What Is to Be Done? Tullio Ascarelli on the Theory of Legal Interpretation

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Abstract

The teachings of Tullio Ascarelli, a well-known scholar of commercial law and of comparative law on the international scene, has left a lasting mark on Italian legal culture insofar as they are one of the most elegant and complex expressions of the 'revolt against formalism' and the need to go beyond the folklore of the 'old Italian style'. The centrality of the theory of legal interpretation, in constructing and developing the complexity of the legal experience, is filtered and strengthened herein by referring to literary works. In particular, 'Antigone and Portia' is a means for communicating, at a transnational level, the eternal dialectic existing between the certainty of positive law and the need to develop it through the interpretation and application of all legal texts, between the declarative nature of the interpretation and its creativity. Jurists and judges, the good ones, are supposed to mediate between these two antipodes, in the always perfectible – because always historicised – quest for a reasonable, equal and, as far as possible, just interpretation of concrete cases. Far beyond Law and Literature movements, beyond Feminist legal theories, beyond the natural law tradition, the apparent contrast is re-proposed and recomposed within the harmony of history, by immersing law, as an ongoing action, in society and in the flow of human activity.

I. Why Antigone and Portia and Why Tullio Ascarelli

Socratic maieutics taught that questioning is the necessary instrument of knowledge since it expresses awareness of ignorance and of the eternal inadequacy of knowledge.

Therefore, it is worthwhile asking what is the reason for re-proposing Tullio Ascarelli's 'Antigone and Portia' nowadays, sixty years on, and continuing a dialogue with him, without rhetoric or sophistry.

A preliminary, somewhat simplistic answer lies in the fact that it

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seems that this essay is not particularly well-known in the international debate and has never been translated into lingua franca.[1] A sort of review was published in a Chilean journal.[2] In a *notas bibliográficas* to the collection of writings *Problemi giuridici*, Alamiro De Ávila Martel,[3] a renowned legal historian and expert on Roman law, focused his attention on this essay as a manifesto of the complete volume, able to express Ascarelli's illustriousness through the evocative force of literary language.

This is no coincidence, for 'Antigone and Portia' reproduces the paper delivered at the Conference held at the Italian-Chilean Institute of Culture in Santiago in 1955; its various places of publication include the aforementioned collection[4] (to which the review and current translation refer) and subsequently, with some changes, *Studi giuridici in memoria di Filippo Vassalli* dated 1960.

But this is not, nor could it be, the sole reason. Ascarelli has left a lasting mark on the history of legal culture;[5] he is truly one of the

[1] Mention is made in A.G. Chloros, 'What is natural law' 21 *Modern Law Review*, 609, fn 4 (1958), in reference to natural law; and in D.A. Skeel Jr, 'Lawrence Joseph and Law and Literature' *77 University of Cincinnati Law Review*, 921, 937 (2008-09), promoting the beginnings of the Italian Law and Literature movement. But as will be clarified later, these are not the meanings of Ascarelli's essay; cf also D.J. Chavarri, 'El Mercader de Venecia (Shakespeare) y la Interpretación de la Ley' *Revista del Centro de Investigaciones en Filosofía Jurídica y Filosofía Social*, vol 21, 11, 15 (1996).

[2] A. de Ávila Martel, 'Tullio Ascarelli: Antigone e Porzia' *Revista chilena de historia de derecho*, 83 (1961), recalling Ascarelli's speech heard, presumably in person, in Chile in 1955. On 6 September 1955, inter alia, Ascarelli was appointed '*miembro honorario de la Facultad de Ciencias Jurídicas y Sociales*' of the University of Chile (http://www.analesderecho.uchile.cl/index.php/ACJYS/article/viewArticle/6007/5874) (last visited 20 October 2015).

[3] For more information about this author F. Vicencio Eyzaguirre, 'Alamiro de Ávila Martel (1918-1990): historiador, bibliógrafo y numismático' *Revista chilena de historia y geografía. Sociedad Chilena de Historia y Geografía,* 163-214 (1996). He was known in Italy and wrote a paper 'El Derecho Romano en la Formación de los Juristas Chilenos del Siglo XVIII', in VVAA, *Studi giuridici in memoria di Filippo Vassalli* (Torino: Utet 1960), 395-402.

[4] T. Ascarelli, 'Antigone e Porzia', in Id, *Problemi giuridici*, I (Milano: Giuffrè, 1959), 3-15 (DOC B); earlier in *Rivista Internazionale di Filosofia del Diritto*, 756 (1955) (DOC A); later in VVAA, *Studi giuridici in memoria di Filippo Vassalli* n 3 above, 107-117 (DOC C).

[5] For a sketch of his extraordinary personality, as a man and as a jurist see,

most representative names of the twentieth century, at least as far as Italy is concerned, and possibly not only.

His works in the fields of commercial law and on money were quoted and well-known abroad, especially from the 1940s through to his early demise. Many of these were also published in Portuguese and Spanish[6] and associated with the period of his forced exile in Brazil which, as a Jew, he experienced as a consequence of the racial laws enforced in Italy.[7] His teachings have had a major influence in

among the many: N. Bobbio, 'L'itinerario di Tullio Ascarelli', in VVAA, *Studi in memoria di Tullio Ascarelli*, I (Milano: Giuffrè, 1969), LXXXIX-CXL (this volume includes a bibliography, albeit out of date, of Ascarelli's works: at XIX-LIII); S. Rodotà, 'Ascarelli, Tullio', in VVAA, *Dizionario biografico degli italiani* (Roma: Treccani, 1962), IV, 371-372; P. Grossi, 'Le aporie dell'assolutismo giuridico (Ripensare, oggi, la lezione metodologica di Tullio Ascarelli)' (1997), in Id, *Nobiltà del diritto. Profili di giuristi* (Milano: Giuffrè, 2008), 444-504; lastly, for a commendable and well-documented biography, and for useful bibliographical information about the many, mainly Italian authors, who focused on Ascarelli's work, cf M. Stella Richter Jr, 'Ascarelli, Tullio', in I. Birocchi et al eds, *Dizionario biografico dei giuristi italiani* (Bologna: Il Mulino, 2013), I, 108-111; Id, 'Tullio Ascarelli avvocato' *Rivista delle società*, 190-201 (2013).

[6] Eg: *Principios y problemas de las sociedades anónimas,* translated by R. Cacheaux Sanabria (México, DF: Imprenta Universitaria, 1951); *Sociedades y asociaciones comerciales,* translated by S. Sentís Melendo (Buenos Aires: Ediar Editores, 1947); *Iniciación al estudio del derecho mercantil* (Barcelona: Bosch, 1964); *Introducción al derecho comercial y parte general de las obligaciones comerciales*, translated by S. Sentís Melendo (Buenos Aires: Ediar, 1947); *Teoría de la concurrencia y de los bienes inmateriales*, translated by E. Verdera and L. Suárez-LLanos (Barcelona: Bosch, 1970); *Problemas das Sociedades Anônimas e Direito Comparado* (São Paulo: Saraiva, Livraria acadêmica, 1945), (São Paulo: Saraiva, 1969), (Campinas: Bookseller, 2001), (Sâo Paulo: Quorum, 2008); *Negocio juridico indirecto* (Lisboa: Jornal do Foro, 1965); *Teoria geral dos títulos de crédito,* translated by N. Nazo *(*São Paulo: Saraiva, 1943), (São Paulo: Saraiva, 1969), (Campinas, SP: Servanda, 2009); *Panorama do direito comercial* (São Paulo: Saraiva, 1947), (Sorocaba: Minelli, 2nd ed, 2007); for the Spanish version of the latter book, see *Panorama del derecho comercial*, translation from original Brazilian version, by J.M. Jayme Urrizzaga (Buenos Aires: Depalma, 1949); *Ensaios e pareceres* (São Paulo: Saraiva, 1952); *Apresentação do Brasil*, translation of the second Italian version of *Sguardo sul Brasile,* by O. de Castro (São Paulo: Edições Sal, 1952); *Derecho mercantil*, translation by F. De Jesú Tena (México, DF: Distribuidores Porrúa, 1940).

