Ascarelli and the problem of interpretation: about a recent essay by Tommaso Gazzolo

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Abstract

Il presente contributo prende in esame un recente saggio (2018) di Tommaso Gazzolo dedicato alla concezione dell'interpretazione giuridica, quale essa si desume dalla lettura dell'opera di Tullio Ascarelli. L'interesse del contributo sta nella originale lettura che ne viene proposta. Secondo l'Autore, infatti, le tesi teoriche di Ascarelli sull'interpretazione giuridica vanno comprese alla luce della concezione della legge e dell'interpretazione propria della tradizione ebraica, che avrebbero finito per condizionare profondamente anche il pensiero del giurista Ascarelli. L'occasione è allora propizia, sia per commentare i tratti salienti del saggio in questione, sia per suggerire altre possibili letture, non necessariamente incompatibili con quella proposta.

This paper examines a recent essay (2018) by Tommaso Gazzolo dedicated to the concept of legal interpretation as inferred from a reading of Tullio Ascarelli's work. The interest of the essay lies in the original reading he proposes. According to the author, in fact, Ascarelli's theoretical theses on legal interpretation are to be understood in the light of the Jewish conception and interpretation of the law, which ended up profoundly influencing the jurist Ascarelli's thought as well. The occasion is therefore propitious not only to comment on the salient features of the essay in question, but also to suggest other possible readings, not necessarily incompatible with the one proposed.

Key words

Interpretazione; Legge; Disposizione giuridica; Norma; Torah; Talmud; Diritto comparato; Diritto commerciale; Antigone; Porzia.

Parole chiave

Interpretation; Law; Legal provision; Norm; Torah; Talmud; Comparative law; Commercial law; Antigone, Portia.

1. A double belonging

In a fine essay of a few years ago, published in the series "*Imago iuris*" directed by the Paduan Luigi Garofalo, Tommaso Gazzolo, a philosopher of law from Sassari, proposes an original reading of the theory of interpretation of the great Roman jurist of Jewish religion Tullio Ascarelli, taking as a reference Ascarelli's paper dedicated to Antigone and Portia[1]. This is a highly cultured work of great depth, capable of providing an explanation, through two literary images, of the Roman master's most cherished theoretical theme, the theme of legal interpretation. The title of Gazzolo's essay is evocative in itself, *Una doppia appartenenza. Tullio Ascarelli e la legge come interpretazione [A Double Belonging. Tullio Ascarelli and Law as Interpretation].* In fact, it also summarizes the crux of the author's hermeneutical

1 T. Ascarelli, *Antigone e Porzia* (1955), in Id., *Problemi giuridici*, I, 1959, pp. 3 ss.; cfr. C. Crea, *What Is to Be Done? Tullio Ascarelli on the Theory of Legal Interpretation*, in *The Italian Law Journal* (on line), 1, 2, 2015, pp. 181-205.

proposal: Ascarelli's conception of law denotes a double debt, one deriving from his theoretical studies on law (comparative law, legal dogmatics and history of law), the other from his reading of the sacred texts of the Judaic tradition[2].

This work is, to some extent, even resolutive, at least for Ascarelli, since it almost seems that the path indicated and represented by Portia makes it possible to overcome the dilemma, which is also the presupposition, posed by Antigone and Creon, between legal provision (prior to interpretation) and norm (once interpreted). And this is achieved only through interpretation and the use of arguments that can justify a possible interpretative result, which is never a definitive one, as it cannot be freed from the concrete case. In other words, according to Ascarelli, it is not a matter of stating that the norm is simply the legal provision reformulated as a result of interpretation[3], nor that for a normative formulation there are several interpretative solutions[4], nor finally that the provision already contains in essence all its meaning, which the interpreter only has to make explicit[5].

Gazzolo goes even further, and therein lies the interest of his essay: interpretation is not that activity that allows meaning to be attributed to a provision, albeit always temporary, because it is conditioned by history, by the concrete case and the interpreter's values. Interpretation calls into question the very ability of positive law to set rules of conduct, since prior to interpretation, there is no text; there is no signifier to which meaning can be attributed, but the attribution of meaning lies all in that activity of differentiation between the interpreting utterance and the interpreted one, which is the very making of interpretation. On closer inspection, there are no signified, but always and only signifiers; the relation between legal provision and norm is not of relationship, but of immanence. The criterion through which to determine the goodness of an interpretation is not its relation to a legal provision that has been laid down, nor is it only the consistency and correctness of the interpretative activity, but it is the interpreter's awareness of the meaning of the interpretation and its proceeding by differences[6].

