troy not for his own revenge, but for the unjust doings of your wife. That she returns with you, repay, what you received. Has not the earth received my sister's blood for you?') and Helen ('for she should pay to Greece whose sons and fathers she has slain, for brides and women whom she robbed of men'). But Orestes, unlike Antigone, is not convinced that what he did was just and right, he just argues that he should not be punished for it. And it had not been his idea anyway.

Elektra's defence is the same as Orestes': 'Orestes did this deed to please the gods, and I took part, as a woman could have. - It was Apollo sacrificing us by ordering our mother's death.'

Pylades is reprimanded but not accused (after all, he has not killed his mother).

Helen upon her return from Troy is so much despised ('has drowned all Greece in tears') that she must fear for her life and only arrives in darkness.

Menelaos is featured as a weak character who refuses to help his nephew because he is 'short of men', as the one who talked his brother Agamemnon into the Trojan war and who upon return has cast an eye on the Argean throne (one reason more not to help Orestes).

All of the above would make a good courtroom drama: The accuser purports to defend an ancient law, but maybe just wants revenge for his daughter, the victim Klytemnestra had more than one bone to pick with her returning husband, the son Orestes received divine orders to avenge his father. Tyndareus (sensible) argument that his daughter should have been put on trial instead would have been unrealistic given that Aegistos ruled the kingdom and hoped for nothing more than Orestes' death. Uncle Menelaos, instigator of the war against Troy, refuses to help until Orestes threatens to kill his daughter Hermione (whom Orestes is eventually given permission to marry, no doubt another blessed relationship).

Salvation at this point must come from Apollon. He announces that Helen has been placed among the immortals and that Menelaos should look for another wife; that Orestes should leave the town to be absolved by a court in Athens and that he should subsequently marry Hermione and become king of Argos. Finally, that Pylades should marry Elektra.

Typical for the ancient world is the absence of any claim to absolute truth and the interaction of Gods and humans.

## **ACT II - ANTIGONE: RIGHT AND WRONG AS A NON-NEGOTIABLE - 'UNGEHEURES IST VIEL. ABER NICHTS UNGEHEURER ALS DER MENSCH'**

If Ascarelli finds Antigone disconcerting, how much more did the contemporaries of Sophocles! Antigone is a martyr of her conviction that she must obey laws superior to those given by the ruler of Thebes, Kreon. Kreon has decreed that only one of Antigone's two brothers (the good one in the fight for Thebes, Eteocles), but not the other one, (Polyneikes, who had taken arms against Thebes) should be buried, but Antigone is intent to defy this order because ancient custom and her conscience requires her to bury both of her brothers ('Are both not equal in Hades?'). In defiance of Kreon's orders she buries the other brother as well, gets caught, dies unrepentant and becomes a martyr to her cause. She would not dream of blaming someone else (she is even at pains to tell her sister why the guilt is hers alone: 'You did not want this, and you took no part therein', a very precise description of criminal authorship), or even of pleading for mercy. Her conviction that she has done no wrong can only be proven by acting overtly (she does not mind whether she gets caught or not), by refusing to repent and by suffering the consequences.

Antigone, and this sets her apart from Orestes and her father Oedipus, Antigone is the master of her fate. Orestes justifies his deed with orders from Apollon, Oedipus his doings with the fate inflicted on him, while Antigone takes it all on herself.

When looking for people dying for their beliefs, pre-Christian world has very little to offer. Martyrs are alien to a polytheistic world, because a martyr does not only believe to have God on his or her side, but also that this God is an authority outside of this world. If the Gods were part of this world, such kind of sacrifice would make no sense unless, as can be argued for Antigone and Socrates,<sup>5</sup> one dies for a certain immutable principle that is equally beyond human justice. Both for Antigone and Socrates, it was only the sacrifice that proved them right: By ordering Antigone's death, Kreon loses his son and wife. Socrates' accusers were put on trial shortly after he had died and were convicted to death.

### ACT III - MONOTHEISM AS BOTH EMPOWERMENT AND INTOLERANCE - 'TU SOLUS SANCTUS'

Aristoteles' logic in the 4<sup>th</sup> century BC introduced something new: a logic that distinguished between true and false knowledge. The claim was both for what was true, and for what could not be true, for it defined the incompatible: *tertium non datur*. True knowledge was distinguished from hocus-pocus, pseudo-science, etc. Truth could be based on experience, eg 'all men are mortal', mathematical, historical (the Trojan war) and ventured also in philosophical concepts (*Panta rei; misen agan*). This remained the prevalent (Western) approach until the recent discovery of fuzzy logic and the physical uncertainty principle. The Greeks did not apply this concept of truth to religion, though.