[7] As regards his deep influence on the Brazilian legal system, reference to numerous papers contained in the following is useful: A. Junqueira de Azevedo, H.T. Tôrres and P. Carbone eds, *Princípios do novo Código Civil brasileiro e outros*

Latin America, as can be seen from the re-publication of his works, also in recent years. Numerous reviews of his writings also appeared in foreign journals,[8] both in German and in English.

His personality as a fervent scholar and supporter of the comparative method, mindful of the debate and movements

temas: homenagem a Tullio Ascarelli (São Paulo: Quartier Latin, 2nd ed, 2010; the first edition is from 2008); cf also N. De Lucca, 'A influência do pensamento de Tullio Ascarelli em matéria de títulos de crédito no Brasil' *Revista Magister de Direito Empresarial, Concorrencial e do Consumidor*, no 1, 17-35 (2005); P.A. Forgioni, 'Tullio Ascarelli, a teoria geral do direito e os contratos de distribuição' *Revista de Direito Mercantil Industrial, Economico e Financeiro*, no 137, 30-48 (2005); Id, 'Tullio Ascarelli e os contratos de distribuição' *Revista Magister de Direito Empresarial, Concorrencial e do Consumidor*, no 2, 11-35 (2005); R. Nogueira Barbosa, 'Tullio Ascarelli e o direito tributario do brasil' *Direito tributario atual*, 2703-2743 (1990); Id, *Tullio Ascarelli e o direito tributario do brasil* (São Paulo: Instituto Brasileiro de Direito Tributario, 1979); F. Konder Comparato, 'O direito brasileiro na visão de Tullio Ascarelli' *Revista de direito mercantil*, no 38, 11 ff (1980); Id, 'Origem do direito comercial. (Traducao do primeiro capitulo do corso di diritto commerciale – introduzione e teoria dell'impresa, a. Giuffre, 1962, de Tullio Ascarelli)' *Revista de Direito Mercantil Industrial, Economico e Financeiro*, no 103, 87-100 (1996).

[8] J. Dach, 'Reviewed work: *Studi Giuridici Sulla Moneta* by T. Ascarelli (dott. A. Giuffrè: Milano, 1952)' 2 *The American Journal of Comparative Law*, 550-552 (Autumn, 1953), describing Ascarelli as one of the few in the international scene, 'who have published comprehensive works dealing with the whole body of laws relating to money'. The book the said review refers to 'is a collection of essays published between 1923 and 1951, some of them taken from his *La Moneta, Considerazioni di Diritto Privato* (Padova, 1928), which have become classics.'; P.J. Eder, 'Reviewed Works: *Lezioni di Diritto Commerciale. Introduzione* by T. Ascarelli; *Saggi di Diritto Commerciale* by T. Ascarelli; *Principes de Droit Commercial* by J. van Ryn' 4 *The American Journal of Comparative Law*, 280-284 (Spring, 1955), where Ascarelli's writings are praised and the common law lawyer's fondness for Italian law, which opted to unify civil and commercial law (unlike Belgian law of the period, described by van Ryn), comes to light. For reviews in German, see: F.A. Mann, 'Reviewed Work: *Obbligazioni Pecuniarie (Geldschulden) (Artt. 1277–1284), Commentario del Codice Civile a cura di Antonio Scialoja e Giuseppe Branca. Nicola Zanichelli, Bologna, und Soc. Ed. del Foro Italiano* by Tullio Ascarelli' *Zeitschrift für ausländisches und internationales Privatrecht* 25. Jahrg., H. 2, 343-346 (1960); J. Bärmann, 'Reviewed Work: *Problemi Giuridici, 2 Bände* by Tullio Ascarelli' *Archiv für die civilistische Praxis* 161. Bd., H. 5, 470-474 (1962); the review by A. Tunc, 'Tullio Ascarelli.—Problemi giuridici (Problèmes juridiques), Milan, A. Giuffrè' *Revue internationale de droit comparé*, vol 13, no 2, 393-394 (April-June, 1961).

promoting the unification of law at an international level,[9] is equally well-known. He obtained honorary degrees from several foreign universities, such as the National University of Brazil in Rio de Janeiro, and the Universities of São Paulo Porto Alegre, Santiago de Chile and Brussels[10] and, if he had not died, also from the University of Chicago and the Sorbonne in Paris.

Of particular relevance is Ascarelli's portrait made by Gino Gorla in the *American Journal of Comparative Law*.[11] Ferdinand Stone recalled it with empathy in a short yet incisive page *in memoriam* published in the *Tulane Law Review*,[12] of which Ascarelli was a contributing editor for some years. André Tunc, too, dedicated an article to his memory: it appeared in the *Revue internationale de droit comparé*, to his memory.[13]

He was an eclectic, broad-spectrum academic, 'a prolific writer', but above all 'a man richly endowed with initiative, an animator of ideas, the inspiration of pupils and friends'.[14]

II. The Centrality of the Theory of Legal Interpretation: Historical-critical Anti-formalism and the 'Revolt' against the 'Folklore' of the 'Old Italian Style'

The key issues of Ascarelli's thinking are to be found in his studies

[9] He was a member of the Society for International Law: F. Ferrara, 'Tullio Ascarelli' *Rivista di diritto civile*, I, 113, 114 (1960); as regards his involvement in movements for the unification of law, H. Cãmara, 'Inter-America Legislative Unification of Bills of Exchange and Promissory Notes' 11 *New York Law Forum*, 503, 504-505 and 514-515 (1965); International Association Rep. Conf., 237, 341 (1934); above all see his speech documented in '*1959 Unification du Droit*', 393, 436, 469, 471, 474, 499 (1959).

[10] M. Stella Richter Jr, 'Ascarelli studente' *Rivista delle Società*, 1237, 1256, fn 60 (2009) (also referring to G. Osti, *Commemorazione di Tullio Ascarelli* (Bologna, 1960), 5).

[11] G. Gorla, 'In Memoriam. Tullio Ascarelli' 9 *American Journal of Comparative Law*, 328, 332-333 (1960).

[12] F. Stone, 'In Memoriam' 35 *Tulane Law Review*, 1 (1960-61).

[13] A. Tunc, 'Nécrologie: Tullio Ascarelli' *Revue internationale de droit comparé*, vol 12, 238-240 (January-March, 1960); also M. Broseta, 'Tullio Ascarelli' *Revista de derecho mercantil*, 97-102 (1960).

[14] G. Gorla, n 11 above, 332; the description is also cited by F. Stone, n 12 above, 1.

of the theory of interpretation, closely related to a vision of law and the legal method, rooted in history and comparison with other legal systems, including, even if not exclusively, those of common law. These issues represent a kind of leitmotiv of his works[15] and some emblematic examples can be found herein.

The need to go 'beyond legal concepts', the ongoing 'quest of value judgments', the awareness that interpreting law is 'a creative and not simply a declarative activity'[16] come to light in 'Antigone and Portia'.

The latter statement, shared in the Italian context with Calamandrei[17] inter alia, actually finds its original, if not more complete, position in the method gradually constructed by Ascarelli, linked with a clear, complex, yet perfectible framework. In an attempt to simplify, these are some of the guidelines of his method: a) centrality of interpretation and application insofar as an internal component of the necessary development of law; b) creativity of interpretation in the 'continuity' with the pre-established legal system; c) historicisation and typification of the interpretative process according to the dynamic and broad-spectrum socio-economic reality (historical-evolutive and pragmatic approach); d) centrality of the interpreter's appraisal and *reasonable* use of legal argumentation, also for the purpose of self-control and external control (democratic) of the results of interpreting.

[15] M. Meroni, *La teoria dell'interpretazione di Tullio Ascarelli* (Milano: Giuffrè, 1989); as well as, F. Casa, *Tullio Ascarelli. Dell'interpretazione giuridica tra positivismo e idealismo* (Napoli: Edizioni Scientifiche Italiane, 1999); M. Reale, 'La teoria dell'interpretazione nel pensiero di Tullio Ascarelli' *Rivista internazionale di filosofia del diritto*, 231-246 (1983). Ascarelli's legal hermeneutics were diffused in Brazil firstly thanks to his *Problemas das Sociedades Anônimas e Direito Comparado* (1945) n 6 above, with specific reference to 'A idéia do Codigo no direito privato e a funçao da interpretaçao', subsequently translated into Italian 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in T. Ascarelli, *Saggi giuridici* (Milano: Dott. A. Giuffrè, 1949), 41-81; recently E.R. Grau, 'Ascarelli, a interpretação, o texto e a norma', in A. Junqueira de Azevedo, H.T. Tôrres, and P. Carbone eds, n 7 above, 33-40.

[16] G. Gorla, n 11 above, 333.

[17] J.H. Merryman, 'The Italian Style: III Interpretation' 18 *Stanford Law Review*, 583 (1965-66), comparing the role of Ascarelli and of Calamandrei. Cf also the following n 54.

Throughout his early writings,[18] there was actually a clear separation between the jurist's exegetic-dogmatic viewpoint and the historical-philosophical one. Thus the creative function of the interpreter and the openness of the legal system can only be justified from the latter perspective. Eventually such initial 'dual truth'[19] was progressively abandoned with great intellectual honesty: a change of perspective that is clearly outlined in the essay translated herein. This can also be seen by comparing the first version of the essay with the last,[20] through a philological analysis.

The evolution of Ascarelli's thinking – as far as the complexity and the unity of the legal experience is concerned – originate from his background in commercial law, with its attention to empirical data,[21] and from the perceived inadequacy of codified law (and its traditional legal models) as regards an industrial, mass production society. Furthermore they derive from the in-depth examination of other legal systems.

By immersing himself in other juridical environments and their history, the tireless 'legal traveller'[22] learns and takes on board ideas

[18] T. Ascarelli, 'Il problema delle lacune e l'art. 3 disp. prel. cod. civ. (1865) nel diritto privato' *Archivio giuridico Filippo Serafini*, 235-279 (1925), then in Id, *Studi di diritto comparato e in tema di interpretazione* (Milano: Giuffrè, 1952), 209-246; Id, 'Recensione a Marcel de Gallaix, La réforme du code civil autrichien' *Rivista internazionale di filosofia del diritto*, 651, 652 (1925).

[19] 'Dual truth' is already mentioned in T. Ascarelli, 'Contrasto di soluzioni e divario di metodologie' (1953), then in Id, *Saggi di diritto commerciale* (Milano: Giuffrè, 1955), 527, 564 (referring to his first essay, focusing on *lacunae* of legal order: see n 18 above). The change of approach is highlighted by: L. Caiani, 'Tullio Ascarelli e il problema del metodo', in Id, *La filosofia dei giuristi italiani* (Padova: Cedam, 1955), 143; M. Meroni, n 15 above, 162; N. Bobbio, n 5 above, XCVIII.

[20] Cf T. Ascarelli, 'Antigone e Porzia' (called DOC C) n 4 above, 116.

[21] We refer also to the influence of Cesare Vivante (a scholar of commercial law and teacher of Ascarelli) who taught the centrality of the 'nature of things' through to the extreme consequence of considering it as a source of law: A. Asquini, 'Il pensiero giuridico di Tullio Ascarelli' and G. Ferri, 'Il pensiero giuridico di Tullio Ascarelli', in VVAA, *Studi in memoria di Tullio Ascarelli* n 5 above, respectively LXXIII-LXXXIV and CXLV; as regards the critical debate that arose in Italy from said approach, N. Bobbio, 'La natura delle cose nella dottrina italiana. Appendice B', in Id, *Giusnaturalismo e positivismo* (Milano: Edizioni Comunità, 1975), 225-238; T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 82; and Id, 'Prefazione', in Id, *Studi di diritto comparato* n 18 above, XX.

[22] According to the self-definition voiced on numerous occasions by Ascarelli

from many foreign authors (including Wendell Holmes, Benjamin Cardozo, Roscoe Pound, the method of François Geny,[23] and Brazilian literature itself which already made a clear distinction between *ius* and *lex*). He then inserts them into the Italian context through numerous works on the theory of legal interpretation that are perhaps asystematic from a topographical point of view, but, at the same time, coherently connected one with the other. And this is when the apparent dichotomy of evaluative perspectives joins together in the man-jurist, who could not help being tied to the past and projected towards the future, in accordance with a never-ending research process that failed to reach completion because it is always historicised.

The result is acknowledgement of the interpreter's creative function. Such an affirmation is more or less an acquired fact in today's legal culture even if debate is still rife with regard to the levels of creativity and ways in which the interpreter's creative function can be performed.[24] Quite natural in other experiences (such as common law),[25] this fact was not so easily acceptable for the Italian jurist in the post-World War II years. A refined American academic, John Henry Merryman clearly grasped this, considering Ascarelli as one of the exponents of a 'new Italian style' arising from the 'revolt against formalism'.[26] This revolt was indeed an expression of the crisis of law

himself, and emblematic of the fight against legal provincialism and of openness to the spatial and not just temporal complexity of the legal experience, deeply linked to the sociability of law: P. Grossi, n 5 above, 450-453 and 465.

[23] P. Costa, 'L'interpretazione della legge: François Gény e la cultura giuridica italiana fra Ottocento e Novecento' XX *Quaderni fiorentini*, 367-495 (1991).

[24] As M. Cappelletti urged in his *Giudici legislatori? Studio dedicato alla memoria di Tullio Ascarelli e Alessandro Pekelis* (Milano: Dott. A. Giuffrè, 1984), 10, 63-65.

[25] P.J. Eder, n 8 above, 281 referring to Ascarelli's article on 'Judicial Interpretation and the Study of Comparative Law' contained in his *Saggi giuridici* n 15 above. On the other hand, the affinity with American realism is highlighted by many: M. Reale, n 15 above, 235; and, specifically J.H. Merryman, n 17 above, 600, who, however, does not forget to underline Ascarelli's depth of thought and its universal importance at least as regards the various civil law systems.

[26] The expression, as is well known, comes from M.G. White, *Social Thought in America: The Revolt against Formalism* (New York: Viking Press, 1949); it was adopted within the Italian context by Norberto Bobbio who included various tendencies through this symbolic locution: '(1) the critique of legal positivism and

which jurists were called upon to deal with, and of a need for political, cultural and legal transformation, closely linked to the new values of the Italian Constitution.

Ascarelli's position was anti-formalist, not so much moderate as critical, fighting against that 'folklore' of suppositions so obstinately rooted in the Italian culture.[27] Indeed, he describes himself as a heretic, unpopular with his peers.

During the years of Fascism, formalism had also had the unquestionable role of maintaining a basic democratic attitude within the Italian context. However, after the regime fell from power, formalism remained. This happened for fear that the social aims – forming the foundations of functionalist approaches – could go back to being bad aims, even if at that moment they had become democratic. And so, some continued to prefer the idea of a certain (apparently), complete and unchangeable legal system over the fallibility of human beings.[28] Irrational fear of the regime held onto the alleged rationality and infallibility of law. During those years, the legacy of the German pandectists and of codification found expression, respectively, in the absolutism of legal concepts, including that of legal order, and in the idolatry of positive law. Obsequious respect of the principle of separation of powers tended to relegate the judge's role to that of a mere *bouche de loi,* a mechanical and neutral executor of rules. In this way, the myth of certainty, completeness and immutability was expected to be incarnated.