The conviction that there is one true God and one God only was, as far as we know, first voiced by the Egyptian pharaoh Ikhnaton.<sup>6</sup> Aton, the sun, was the only God that there was. *Nota bene*: Not that there *should* only be one God, but that there *was* only one - the others were superfluous. This put many priests out of work and was thus considered a bad move. His son, originally named Tutankaton, was made to bring all the old Gods back, for which reason he is now known as Tutankhamun (Amun being one of the old Gods). Polytheism then remained unchallenged until the arrival of Moses. The flight of the Israelites from Egypt was a flight from the polytheistic world into one where monotheism became a

---

<sup>5</sup> Socrates was accused of blasphemy, which in the sense of disregarding the old Gods may very well have been true. In his apology, he states that his God has ordered him to awaken people. By the reference to his God, he certainly did not mean Zeus and the like, but rather something pertaining to his conscience. As a punishment, Socrates did not plead for exile and did not consider to flee, either: Why after all should an upright person fear death?

<sup>6</sup> History and implications of monotheism have been set out by J. Assmann, *Die Mosaische Unterscheidung oder der Preis des Monotheismus* (*The Mosaic Distinction or the Price of Monotheism*) (Munich: Carl Hanser Verlag, 2003).

belief (*credo in unum Deum*) and thus a further truth. Apart from being a belief, also a command (*tu solus sanctus!*). The difference to the old religions is its claim to exclusivity (*tertium non datur*), which up to that point had not existed in religion: In the old, polytheistic religions, Gods could be translated between cultures (Zeus for Jove for Baal), and when a Roman Emperor such as Elagabal introduced Bal as his own personal God in Rome, eyebrows were raised, but as long as this did not jeopardise worship to the traditional Roman Gods, that was just fine. Gods in the old sense were nothing to be believed in or not, they were there. It was not a transgression not to *believe* in them, but not to *honour* them by sacrifices. Gods made trouble when they did not receive the sacrifices they were due.<sup>7</sup> Christians were not prosecuted in the Roman Empire because they brought along a new God, but because they refused to honour the old ones.

What have been the consequences of this creed in one God?

The Zeus of Phidias was an actual presence in this world, the old-testamentary God was not. Monotheism breaks with the unity of humanity, nature, cosmos and Gods. God and his reign is no longer of this world, a feature that is common to all monotheistic religions.

The world of many Gods is a world of images that contrasts sharply with the command ‘though shalt not make an image of me.’ Images are part of the belief that Gods are a part of this world. It is the destruction of images (not necessarily religious, see the destruction of the Colossus of Rhodes) and the closure of cultural sites (not necessarily religious, see the Academy of Athens) that marks the end of ancient culture.

One of the most important creeds of monotheism is the deification of justice. Justice becomes a direct concern of God in that He acts both as judge and legislator: No one in the ancient world would have claimed that laws directly descended from God as was the case for the ten commandments. Monotheism makes justice a concern of God and thereby elevates justice to a religious truth. Justice thereby becomes the essence of true religion and an inseparable part thereof. Injustice, debauchery and immorality thereby become characteristics of the unfaithful. It is the perception of ‘divine justice’ that has made it difficult to approach justice other than from the perspective of *tertium non datur*. In the ancient world, humans demanded justice no less than today. But providing justice was the task of those in power, not of the Gods. There is no perceived difference between human and

---

<sup>7</sup> An interesting example is Mozart’s *Idomeneo*, perhaps the last Greek drama: Idomeneo returns from Troy when he encounters a deadly storm. He promises Poseidon, the God of the seas, a sacrifice should he reach Crete alive: He would sacrifice to Poseidon the first person he meets in Crete. The first person now happens to be his son Idamantes, desperately wandering the shore of the island in search for his father’s ship. Idomeneo has no intention of sacrificing his son and hides his vow from his people until an ever increasing storm forces him to. The high priest offers himself as a sacrifice instead (*ma salvate il prence, il rè*) and so does Ilia, a Trojan princess Idamantes has fallen in love with. Only then is Poseidon placated and resolves the issue similar to Apollon in Orestes. But Mozart would not be Mozart without intertwining this drama with one of freedom (Ilia and her countrywomen from Troy) and of love (Idamantes - Ilia - Elektra). Mozart’s most dramatic opera.

divine justice: Apollo may put in a good word for Orestes, but the latter should ultimately be absolved by a worldly court (the Areopagos).<sup>8</sup> With the exodus of the Jews from Egypt, this changed: There was now a God that promised law, justice and liberty. What was left behind was oppression, lawlessness and arbitrariness. To serve God would henceforth mean to be just and generous rather than to provide lavish sacrifices. It is this moral responsibility (or irresponsibility) that marks the change in human perception: Where an individual due to moral responsibility must take fate into their own hands, there is no going back. Antigone is a typical representative of monotheistic conscience: For her, law and justice are divine and immutable and no longer in the hands of a king. Only due to this perception can she arrive at the conclusion that Kreon's laws are unjust. And only because of her perception of divine justice can she take fate into her own hands and decide to suffer in the name of justice. Martyrdom, as became common in the Jewish, Christian and Muslim world, is a person's sacrifice in recognition of a perceived otherworldly justice.