Anarchic pressures linked to free law movements as well as

support of natural law; (2) the critique of the theory of law as a creation of the state in order to revive and to enlarge the institutional theory of law; (3) the critique of legalism seeking to open the way for reconsideration of the problem of the sources of law; (4) the critique of juristic conceptualism envisaging a less rigid form of interpretation and a jurisprudence more open to the empirical study of law.' (N. Bobbio, 'Trends in Italian Legal Theory' 8 *American Journal of Comparative Law*, 329, 330 (1959)).

[27] J.H. Merryman, n 17 above, 585; N. Bobbio, n 5 above, CXVI.

[28] At the time of fascism, formalism was used in Italy to conserve a basic democratic attitude, while the functionalist approach – in other words of a law attentive to social purposes which Roscoe Pound, among others, had promoted in the United States during the same period – came to be identified with the regime: G. Calabresi, 'Two Functions of Formalism: In Memory of Guido Tedeschi' 67 *University of Chicago Law Review*, 479, 482 (2000).

tendencies for a return to natural law[29] were set against such conservative rigidity. Furthermore, at the same time, reasonably progressive pressures emerged, aimed at optimising – in the light of history – the need to adapt legal-norms to the constantly changing economic and social situation[30] (and to the correlated conflicts of interest).[31] Of particular relevance in this context was the close connection with the advent of constitutional principles, technically posthumous to the Italian Civil Code.[32] Indeed their subversive and problematic power,[33] insofar as a precondition of the whole legal order, was understood perfectly by Ascarelli.

In this way the theory of interpretation flourishes as the main, if

[29] F. Carnelutti, 'L'antinomia del diritto naturale' *Rivista di diritto processuale,* 511-525 (1959); but above all Id, 'Bilancio del positivismo giuridico' *Rivista trimestrale di diritto pubblico*, 288-299 (1951).

[30] T. Ascarelli, 'Funzioni economiche e istituti giuridici nella tecnica dell'interpretazione', in Id, *Studi di diritto comparato* n 18 above, 55-98, which reproduces a lesson held at São Paolo University in 1947; Id, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 69-111; for an analysis of the transformation of legal institutions through contractual practice Id, *Studi in tema di contratti* (Milano: Giuffrè, 1952).

[31] It is useful also to note the affirmation during this time in Italy of *Interessenjurisprudenz* (as a criticism of the rigidity of *Begriffsjurisprudenz*) in order to implement an axiological, teleological and evolutive interpretation (even if not creative). This hermeneutical legal approach was represented firstly by another renowned jurist: Emilio Betti (J.H. Merryman, n 17 above, 597-598; E. Betti, 'Hermeneutics as the general methodology of the Geisteswissenschaften', in G.L. Ormiston and A.D. Schrift eds, *The Hermeneutic Tradition: From Ast to Ricoeur* (Albany, New York: State University of New York Press, 1990), 159-197).

[32] The Italian Civil Code dates from 1942. The Constitution came into effect in 1948; the Italian Constitutional Court started its judicial activity on 5 June 1956. For a commendable systematic reinterpretation of all the institutions of Italian civil law in the light of constitutional principles: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 3rd ed, 2006); Id, 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95-112 (1980), now in English 'Constitutional Norms and Civil Law Relations' 1 *The Italian Law Journal*, 17-49 (2015).

[33] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 23; Id, 'Un commentario alla costituzione' (1951), in Id, *Studi di diritto comparato* n 18 above, 307-311; Id, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 46 ff; already in the first essay on the theory of interpretation, Id, 'Il problema delle lacune e l'art. 3 disp. prel. cod. civ. (1865) nel diritto privato', in Id, *Studi di diritto comparato* n 18 above, 212-215.

not the only, instrument able to reconnect the jurists' role to history as well as to the economic, social and even political reality.

III. 'Ongoing Creativity' between Idealistic Historicism and 'Legal Concretion' of Law as a Complex Experience

Within the described context, Ascarelli's peculiarity is his legal historicism which borrows from the neo-idealism of Benedetto Croce.[34] This evaluative viewpoint enables him to distance himself from a variety of approaches such as jus naturalism (excess of transcendence), legal positivism (excess of rationalism), sociological realism (excess of empiricism) and free law movement[35] (excess of intuitionism and irrationality). But above all, historicism represents the basis for justifying and promoting that legal concretion movement[36] aimed at an understanding of the phenomenon of law as a composite 'experience' and as a 'socio-dynamic' unity, irreducible to only one of its founding elements and inserted within the complexity of law and society.

On these bases, he reminds us that the interpreter's work is not just declarative, but creative, not only in the macroscopic hypothesis of '*lacunae*' or in the presence of indeterminate concepts (or standards of conduct, which he defines as 'windows on the legal order'),[37] but always in relation to all normative texts. Law provisions are never clear, unless upon completion of the whole interpretative process.

[34] The point is largely shared in literature. It is Ascarelli himself who constantly refers to Croce's historicism (eg T. Ascarelli, 'Contrasto di soluzioni e divario di metodologie' (1953), in Id, *Saggi di diritto commerciale* n 19 above, 527, 564) as well as the readings of Giovanni Gentile: P. Grossi, n 5 above, 477-480 (and fn 117). For a memorable work on the historicism of Benedetto Croce cf A. De Gennaro, *Crocianesimo e cultura giuridica italiana* (Milano: Giuffrè, 1974).

[35] From a sociological viewpoint, S. Andrini, 'Percezione sociologica e cultura giuridica: Tullio Ascarelli' *Sociologia*, 34-40, especially 37 (2012).

[36] M. Reale, n 15 above, 237 according to which the dialectic between legal structures and real functions – which fuelled the following philosophical and legal debate – was clarified with great perspicacity by Ascarelli, already in the 1940s.

[37] Recalling the definition of Vittorio Polacco, T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 65.

Interpretation goes beyond the declarative moment 'because otherwise, the very possibility of offering a solution for any case would fail'.[38] It renews the historically-established norm and ensures the perennial vitality and modernity of law in the comparison between facts and values, legal structures and their real economic functions.[39] Therefore, the very historicity of law is based on the creativity of interpretation.

Law, on the other hand, lives in concrete application. The norm's very 'positivity' lies in concrete application (a circumstance that cannot be separated from interpretation); the norm – insofar as abstract and issued at a different time than its practical implementation – cannot contain within it the multiplicity of real cases. Hence, still from a historical viewpoint, the necessary role of the interpreter.

Hence also the centrality of the comparison between legal systems and of the comparative reasoning itself: because it is by looking outwards that one truly understands one's own identity and fosters a virtuous process of knowledge, growth and improvement.[40] Comparative studies elude isolation and the autopoietic self-referentiality of national laws; they represent an antidote to the dangers (and the deceptions) of provincialism,[41] supporting the selection of man's problems without denying the characteristics of legal systems and their differing responses, yet stimulating the quest for the best response or relativising the response given within a specific legal system. Another phase of historicity which is both endogenous and exogenous, in time and in space.

If application is interpretation and, hence, interpretation

[38] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 71.

[39] Ibid 73.

[40] See the various essays collected in T. Ascarelli, *Studi di diritto comparato* n 18 above, specifically 3-98, 163-208 (widely quoted by J. Puig Brutau, 'Realism in Comparative Law' 3 *American Journal of Comparative Law*, 42, 43-44 (and fns 4, 5, 6), 48-49 (1954); and by E. Genzmer, 'A Civil Lawyer's Critical Views on Comparative Legal History' *American Journal of Comparative Law*, 87, 89 (1966-67)); and T. Ascarelli, 'Interpretazione del diritto e studi del diritto comparato', in Id, *Saggi di diritto commerciale* n 19 above, 481-519.

[41] F. Messineo, 'Tullio Ascarelli', in VVAA, *Studi in memoria di Tullio Ascarelli* n 5 above, LXI.

contributes to the foundation of legal order, interpretation always implies a choice among various possibilities and, consequently, not only an acknowledgement but also a decision, inevitably influenced by the interpreter's sensibility, by his axiological, personal coefficient.

Therefore, legal hermeneutics cannot be neutral, agnostic; rather, it is evaluative and affected by the interpreter's concepts (once again inserted into the specific historical socio-economic and political setting) from the beginning, when the selection of the preconditions of legal reasoning is set out. It is influenced or can be influenced by the very '*communis opinio*' in force at the time of interpretation.

It is necessary – Ascarelli warned – that complete awareness of all of this is acquired. Indeed, fitting interpretation into the tangles of sheer reconstruction and logical deduction means deresponsibilising legal reasoning and concealing paradoxically undeclared 'premises', that are never 'mathematical', never certain or defined a priori.

Nevertheless, interpretation must consider two opposing needs:[42] on the one hand, the 'certainty of law' expressed by the pre-established juridical system (the interpretation's declarative nature stigmatises the requisite of certainty which is fundamental and is an undeniable guarantee of legality, freedom, equality and security of civil life); on the other, the need for constant renewal of legislation, its amendment and even transformation according to the changing reality, to historically subsequent cases – in short, in relation to the flow of life.

Balancing rigidity and flexibility attributes a different essence[43] to the 'declarative' and 'creative' nature of interpretation. One cannot result in fixity, but only in stability; the other cannot overflow into arbitrariness or decisionism. The contrast between the two aspects of hermeneutics joins together in what we could define 'continuing creativity': ie an ongoing action by the interpreter who complies with tradition and, at the same time, projects the legal order into the future and into the concreteness of always new and diversified human interests and facts, into 'living law'.[44]

[42] T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 61-79.

[43] As regards the various meanings of creativity in Ascarelli's thinking, cf M. Meroni, n 15 above, 274-282.

[44] M. Hertogh ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart

Continuity can also be verified through reasonable reasoning (not only logical-rhetorical) which uses the legal text as a starting point for formulating a 'socially applicable' norm. In any case, the interpreter's acceptance of this or that criterion of argumentation, of this or that qualification, of this or that hierarchy, at a given time, in a given place, is part of 'a real constitutional structure' and of the tendencies and values that identify themselves in this.[45]

The role of the doctrine itself (in the Italian sense of the term) is not separate from that of the interpreter-judge; indeed, very often the interpretation and application of law is built upon the categories formulated by scholars. Nevertheless, far from presenting themselves as *sub specie aeternitatis*,[46] these legal models are constantly

Publishing, 2009); D. Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities' 9 *Theoretical Inquiries in Law*, 443 (2008).

[45] Adoption of the reasonable and not just rational and logical-demonstrative reasoning of Chaim Perelman emerges (T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 87-88, fn 19, 91 and fn 22), but above all Ascarelli's awareness of the connection between theory of legal interpretation, theory of the sources of law and the constitutional system of the production of norms (which characterise each country during various historical periods: Id, 'Giurisprudenza costituzionale e teoria dell'interpretazione', in Id, *Problemi giuridici* n 4 above, 157).

[46] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 75-77 (and fn 7), 79 (and fn 10). Legal categories must be inserted into their real economic-social function; they must be relativised and adapted to the flow of life and history within the environment and system actually in force. The jurist cannot do without them because they steer – just like 'vectors' that translate general concepts – interpretation. Unlike categories such as *regulae juris* of Paulian memory. Indeed the latter are simple formulas summarising sets of rules, useful for educational purposes but of no use as regards interpretation (for a real application of this approach and for further examples, cf T. Ascarelli, 'Considerazioni in tema di personalità giuridica' and 'Sul concetto di titolo di credito', both republished in Id, *Saggi di diritto commerciale* n 19 above, respectively 130-217, and 567-590). As regards the following debate on legal concepts and their functions among Italian scholars cf R. Orestano, *Introduzione allo studio del diritto romano* (Bologna: Il Mulino, 1987), 11; N. Lipari, *Le categorie del diritto civile* (Milano: Giuffrè, 2013); F. Macario and M. Lobuono, *Il diritto civile nel pensiero dei giuristi. Un itinerario storico e metodologico per l'insegnamento* (Padova: Cedam, 2010); G. Perlingieri, 'Venticinque anni della Rassegna di diritto civile e la «polemica sui concetti giuridici». Crisi e ridefinizione delle categorie', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea (Atti del Convegno per i Venticinque anni della Rassegna di diritto civile, 16-18 dicembre 2004)* (Napoli: Edizioni Scientifiche Italiane, 2005), 543-575.

updated in view of the actual situation they are applied to. This occurs in particular for those categories that reconstruct a type of social reality in relation to legislation: in other words, that must be based on reality. Even a fairly simple text – 'open the door' – imposes a similar typological reconstruction: 'open=open wide, half-close and so forth; open in person; have someone open'. It must be performed 'in keeping with the law provisions (open=immediately; in five minutes; whatever happens; etc.)' and 'in keeping with the sanction and with the *ratio* of proposition' and vice versa, always taking into account the meaning of each term within the overall discourse.[47] Reality changes and, consequently, its processing and re-processing by scholars and by judges changes.

Therefore the interpreter – be he judge or academic, each with his own separate tasks – converges into the complex figure of the jurist who updates, amends and, hence, reformulates and recreates the given *corpus juris* (the seed) through a never-ending hermeneutical process (the plant).

This is why the history of 'judge-made law' and the history of 'doctrine' merge in the unity of the history of law, viewed as a 'legal science': interpretation and application are essential parts of the development of law and internal to this.

Even historical-comparative analysis supports these affirmations: indeed it shows us that the role of interpreter in common law and in civil law is not so distant after all. The pre-established starting points (respectively the case law precedents with the binding *stare decisis*, and the *corpus iuris*)[48] and their relative histories and traditions are

[47] The example is taken from T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione', in Id, *Problemi giuridici* n 4 above, 144, fn 8; it is recalled also by N. Bobbio, n 5 above, CXXVI.

[48] T. Ascarelli, 'Prefazione', in Id, *Studi di diritto comparato* n 18 above, IX-LIII and Id, 'Interpretazione del diritto e studio del diritto comparato' (1954), in Id, *Saggi di diritto commerciale* n 19 above, 481-526 highlighting the convergence between codified laws of Roman origin (where the code was surpassed by special legislation) and common law systems (where the progressive importance of legislation with regard to legal precedents emerged). The convergence was marked by the gradual affirmation of an industrial mass production, also in continental Europe, similarly to what had been happening for some time in England and above all in the United States. It was also marked by the techniques of interpretation, increasingly focused, in both legal families, on recognition of the interpreter's creative role. Cf also Id,

different, but the nature of interpretation is the same. In both legal families, it is necessary to interpret, combining certainty and the ongoing creation of law, in the constant, dynamic comparison with real facts and with the environment in which the hermeneutic action is placed.

There is more to Ascarelli's thinking: the centrality of a kind of *typification* of the very hermeneutic process. If the lawmaker and legal scholarship tend to typify (ie to create evaluating models) for the purpose of classifying, the same holds true for the interpreter-judge in two ways: on the one hand, as an understanding and a typological reconstruction of reality in the previously explained meaning; on the other, as a typification of concrete cases. The latter passage is all-important: indeed, the real case always represents a typical case because the principle applied to it is also a typical one.[49] Each case has to be considered schematically and abstractly, as having typical elements and, hence, reducible to predictable schemes that can possibly be repeated, also in future circumstances.