But martyrdom is also a form of intolerance, and monotheism indeed created a new form of intolerance

'based on the new conscience of incompatibility, which in the first place led not to violence against non-believers, but to the suffering of violence, that is, the determination rather to die for one's one faith than to be ready for acts or convictions incompatible with the true religion...ultimately, the problem of 'violence and monotheism comprises both the suffering from and the use of violence. With violence as with hatred. The Mosaic distinction brought a new kind of hatred into the world, namely the hatred against 'heathen' that only in light of the monotheistic distinction could be separated and become perceptible as those worth to be hated'.<sup>9</sup>

There are three different scenarios where monotheistic-based intolerance has come to the fore.

The first in the form of martyrdom, as in Antigone, against a perceived injustice by those in power. Ascarelli was weary about Antigone's Calvinistic streak: The more fervent a monotheistic religion, the stronger the distinction between just and unjust and the more extreme the martyrs: Those that have God on their side can do no wrong and theirs is paradise. The death of innocent people is justified as the death of non-believers ('heathen') or collateral damage.

The second is hatred and violence against non-believers amongst the faithful. In the Old Testament, this was confined to non-believers amongst the Israelites: As much as Elia praised his God as merciful, tolerant and patient, the 450 priests of Baal were slaughtered remorselessly. In the history of Christian faith, there was witch-burning and inquisition.

---

<sup>8</sup> In Aeschylus' drama *Orestes*, even goddess Athena casts her vote in order to absolve Orestes.

<sup>9</sup> J. Assmann, n 6 above, 35.

But third and most commonly, where the oppressed become the oppressors and truth becomes an issue of faith and injustice a disturbance of divine order. Believers instead of suffering from defending their truth as martyrs make others suffer. This happened when the Roman Empire adopted Christianity as a state religion in AD 380: Promptly, the Olympic games and the Academy of Plato were dissolved and non-believers persecuted for idolatry. This is a pattern that has gained even more momentum with Christian and Muslim interest in proselytising (converting) so-called heathen and non-believers by force or persuasion: Augmenting the flock of the faithful becomes a matter of interreligious and intercultural zeal, while converting the faithful to a different religion an act of sacrilege. Those that had advocated the cause of religious freedom as oppressed minorities were less vociferous of this cause when in power. Alleged acts of desecration were sanctioned by persecution or fatwa, infidels became second-class citizens, were expelled or worse, converts were regarded with suspicion: In Spain, Jewish and Muslim converts publicly had to eat pork meat to make sure they were good Christians. In Italy, the word ‘marrano’ still has the meaning of someone who cannot be trusted.

The addition of religious truth to other truths such as scientific one has given rise to discussions where conflicts between religious and scientific were perceived: ‘*eppur si muove*’ is but one example, the banning of school books that teach evolution and not the myth of creation another.

With the perception that justice is part of religious truth and has become a task and quality of God, also justice on Earth is regarded differently: the conscience of justice and a corresponding responsibility towards God has led to enlightenment, self-empowerment and self-responsibility behind which there is no going back. But it has instilled a rigour in justice that does not bring peace.

Shakespeare’s ‘Measure for Measure’ is an example thereof. The play is about the Duke’s substitute, Angelo, who, now in power, is intent no longer to make a ‘scarecrow of the law’. He is the type of person who ‘was begot between two stock-fishes’, ‘his urine is congealed ice’ and ‘he hath forced me to tell him he is indeed Justice’. He wants to enforce a long dormant law that punishes sexual intercourse out of wedlock by death, punishment to be meted out against Claudio who due to adverse circumstances could not yet marry his betrothed Juliet. Angelo is not swayed by pleas of mercy, but rather by the beauty of Claudio’s sister of whom he demands a *rendezvous* in return for Claudio’s life. Yet Angelo is duped and who comes to the encounter is Mariela, Angelo’s ex-fiancée disengaged because her dowry got lost. Angelo orders Claudio’s death regardless, but he is duped again as the head of a dead pirate is sent to him as proof. When Angelo’s deeds become clear, he must demand death for himself even twice: Measure for measure, an Angelo for breaking the law and an Angelo for a Claudio. But who opposes this is Mariela: She wants a husband after all, and a living one.<sup>10</sup> Doing justice by

---

<sup>10</sup> A notably humourless and cacophonous version of the topic is Richard Wagner’s ‘Das Liebesverbot’. Another twist of the topic is provided in Bocaccio’s ‘Decamerone’, the seventh story of

upholding principles would thus create other injustices and not bring peace.<sup>11</sup>

Doing justice by creating other injustices is a theme not limited to dramas in literature. A modern-day drama of principle vs pragmatism, fundamental vs situational justice is the US Purdue Pharma litigation. Purdue Pharma developed and actively marketed a painkiller called OxyContin, an opioid. Millions of Americans became addicted and approximately 247,000 people in the United States died from prescription-opioid overdoses. Based on insufficient warnings about the addictive nature of the drug, more than 100,000 individual lawsuits were filed against Purdue, in addition to lawsuits by Indian tribes, states and local governments. Purdue no longer markets OxyContin and currently has assets estimated one billion US\$. It is thus far from bankrupt, yet in 2019 declared bankruptcy in light of the expected liabilities. Purdue Pharma is owned by the Sackler family with an estimated wealth of 11 billion US\$ (withdrawn from Purdue over a number of years). According to the bankruptcy plan, Purdue would pay 1.2 billion US\$ toward the settlement immediately upon emerging from bankruptcy, with millions more expected in the years to come. The Sackler family would pay (repay from what they had withdrawn) up to six billion US\$ over 18 years, with almost 4.5 billion US\$ due in the first nine years. Native American tribes would receive about 161 million US\$ from a trust, while all money to be paid out should go to initiatives intended to ease the opioid crisis, including addiction treatment and prevention. Payments to individual plaintiffs range from about 3,500 to 48,000 US\$. Guardians of about 6,550 children who experienced withdrawal symptoms from drug exposure in the womb may each receive about 7,000 US\$.<sup>12</sup> Lots of initiatives already counted on this money for their addiction treatment programmes, as the settlement plan had been approved by almost all of the plaintiffs, 50 Attorneys General of the States, but had been objected to by the US Trustee Programme, a branch of the US Justice Department that ultimately brought the case before the Supreme Court. The Programme argued that some of plaintiffs had not agreed

---

the sixth day. In the story, Madonna Filippa and her lover are caught by her husband who denounces her to the authorities. The laws of Prato stipulate death by burning for such act. Filippa, instead of fleeing town, faces the court and despite warnings of the judge confesses her acts. But she adds the following: A law would only be just when made with the agreement of all, yet no woman had agreed to this law. She further asks her husband whether she had always complied with all his wishes, which her husband affirms. She then adds: 'Well, if my husband always received all that he wanted, what should I then do with what he has left? Why should I not give this to a noble young man who loves me dearly?' This makes the whole courtroom laugh and the judge urges the burgers of Prato to change the law.

<sup>11</sup> At the end of the Second World War, a group of Jewish survivors of the concentration camps had the plan to kill six million Germans as an application of *lex talionis* in revenge for the six million Jews that had been exterminated. Already Socrates (Crito; and before him Anaximander) rejected the *lex talionis* based on the simple reasoning that the imperative of 'man should do no wrong' would not support it, because the rationale of the *lex talionis* was to reciprocate a wrong with another wrong. The *lex talionis* would thus be a concept of injustice, not of justice.

<sup>12</sup> The New York Times, 'What to Know About the Purdue Pharma Case Before the Supreme Court' 4 December 2023; *ibid* 'The Moral Limits of Bankruptcy Law' 4 June 2024.

and that settlement included a judicial order releasing the Sackler family from all opioid-related claims and enjoining victims from bringing such claims against them in the future. An absolution without pain. A conflict between problem-oriented and system-oriented justice: While thousands of programmes dedicated to helping victims can be financed, while victims themselves receive at least some compensation for their pain and suffering, those that have caused all this misery walk in the sunshine. But catching those might take years and in the meanwhile provide no help to those who suffer.

A deeply divided Supreme Court (5:4)<sup>13</sup> opted for fundamental justice: ‘In this case, the Sacklers have not filed for bankruptcy or placed all their assets on the table for distribution to creditors, yet they seek what essentially amounts to a discharge, including fraud and willful injury. No provision of the code authorizes that kind of relief.’ And, equally pertinently, ‘a ruling for the Sacklers would provide a roadmap for tortfeasors to misuse the bankruptcy system in future cases.’ The minority on the other hand stressed that

‘the decision is... devastating for more than 100,000 opioid victims and their families... As a result, opioid victims are now deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation.’

Interestingly enough, the division was not along party lines or progressive /conservative, but rather represented fundamentally different perceptions of justice. The result, albeit a narrow one, confirms that the United States is a country where in the end of the day, old testamentary beliefs (‘betraying Uncle Sam’; *nullum crimen sine poena*) weigh more than commercial considerations.