This type of schematisation is needed to compare cases, and for the use of the precedent (even if lacking in technically binding value in Italy and in continental systems) in subsequent trials, so as to guarantee equality and uniformity when applying the law. Nevertheless, it remains understood that typifications are always surpassed in history, yet they are always necessary in order to prevent 'easy appeals of an equitable decisionism'[50] and to implement creativity of interpretation in keeping with tradition (the *corpus iuris* insofar as ultimately composed of legal norms, but also judicial decisions).

'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 117, fn 4; A. Torrente, 'Il giudice e il diritto', in VVAA, *Studi in memoria di Ascarelli*, IV, (Milano: Giuffrè, 1969), 2313-2325 (with reference to Italian case law).

[49] M. Reale, n 15 above, 432-433. Ascarelli's idea is borrowed in part from the comparison with English law (P.S. James, *Introduction to English Law* (London: Butterworth, 1959), 13) but expresses and combines with the well-known tendency to create 'types', a characteristic of Italian legal tradition.

[50] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 78.

IV. Antigone *vs* Portia? Heroic Justice *vs* Interpretative Artifice: From Conflict to Reasonable and Perennial Balancing

The dialogues between Antigone and Creon on the one hand, and Portia and Shylock on the other, symbolise and stigmatise the interpreter-jurist's tension when interpreting and applying norms. The use of Sophocles' tragedy and Shakespeare's Merchant of Venice,[51] known all the world over, is the poetic means for tackling, at a transnational level, the deeper questions of legal thinking, the contrast which inspires it and, at the same time, justifies its ongoing evolution. The reference to literary works is an expedient of universal communication, which casts a bridge – free from the characteristics of each legal order – between continental jurists and common law lawyers.

The cultural suggestions, imbued with humanism, most probably experienced by Ascarelli, were numerous at that time. One need only consider the essay by Giovanni Brunetti '*Il fatto illecito e il fatto immorale nel diritto positivo*' from 1906[52] which used the Merchant of Venice in its study on relations between positive law, morals and legal interpretation, reproducing the debate between Rudolf von Jhering and Josef Kohler (expressly referred to in Ascarelli's essay)

[51] Recalled on several occasions in Ascarelli's writings: eg T. Ascarelli, 'Scienza a professione' *Foro italiano*, 86, 89 (1956); Id, 'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 125-126; Id, 'Interpretazione e applicazione della legge (Lettera al prof. Carnelutti)' (1958), in Id, *Problemi giuridici* n 4 above, 156.

[52] G. Brunetti, *Il delitto civile* (Firenze: B. Seeber, 1906), 213-263. Dating from the same period, mention can be made of: A. Ascoli and C. Levi, 'Il diritto privato nel teatro contemporaneo francese italiano' *Rivista di diritto civile*, 145-203 (1914); P. Calamandrei, 'Le lettere e il processo civile' *Rivista di diritto processuale civile*, I, 202-204 (1924); later A. D'Amato, *La Letteratura e la vita del diritto* (Milano: Ubezzi & Dones, 1936). Without entering into the vast cultural itinerary of Italian Law and Literature, see: generally, A. Sansone, *Diritto e letteratura. Un'introduzione generale* (Milano: Giuffrè, 2001); the remarkable essay, based on Kafka's 'Before the Law', written by G. Teubner, 'Das Recht vor seinem Gesetz. Zur (Un-)Möglichkeit kollektiver Selbstreflexion der Rechtsmoderne', in S. Keller and S. Wiprächtiger eds, *Recht zwischen Dogmatik und Theorie: Marc Amstutz zum 50. Geburtstag* (Baden-Baden: Nomos Verlag, 2012), 277-296; and the stimulating reflection by P. Femia, 'Benito Cereno in Bucovina', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* (Milano: Giuffrè, 2013), 23-116.

regarding Portia's judgment, as dealt with by Emil Steinbach. Or looking overseas, the article by Benjamin Cardozo entitled 'Law and Literature' in 1924-25[53] where literary representation was already viewed as a means for understanding the legal experience, the 'law in action' which Ascarelli held so dear.

As regards the figure of Antigone, reference to it was, in a certain sense, fairly popular[54] in Italy at that time. In '*Le Leggi di Antigone*' Piero Calamandrei evoked Sophocles' heroine in order to justify the Nuremberg sentences against Nazi criminals. Subsequently, in his closing argument to Danilo Dolci's trial, he used the same reference in an evolutive and constitutionally-oriented perspective, in order to defend the right to work against public order measures typical of the (past) Fascist period.

[53] B. Cardozo, 'Law and Literature', in M.E. Hall ed, *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon, 1947), 339 (first version in 14 *The Yale Review*, 699 (1924-25)). This essay is considered to be one of the first in American Law and Literature together with J.H. Wigmore, 'A List of One Hundred Legal Novels' 17 *Illinois Law Review*, 26 (1922-23) (original version, in the same journal: 574 (1908)). Both were authors familiar to Ascarelli who, nevertheless, was mainly inspired by the work from the end of the nineteenth century on the Merchant of Venice by J. Kohler, *Shakespeare vor dem Forum der Jurisprudenz* (1883) (Berlin, 2nd ed, 1919).

[54] P. Calamandrei, 'Le Leggi di Antigone' *Il Ponte* (1946), now in Id, *Costituzione e leggi di Antigone. Scritti e discorsi politici* (Scandicci: La Nuova Italia, 1996), 17; also Id, 'Antigone e la donna giudice' *Il Ponte*, 257-258 (1953) and Id, 'In difesa di Danilo Dolci' *Il Ponte*, 529-544 (1956). The latter essay is the shorthand copy of the closing argument delivered on 30 March 1956 in front of the Criminal Court of Palermo. Here the 'unwritten' laws of Antigone are expressly identified by Calamandrei in the Constitution which defends the right to work and hence justifies – if correctly applied by the judges – Danilo Dolci's act. (He was arrested for having promoted a countdown strike among the unemployed in Sicily. The demonstration consisted in persuading the unemployed to start works to repair an old disused municipal road. But this action violated the public safety act dating from the Fascist period: ie the unjust law opposing the justice advocated by Danilo Dolci and founded on the new values of the Italian Constitution). Two phases can be identified in Piero Calamandrei's thinking: a first phase of strict legality which limited the judge's role to a mere executor of the law; then, a second – historically related to the fall of Fascism and the advent of the Italian Constitution – where the step is made to a wider legality based on the principles of the constitution and on the need for an evolutive interpretation of the whole system of positive rules in light of the new values: G. Pecora, *Uomini della democrazia* (Napoli: Edizioni Scientifiche Italiane, 2007), 85-201.

This is not the place to explore the vast field of relations between Law and Literature. Some may consider the aforementioned writings – and Ascarelli's essay itself[55] – as an example of a preliminary phase of this movement. An early, more neutral phase of 'Law *in* Literature', of utmost importance for a jurist's humanist background, for his perception of the major issues of legal debate, and, above all, as mentioned, for transversal, and to a certain extent, external communication. It should be pointed out, however, that he was always so careful as to avoid extreme contaminations[56] or interferences such as attributing to literary texts an 'operational' and constructive function, including in relation to legal reasoning and/or vice versa.

Indeed, in Ascarelli's essay, the combination of the two theatrical works is by no means random. One completes the other: the metaphors express the problem of law from a historical viewpoint.[57]

[55] In this sense D.A. Skeel Jr, n 1 above, 921, 937.

[56] R.A. Posner, *Law and Literature: A Misunderstood Relation* (Cambridge MA: Harvard University Press, 1988), 91-101 and 111-112 (expressing doubts on Law and Literature movements, except for educational purposes, and reinterpreting the dialogue between Portia and Shylock on the one hand, and the figure of Antigone on the other, as expressions of the conflict between hypertechnical rules and equitable standards, between legalism and equity).