#### **ACT IV - JUSTICE AND MERCY: MERCY BRINGS PEACE, JUSTICE DOES NOT - ‘TUTTI ASSOLVO E TUTTO OBBLIO’**

We must make a pause here to point out that Christianity could have taken a completely different course had it been for the teachings of a man called Marcion<sup>14</sup> whom the early Christian church regarded as their most dangerous heretic. Marcion originated from Asia minor and came to Rome in the middle of the 2<sup>nd</sup> century in knowledge or in possession of the epistles written by St Paul about one century earlier. In the middle of the 2<sup>nd</sup> century, no definite text of the New Testament had been established, and it is not entirely clear which of the gospels

---

<sup>13</sup> *Harrington, United States Trustee v Purdue Pharma L. P. Et Al.*, 27 June 2024, 603 US 2024.

<sup>14</sup> A. Harnack, *Marcion*, 1924, reprint 1960; G.A. van den Bergh van Eysinga, ‘Marcion als Zeuge für ein vorkatholisches Christentum’ *Radikalkritik*, (2016), available at <https://tinyurl.com/3whnbrek> (last visited 30 May 2025).

had already been written, if at all, and in which form or version, and how authoritative they were considered to be. The epistles of St Paul certainly were. In order to define Christian faith as monotheistic, but different from Jewish faith, Marcion wrote his (now lost) 'Antitheses'.<sup>15</sup> From the scriptures of St. Paul, Marcion took as key definitions of Christianity that God sacrificed his son to liberate humanity, and that this was a liberation from the law: The God that liberated humanity through this sacrifice was infinitely merciful, while the (old-testamentary) God that had made humanity subject to the law was *JUST*. As the teachings of the Old Testament had to be considered words of God, and likewise the teachings of Jesus, there was no way to reconcile a God who provided (and demanded) justice (as in the Old Testament) with a God that provided (and taught) mercy. Retributive justice as taught by the Old Testament (an eye for an eye) was the opposite of mercy (whose quality, as we know, is not strained) as taught by Jesus. From this, Marcion drew the following conclusions:

The Old Testament could not be part of Christian faith. The old testamentary God of law and of justice could not be the same as the God that taught mercy and had sacrificed his son. Marcion thus reasoned that there should be two Gods. One that had created the world and that was just, and one that nothing to do with the creation but that out of pure mercy had sacrificed his son to liberate humanity from the yoke of the law. The merciful Christian God could only be perceived by way of recognition, as he did not manifest himself by his acts other than the sacrifice of his son.

Marcion's understanding of Christian faith was based on the notion of a purely merciful God that had no dealings in and with this world. As only a just, but not a merciful God could judge and punish, notions of hell (*dies irae, dies illa; iuste iudex ultionis/donum fac remissionis/ante diem rationis*) could not be part of Christian faith: Bad deeds fall upon the person him-or herself. Shakespeare has expressed this in Macbeth, and Mozart in *Così fan tutte*. While Macbeth is punished by ordering Banquo's death with 'scorpions in his mind' and illusions of Banquo's ghost, Lady Macbeth vainly tries to wash the blood away, as 'all the perfumes of Arabia cannot sweeten these little hands'. In Mozart's *Così fan tutte*, two young gentlemen agree to a bet that their *fiancées* are faithful. To prove the contrary, they are meant, in disguise, to try and seduce the other's - and succeed: *Così fan tutte* (all women do it like this). All four must now live with this experimental experience. Rarely was the way to hell paved with such beautiful (seductive?) music. The '*così*' (like this) makes us laugh and the '*fan tutte*' (all women) rather melancholy.

The Christian God cannot help the cause of justice, or prevent injustice, because a merciful God cannot perceive justice, just as a blind man cannot perceive colour. If for example Camus in *La Peste* remarks that he 'cannot believe in a God

---

<sup>15</sup> An antithesis contrasts an earlier teaching (perceived mistaken) with how it should be, eg 'The scripture tells you 'an eye for an eye', but I tell you that if your enemy beats you on one cheek, also offer him the other.'

that lets innocent children die', this is a criticism that can be levied against the old testamentary God (because he is the God of the law), but not against the Christian God. Like the parable of the workers in the vineyard, there is no justice in God's realm, and any appeal to God's justice is mistaken. If God is not part of this world, he cannot help (to make it rain or find something that has been lost), and if God is infinitely merciful, he can neither be offended nor can he judge. Mozart has expressed this in his opera *'La Clemenza di Tito'* that is more easily understood as *'La Clemenza di Dio'*:<sup>16</sup> Vitellia, ever jealous daughter of former emperor Vitellius, thinks that Titus has snatched the Roman throne and should take her as his wife instead of Servilia, sister to Sesto. Vitellia instigates her lover Sesto to assassinate Titus, unbeknownst that Titus no longer wants to take Servilia as his wife upon learning that she loves someone else.<sup>17</sup> Titus now wants to marry Vitellia. But once Vitellia learns of this turn of fortune, Sesto has already been sent on his mission. The coup fails, Sesto is identified as the culprit and law and order man Publius arrests him. Publius represents Justice (*'terribile, ma giusto'*) and is not swayed by pleas of mercy:

*'L'anima mi commove,  
ma vana è la pietà'*<sup>18</sup>

God however (impersonated by Titus) absolves the ever-erring human being (impersonated by Sesto and Vitellia):

*'Se la fé de' regni miei  
coll'amor non assicuro,  
d'una fede non mi curo  
che sia frutto del timor.  
...sia noto a Roma  
ch'io son lo stesso e ch'io  
tutto so, tutti assolvo e tutto obbligo.'*<sup>19</sup>

If God is thus perceptible only by recognition of his existence (faith can move mountains), there are decisive moments in faith: First, recognition of God (liberation) and second, recognition that God cannot assist us but through ourselves (self-responsibility). Both moments have been captured by *Leonardo da Vinci*: The

---

<sup>16</sup> One should compare the overture of Tito (Titus, a Roman emperor) with that of Lucio Silla (Sulla, another Roman emperor): Mozart's Silla is a man whose language is the marching of soldiers' boots, while Tito's is magnanimity.

<sup>17</sup> As both Servilia and Annio are sopranos, Servilia's love could also be to a woman: Tito would not mind. In the duet ('Ah, perdon.'), both their voices become indistinguishable - more united two people cannot become.

<sup>18</sup> My heart is moved, but mercy is in vain.

<sup>19</sup> If I cannot guarantee the loyalty of my kingdoms with love, I am not interested in a loyalty that is built on fear...Be it known in Rome that I am whom I am, I know everything, I forgive all and I forget everything.

moment of recognition in the *Adorazione dei Magi* (unfinished, but the awe and wonder of those present is well-perceptible), and the moment of perceiving self-responsibility in the 'Last Supper' (the incredulity and recognition that Jesus will no longer be amongst his disciples, and the infinite loneliness that comes with it, best embodied by the person to the left of Jesus (for the spectator to the right)).

Marcion's teachings would have led Christianity even further away from a cosmotheism (because God has nothing to do with this world), but Marcion's teachings would have brought Christianity much closer to the teaching of unconditional grace and mercy that has no place for justice as a divine quality. Marcion thus preached a liberation from the law in the sphere of the divine.

It was not to be. Historical justification and reliance on written history and genealogy was too important to the fledgling Christian church to discard the Old Testament as incompatible with the teachings of Jesus. Since that time, the relationship between justice and mercy have remained ambiguous. Particularly the Catholic church has crept back to the perception of divine justice as a pretext for control and oppression and the opposite of freedom, because for true freedom, freedom from fear is the first requirement. Michelangelo's Last Judgement in the Sistine Chapel is a vivid example of oppressive justice.

#### **ACT V: JUSTICE THROUGH DISCOURSE AS THE ONLY WAY TO BRING ABOUT PEACE - 'THE QUALITY OF MERCY IS NOT STRAINED'**

The previous chapter was an analysis on the perception of justice in monotheistic religions. It has demonstrated that wherever justice is perceived a divine quality, justice becomes part of the religious perception of right or wrong and thus becomes non-negotiable and non-debatable. It is this perception, impersonated by Antigone, that Ascarelli deems unhelpful, uncondusive and ultimately unsuccessful.

Ascarelli's own perception on how legal conflicts should be resolved comes in the person of Shakespeare's Portia (*The Merchant of Venice*): The despised Jew Shylock grudgingly provides a loan to Antonio but only on condition that in case of forfeiture of timely payment, Shylock can cut a pound of Antonio's flesh. The loan cannot be repaid in time and Shylock sues in court to get his pound of flesh. Who is asked to resolve this case is a young lawyer from Padova (then as now a highly esteemed university, especially for law) who is none else than Portia, a clever young lady betrothed to Bassano, a friend of Antonio's. Just as in *Measure for Measure*, justice is contrasted to mercy as Portia reminds Shylock:

'Therefore, Jew, though justice be thy plea, consider this, that in the course of justice, none of us should see salvation: we do pray for mercy, and that same prayer doth teach us all to render the deeds of mercy.'

Only as Shylock refuses take up this well-meant offer does it become necessary to interpret the contract. Portia, as we know, laughs the case out of court in that Shylock may cut his pound of flesh, yet without spilling any blood.