[57] The systematic crisis of law in the face of European needs can be resolved by a science, that legal one which is basically an applied and essentially hermeneutical science (V. Scalisi, 'Il nostro compito nella nuova Europa' *Europa e diritto privato*, 239 (2007)). The interpretation stimulates a debate able to identify an '*unitas*' in the persisting and ineradicable '*varietas*' of cultures and languages that characterise the various European countries. Therefore, the European '*ius commune*', is based on the work of jurists which consists in interpreting but is aimed at justice. This is the message of Ascarelli himself: '*El disfraz de Porzia, de doctor patavino, trae el hálito del nuevo derecho de juristas, el derecho común, que se extenderá por Europa como un reguero de pólvora salido de todas las universidades*.' (A. de Ávila Martel, n 2 above, 83). Tullio Ascarelli, attentive to the debates regarding the unification of law (with specific focus on 'Unification of the Bill of Exchange Law'), expressly stated – in his general report to the International Congress of Private Law in Rome in 1950 – that in order to make such a process 'real': it '*doit porter sur le droit et non sur le texte législatif. Elle doit être conduite d'un point de vue fonctionnel et non formel*' (*'L'unification du droit. Actes du Congrès international de droit privé (Rome Juillet 1950)*' (Rome: Unidroit, 1951), 297); this methodological directive had a major influence on the Commission's activities: A. Levi, 'Un complement pratique a l'Œuvre d'unification de la lettre de change internationale', in *1959 Unification du Droit*, 241-242 (1959). Cf also our n 9 above.

In a vision where legal order – as a complex, as well as unitary legal experience – is not a 'fact' but a 'process', there is no contrast between natural law (the emblem of justice) and positive law (the instrument of 'certainty') but, simply, an infinite and necessary dialectic, within a dynamic and procedural dimension.

Antigone and Creon are not in disagreement since their ways of reasoning are well argued: they are both bearers of values which present themselves eternally in the history of law. Many years later, Judge Posner[58] expresses this well, when he says that in his daily activity a judge cannot fail to take into account both reasons. Defending authority is one thing but it is also important to be able to recognise when authority should reach a compromise.

Ascarelli's reflection does not contain any acceptance of jus naturalism – which would be anti-historical – in contrast to positivism;[59] rather, one finds the ascertainment of the endless dialogue between the historically-established norm (valid, humanly approved and legitimate since it is an expression of sovereign authority and civic values: hence certain and provided with sanction) and its evaluation by the one who has to judge. Such evaluation

[58] R.A. Posner, 'Remarks on Law and Literature' 23 *Loyola University Law Journal*, 182-185, above all 193 (1992).

[59] In philosophical and western thinking, the contrast between Antigone and Creon is symbolically representative of the opposition between jus naturalism-metapositive law on the one hand, and legal positivism on the other, and also between validity and justice and between legalistic formalism and substantialism: F. Brezzi, 'Antigone e le leggi: diritto, etica e politica' *Rivista internazionale di filosofia del diritto*, 381, 395-396 (2014). As regards the complex relation between natural law and positive law in Italian literature, see the essays included in P. Sirena ed, *Oltre il «positivismo giuridico». In onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2012). This old opposition seems to make no sense after the Italian Constitution in so far as all values, recalled by natural law, are now incorporated in its principles (ie the constitutional positivism by P. Perlingieri, 'La grande dicotomia «diritto positivo-diritto naturale»', in P. Sirena ed, just cited, 87-94; the perspective of D. Barbero was very different, *Studi di teoria generale del diritto* (Milano: Giuffrè, 1953), 40; F. Viola, 'Natural Law Theories in the Twentieth Century', available at https://www.academia.edu/10326359/Natural_Law_Theories_in_the_20th_Century (last visited 20 October 2015), 1-102, forthcoming in E. Pattaro and C. Roversi eds, *A Treatise of Legal Philosophy and General Jurisprudence*, vol 12*: Legal Philosophy in the Twentieth Century: The Civil Law World* (Amsterdam: Springer, 2016) (reconstructing the various Natural Law theories and the path towards a process of inclusion of natural law into positive law).

responds to the interpreter's conscience[60] (the ethical imperative of a non-transcendental yet 'inescapable' judgment) and is affected by the needs of social coexistence at the time of the interpretation. This appraisal is an inevitable component of the hermeneutic process and can, at times, impose a revolutionary act (Antigone's sacrifice).

One might ask: is this not perhaps the acknowledgement of the individual's ability to interpret on the basis of and in respect of justice? A deeply humanistic teaching that runs through Italian legal culture over the centuries?

And the dialogue presents itself again, ideally, between the two female figures of Antigone and Portia – two heroines also validated in Feminist legal theories – and between Portia and Shylock in the Merchant of Venice, in accordance with a consideration which greatly recalls Kohler's study of the work by Shakespeare.

There is no more suffering but only smiles. Portia (a woman, yet disguised as a man),[61] with her astuteness, does not deny the pact, or its validity, but goes beyond it using an interpretative artifice based on literal reasoning. The literal criterion is – but only pretextually – used by the doctor of law from Padua to achieve what is to be considered a just and equitable application of the norm (in terms of a socially-accepted norm)[62] in her conscience and in social

[60] The conflict between individual conscience (Antigone) and reason of state (Creon) is highlighted by F. Ost, *Raconter la loi. Aux source de l'imaginaire juridique* (Paris: Odile Jacob, 2004), translated into Italian by G. Viano Marogna, *Mosè, Eschilo, Sofocle. All'origine dell'immaginario giuridico* (Bologna: Il Mulino, 2007), 165. The tragedy is also recalled elsewhere to promote, from the pluralistic viewpoint of a multicultural society, the problems of conscience in the debate regarding the Muslim veil: Id, *Antigone voilée* (Bruxelles: Larcier, 2004).

[61] The disguise seems to represent the equality between man and woman which Ascarelli admired in American society as a 'phenomenon of a high level of civilisation'. Continental America is praised because it has 'no childhood', 'no myths and gods, no fairy tales; a wholly human continent and hence with no God; all made through tenacious, optimistic willpower': G. Auletta, 'Tullio Ascarelli' *Rivista delle società*, 493, 498-499 (1970) (recalling his thinking).

[62] As he explains in a touching letter addressed to Vittorio Scialoja, T. Ascarelli, 'Scienza e professione' *Foro Italiano*, 89 (1956). Therefore, it becomes clear how interpretation that rigidly complies with the norm, hence firstly literal interpretation, shows all its limits in the reasoning of Portia (and of Shylock himself). The letter of the norm (text) is a source of discord and not of certainty, given the several contexts of meaning and value: G. Zagreblesky, 'Sul giudizio di

assessment itself. And equity in Ascarelli's work – as confirmed by the historical evolutive study of Roman law and British law – does not represent justice in real cases. It means, instead, the affirmation of a new principle shared in the new socio-cultural environment, always in a perspective of continuity with tradition (*corpus juris*) that can be argued[63] by normalising, in Aristotelian fashion, the norm's typical (ie normal) scope in light of the abnormality of the case under examination.

Therefore, formalism finds in itself the weapon to outdo itself: the interpretation or better still 'the interpretative criterion' makes it possible to confirm the judge-interpreter's creative power in a no longer dramatic crescendo.

The norm is a historical entity: it becomes such, it only becomes 'positive' after its interpretation and application to a real case, taking into account all the factors affecting the historical process ('economic and ideal; of power and equilibrium').[64] Prior to interpretation there is just a text (or a behaviour), and it does not make a difference whether it is a contract or law provision:[65] what matters is the unitariness of legal hermeneutics, regardless of the diversity of its subject.