According to Ascarelli,

‘behind the playwright’s smile there is also the conflict between the need for certainty, proudly demanded by Shylock, and the need to adapt the norm to moral evaluations; between the individual sovereignty stated in the agreement and the social needs, as someone is bound to say, which push for rejection of it.’<sup>20</sup>

Ascarelli’s opinion of Portia’s interpretation of contract is the following:

‘Moral disapproval respects the norm, but at the same time it alters the norm and hence adapts it to an ever-changing equilibrium of conflicting forces and evaluations. An ongoing re-creation...Law is never a given, but an ongoing creation to which the interpreter contributes in an ongoing manner, as does every member of society, and this is precisely why it lives in history and indeed with history.’<sup>21</sup>

Now, Ascarelli’s ‘ever changing equilibrium’ stands in marked contrast to those that have analysed the Merchant of Venice from the perspective of fundamental, monotheistic justice: Jhering<sup>22</sup> to whom Portia’s verdict is shameful and who has vehemently argued in favour of the contract’s validity, while Kohler<sup>23</sup> argued against validity on grounds of *ordre public*. But Ascarelli tells us: *tertium certe datur*.

As has been argued before, recognising the probabilistic nature of law and justice comes easier to polytheistic societies where justice is not considered a divine quality. To test the theory, it would thus be interesting to look into a modern-day society where the prevailing religious perception is not monotheistic, an example of which is Japan.

Both reception and perception of law in Japan has been based on what I would call utilitarian and certainly probabilistic principles: Discussions about a Civil Code in the 1880s<sup>24</sup> took a turn when the earlier drafts based on the Code Napoléon were significantly altered because in 1871, Prussia had won the war against France and the more successful nation was credited with also having the

---

<sup>20</sup> T. Ascarelli, n 3 above.

<sup>21</sup> *ibid*

<sup>22</sup> R. von Jhering, *Der Kampf um's Recht*, 7<sup>th</sup> ed (Wien: Manzsche Verlagsbuchhandlung, 1883), Vorrede. In this seventh edition, he also vehemently criticises Kohler’s approach (first published in 1883). For Jhering, Shylock is the hero of the play, because by insisting on his rights, he defends the legal order as such.

<sup>23</sup> J. Kohler, *Shakespeare vor dem Tribunal der Jurisprudenz*, 1<sup>st</sup> ed 1883 (Leipzig: W. Rotschild Verlag, 2<sup>nd</sup> ed, 1919) 10, 36, *passim*.

<sup>24</sup> B. Jaluzot, ‘Les origines du Code civil japonais’ 20 (40) *Zeitschrift für Japanisches Recht* 20, 121–146 (2015).

better laws: Thus, principles of German law found their way into Japanese civil law,<sup>25</sup> which however did not mean that these principles would then be applied in the same manner. While academia initially tried to do this, after the First World War, one of the leading professors of civil law, Izutarō Suehiro, noted that ‘there is nothing more stupid than German commentaries and treatises on civil law!’ He further explains that when reflecting at how concrete cases should be solved,

‘fundamental doubts about the established German style way of interpretation crept into my mind. Of course, one may provide a highly learned and sophisticated reasoning, yet will not grasp the reality of things. This is where I noticed that contrary to what I had thought before there is no other way but to look for general principles in concrete consideration of things in regard of single, specific cases. It is around this time that I decided - somewhat exaggeratedly put - to take my leave from the German art of legal interpretation.’<sup>26</sup>

The law should thus be interpreted in accordance with ‘concrete appropriateness’ (*gutaiteki datōsei*) for each case. The relationship between (imported) legal concepts, their application and interpretation since then has been a highly probabilistic one, be it for legislation or jurisprudence.

In regard of legislation, Japan has been expert in formally (*tatema*) complying with international obligations without however applying them when deemed unsuitable for Japan’s interests.<sup>27</sup>

Also Japanese jurisprudence from time to time finds a way of completely altering the written law without however calling the law’s legitimacy into question, just as advocated by Ascarelli.

An example from my area of expertise is the Japanese Supreme Court decision *Kilby*.<sup>28</sup> Based on German law, Japanese patent law had adopted a bifurcation for determining validity and infringement of a patent: Invalidity of a patent could be requested and argued only before the Patent Office, while the ordinary courts when dealing with a possible infringement had to regard the patent as valid. German law in the 19<sup>th</sup> century had introduced this separation to avoid that state courts (eg the Landesgericht Baden) could invalidate federal titles. Meiji Japan had adopted this separation for different reasons, namely to limit the power of the courts *vis-à-vis* the administration. While this separation of powers guaranteed a technically experienced forum to review the validity of patents, the system increasingly became an obstacle to economic development in that many invalid

<sup>25</sup> W. Röhl, *Japanese Law since 1868* (Leiden: Brill Publishers, 2003).

<sup>26</sup> G. Rahn, *Rechtsdenken und Rechtsauffassung in Japan* (Munich: Beck, 1990), 143.