The jurist is an 'apprentice wizard'.[66] He cannot simply make texts explicit in accordance with the parameters of deductive logic; instead, he must show intuition and even 'fantasy', combine '*esprit de finesse*' and '*esprit de géometrie*'[67] for the purpose of making the

eguaglianza e di giustizia. A proposito del contributo di Livio Paladin' *Quaderni costituzionali/a. XXII*, 15-16 (2002).

[63] T. Ascarelli, 'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 114 and 134, fn 17; as regards equity in his thinking, see Id, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 63.

[64] T. Ascarelli, 'Certezza del diritto e autonomia delle parti', in Id, *Problemi giuridici* n 4 above, 116.

[65] As widely demonstrated by P. Perlingieri, n 32 above, 396; and M. Pennasilico, *Metodi e valori nell'interpretazione dei contratti. Per una ermeneutica contrattuale rinnovata* (Napoli: Edizioni Scientifiche Italiane, 2011).

[66] T. Ascarelli, 'Economia di massa e statistica giudiziaria' (1954), in Id, *Saggi di diritto commerciale* n 19 above, 526.

[67] T. Ascarelli, 'Funzioni economiche e istituti giuridici' (1946), in Id, *Saggi giuridici* n 15 above, 90; Id, L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* n 15 above, 69 fn 107 (recalling the

abstract norm effective in relation to the specific characteristics of the real case, and of translating a 'need looked on as just into generally-applicable formulas'.[68]

By innovating and adapting legal provisions, by balancing tradition and change, interpretation creates not, or not only, with revolutionary action but, in the end, with 'reformist' wisdom. Nor does the reference to the dispute between the two rabbis of the Talmud,[69] at the end of the essay, mean evoking religious fundamentals, divinity and transcendence. The second rabbi says: 'the law has been given to men and will be interpreted in accordance with the opinion of the majority'. And God replies: 'my sons have defeated me'. The interpretation is not only human, but it is also embedded in the history made by man, who is the bearer of social beliefs (at times promoting them and at times opposing them) and of axiological values shared at the time of the interpretation and application of norms. This is the 'secularisation of law'.[70]

The tension is constant: between the norm[71] (in the meaning of

dichotomy of Pascal already applied to legal methodology in the French context by François Gény).

[68] T. Ascarelli, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* n 4 above, 110; but also, Id, 'Prefazione', in Id, *Studi di diritto comparato* n 18 above, XLIII-XLVI.

[69] A. Choen, *Talmud* (1931), Italian translation by A. Toaf, *Il Talmud* (Roma-Bari: Laterza, 1999), 75 ff; for an alternative reconstruction of the dispute G. Teubner, *Il diritto come sistema autopoietico* (Milano: Giuffrè, 1996), 1. The same story is also evoked by A. Barak, *Purposive Interpretation in Law*, translated from Hebrew to English by S. Bashi (Princeton: Princeton University Press, 2005), 156-157. The aim is to show the centrality of the judge's creative role and, above all, the indisputable need for all texts (including sacred writings) to be interpreted in keeping with the meaning and circumstances the text has at the 'historical' moment of its real application. Moreover, said meaning 'is disconnected from the author's intent and may even conflict with it'. As is known, Aharon Barak considers it necessary to conjugate, when interpreting, 'the subjective purpose' (ie 'the subjective intent of the drafter at the time of drafting') with 'the objective purpose of the text' (ie the one which 'is determined at the time of the interpretation, and may well be very different from the actual subjective purpose of the author(s), or even from the objective purpose at a different point in time'): T.A. Balmer, 'Book Review: What's a Judge To Do' 18 *Yale Journal of Law & the Humanities*, 139, especially 145 and 146-147 (2006).

[70] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 24, 27, 33.

[71] Within the Italian law tradition the term 'norm' means legal norm: eg N.

text) and its evaluation by the interpreter; between the text and the norm (viewed as the socially-accepted norm resulting from the hermeneutical process which adapts the text to the real situation and society); between the interpreted and applied norm (hence once again become text) and its subsequent interpretation and application to another case. Nevertheless, such tension can be harmonised, not by logic but by history, within that diachronic process of ongoing creation and 'conflicting concord'[72] that is democracy.

Each member of society – not only the man of law – participates, through interpretation, in this process with no more Manichaeic contrast between State and citizen, nor perhaps between man and State.[73]

V. An Ending without an End

Ascarelli concludes his life with a new start: discovering himself to be a philosopher without being just this, he puts forward the idea of a work about the leading scholars of comparative law.[74] He also proposes a series of works illustrating the history of legal thinking, starting with a study on Leibnitz and Hobbes[75] because, in their

Bobbio, n 26 above, 329-340. This holds true also for Tullio Ascarelli. Nevertheless, in his writings, depending on the context, 'norm' can signify both the text to be interpreted and the result of interpretation, while the term 'rule' generally refers to social norm. This ambiguity and complexity was perhaps wanted by the author. The terminology becomes clearer through a systematic and careful reading of his various essays about interpretation: specifically T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione' (1957) in Id, *Problemi giuridici* n 4 above, 140, 158.

[72] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 29.

[73] T. Ascarelli, 'Interpretazione e applicazione della legge (Lettera al prof. Carnelutti)', in Id, *Problemi giuridici* n 4 above, 156.

[74] K.H. Nadelmann, 'A Volume «Great Comparative Lawyers» and a «History of Comparative Law»', in VVAA, *Studi in memoria di Tullio Ascarelli* (Milano: Giuffrè, 1969), III, 1409.

[75] T. Ascarelli, 'Hobbes e Leibniz e la dogmatica giuridica', introduction to T. Hobbes, *A dialogue between a philosopher and a student of the Common Laws of England* – G.W. Leibniz, *Specimen quaestionum philosophicarum ex iure collectarum* (Milano: Giuffrè, 1960), 3-69. The work was reviewed by P. Stein, *Society of Public Teachers of Law*, 145-146 (1961); by E.C. Denninger, *Archiv für Rechts-und Sozialphilosophie*, vol 47, 429-432 (1961). It was translated into French by C. Ducouloux-Favard, with a preface by A. Tunc (Philosophie du droit, Paris:

diversity, they shared the quest for certainty in law. But for Ascarelli, this certainty is not a premise or a result, but an action conditioned by its historical period, an ongoing action that the interpreter's reasonable evaluation[76] helps create, maintaining critical sense through constant questioning. Because every jurist 'must find a value in law', 'justice in a formal legality'. This is the problem of the adjudication process and of the Constitution. This is the task of the interpreter and his responsibility.[77]

The dialectic in history and in the history of law never leads to ultimate unification, to universal synthesis of Hegelian memory, but it re-proposes itself again and again within the complexity and plurality of law, as applied to human action and by human action.

Perhaps, the tragedy of Antigone could not be expressed, unless by a noble man and jurist, creator of history and thinking, who suffered a great deal during his lifetime and who – incredibly – considered himself lucky because of this. His suffering is, however, compensated by his legacy.

Tocqueville said: there are men 'whom I live a little while every day'.[78] For Italian legal scholars or judges, and perhaps not only, Tullio Ascarelli is one of these men, or at least it would be worthwhile to consider him so.

Dalloz, 1966). This preface was, in turn, recently translated into Italian: D. Monda ed, available at http://bibliomanie.it/ricordo_tullio_ascarelli_andre_tunc_davide_monda.htm (no 39, May-August 2015) (last visited 20 October 2015).

[76] T. Ascarelli, 'Hobbes e Leibniz e la dogmatica giuridica' n 75 above, 67.

[77] T. Ascarelli, 'Processo e democrazia', in Id, *Problemi giuridici* n 4 above, 21.

[78] 'Correspondence of Alexis de Tocqueville and Louis de Kergorley', in Œ*uvres complètes*, t. XIII, 418 (Paris: Gallimard, 1977) referring to Montesquieu, Russeau and, not coincidently, to Pascal.