<sup>27</sup> One example (from my own field of expertise) is the obligation under the Paris Convention for Industrial Property (1883) to provide protection against all acts of unfair competition. Japan formally introduced a law to this effect, yet made sure it could not be applied: G. Rahn, *What is Japanese about the Japan Unfair Competition Act*, IIC 1994, 343, 347.

<sup>28</sup> Japanese Supreme Court, 11 April 2000, English translation in 35 IIC 91 (2004) - ‘Kilby’.

patents were enforced only to be invalidated years later (because the courts were quick and the Patent Office was slow) - a phenomenon known as the injunction gap. Portia-style and without openly challenging this separation of powers, the Supreme Court in *Kilby* simply said this: Section 1 (3) Civil Code does not allow rights to be abused. Yet enforcing a patent that was prone to invalidation (because it lacked eg novelty or inventive step) amounted to an abuse of rights. With this reasoning, the formal separation of powers between the courts and the Patent Office remains intact (the courts still cannot invalidate a patent), but a patent the courts deem invalid becomes unenforceable. An elegant solution that achieves the desired result without openly calling into question the separation of powers.

But if, as is argued here, the perception of justice is influenced, if not determined, by religious beliefs, how would then an Italian like Ascarelli come to perceive law as ‘an ever-changing equilibrium of conflicting forces and evaluations. An ongoing re-creation?’

There are two reasons for this, one historical and one cultural.

The historical: For a people like the Italians that for centuries has been occupied by foreigners (Saracens, Normans, Byzantines, French, Spanish, Germans, Austrians, you name it), the art of solving problems by sidestepping them becomes a necessity of survival.

The cultural: Surprising as this may sound, Italy is perhaps the least of all monotheistic Christian cultures. The number of saints is innumerable, rites such as the liquification of San Gennaro’s blood are not far from magic and there is hardly any truck driver that does not have a photo of Padre Pio dangling from the cabin mirror. At least in Italy, the monotheistic God has a good many assistants.

Both factors have led to a perception of justice in Italy that is more relative than elsewhere. Specifically in regard of Ascarelli, there is another aspect: Who, as he, has worked in the field of law comparison is very much aware of the probabilistic nature of any given solution to a legal conflict, and in fact a discussion about comparative law and a possible harmonisation of law requires as a starting point the willingness to question solutions offered by one’s own jurisdiction. In fact, and not coincidentally, before his premature death, Ascarelli was planning to found an international society of law comparison.

Social peace and societal acceptance, and this I understand as Ascarelli’s concern, is only made possible if we regard law and judicial decisions as an ‘equilibrium of conflicting forces and evaluations’. The more our religious predispositions (*‘religiöses Vorverständnis’*) tend to regard justice as a quality of the divine, the more difficult this may come to us.

Once the mental step has been taken to appreciate the relativity of human justice, the question comes to fore how to bring about justice through such ‘equilibrium of conflicting forces and evaluations’. With Portia, Ascarelli would probably have answered: ‘By clever advocacy’, an answer that corresponds to the

legitimacy by procedure according to Luhmann:<sup>29</sup> when accepting that human justice is not open to truth, there is no solution to a given legal conflict that could be proven as correct. Legitimacy of the result must thus be based on the procedure for arriving at such result, namely the discourse aimed at finding a solution: Argument and counter-argument.<sup>30</sup>

With *Antigone* and *Portia*, Ascarelli tells us of the perpetual quest for balancing peace and justice as a socially acceptable equilibrium. A justice that rests on a perception of truth open only to the beholder, like the one of *Antigone*, is premeditated, not open to general acceptance in a democratic society and thus cannot lead to peace. Rather, only discursive justice defined by way of procedure and a general openness of result can find overall social acceptance. *Portia* for Ascarelli embodies the humanist approach to balance peace and justice. One is not possible without the other, and discourse may be the best and probably the only way for bringing about both.

## EPILOGUE

‘It took 2500 years for Socrates’ dream to come true that there should be a writer of the tragic who could also write the comical. Such a man was Mozart, and such a man was Shakespeare. But Mozart had so many more means to express it: He had music.’<sup>31</sup>

---

<sup>29</sup> N. Luhmann, *Legitimation durch Verfahren*, 6. Auflage (Frankfurt: Suhrkamp Verlag, 2001).

<sup>30</sup> Also J. Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt: Suhrkamp Verlag, 1992); R. Alexy, *Theorie der juristischen Argumentation*, 3. Auflage (Frankfurt: Suhrkamp Verlag, 1996).

<sup>31</sup> F. Fricsay, *Über Mozart und Bartok*, 1961. It is not entirely true, though, that Shakespeare was the first to combine of the tragic with the comical: Giovanni Bocaccio with his *Decamerone* came earlier.