Gazzolo illustrates well how this position, with reference to the theory of interpretation, is the result not only of Ascarelli's activity as a scholar of positive law, comparative law and the history of law, but also of his relationship with the Talmudic tradition, and this also in relation to his political and personal events. It follows from this that for the Roman jurist, posing the problem of law means simultaneously discussing law from an ontological perspective and discussing the interpretative activity on a semantic level: interpretation "is nothing but the shift on a semantic level of that differentiation of law from itself which is articulated on an ontological level"[7]. Law and interpretation are nothing more than two external forms of the very idea of law.

2. Three observations

The proposed reading of Ascarelli's theory of legal interpretation allows three observations to be made.

First observation. It is interesting to note that the idea of ambivalence and contraposition has always characterised not only the proceeding of the Roman jurist but also the readings of those scholars, who have most often been interested in his more strictly theoretical works. As if it were no possible to discuss Ascarelli without referring to his oppositions, duplications, the search for implicit contradictions and possible compositions; almost as if recounting Ascarelli meant above all following him, reproducing him, being obliged to propose simple refractions of his reflections[8].

2 T. Gazzolo, *Una doppia appartenenza. Tullio Ascarelli e la legge come interpretazione,* Pisa, 2018, pp. 35-48.

3 R. Guastini, *Dalle fonti alle norme*, Torino, 1992, p.20, who declares himself deeply indebted to G. Tarello, *Diritto, enunciati, usi,* Bologna, 1974, pp. 135-263.

4 See V. Velluzzi, *Le Preleggi e l'interpretazione. Un'introduzione critica*, Pisa, 2013, pp. 19-30, according to whom in the case of extreme skepticism, however, everything that the interpreter decides regarding the meaning of a normative formulation is juridically acceptable, whereas according to the second approach (moderate skepticism) the sphere of possible interpretations is delimited, and only the interpretative outcomes included in this sphere are juridically acceptable.

5 This is the statement of the formalist theory of interpretation, according to which, given a provision, there is only one correct interpretation; for those who believe that it nevertheless constitutes the result of the process, see M. Cossutta, *Interpretazione ed esperienza giuridica. Sull'interpretazione creativa nella società pluralista*, Trieste, 2012, pp. 19-146.

6 T. Gazzolo, *Una doppia appartenenza*, cit., pp. 66-67, 76, 46.

7 *Op. cit.,* p. 30.

8 See again N. Bobbio, *L'itinerario di Tullio Ascarelli,* in *Studi in memoria di Tullio Ascarelli*, I, Milano, 1969, pp. LXXXIX-CXLV; M. Reale, *La teoria dell'interpretazione di Tullio*

This is what Ascarelli calls for[9]. In fact, even just with reference to his writings, mainly on the theory of interpretation, but also those dedicated to the history of law and comparative law, Norberto Bobbio had even discussed a doctrine of the "double truth"[10] already in the mid-1960s. And this, when Luigi Caiani had already explained how certain ambiguities in Ascarelli's theory of interpretation depended on the more mature instances of a certain neo-idealism (not only Crocian), grafted however onto a theoretical structure that was still strongly conditioned by that legal positivism that was typical of most Italian jurists of the 20th century[11].

Think of the opposition between economic function and legal structure, declined as the relationship now between law and society, now between the function and the structure of law[12]. Or between the possibility of reconstructing the work of the legislator from a historiographical perspective and the *voluntas legis*; between this and the context in which it is called upon to affect[13]. Between the norm and the case to be regulated[14]; the fixity of the system and the mutability of norms; the inertia and the dynamics of law[15]. But also between the certainty of law and equity[16]; the value judgments of the legislator and those of the interpreter[17]; an exegetical-dogmatic approach to law and a political-social one[18]; probably between personal conscience and human history[19], oppositions that have not always been easy to reconcile[20].

Ultimately, especially between law and interpretation.

Second observation. More recently, Massimo Meroni has rightly pointed out that Ascarelli's studies of the theory of interpretation have nothing to do with those theories that resolve interpretative activity in the attribution of meaning to a text[21]. For the most part, his is a genuine (non-organic) philosophical proposal of a conception of interpretation, which is unable to disregard an idea, albeit not always well defined, of the very meaning of law[22].

As a matter of fact, Ascarelli's theory of interpretation cannot be so easily classified, and not only because of the often-impressionistic nature of its proceeding. In fact, this cannot be in any way compared to those important studies of mainly analytical formation[23], in which the analysis is dedicated to

Ascarelli, in *Rivista internazionale di filosofia del diritto,* 1983, pp. 231-246; P. Grossi, *Le aporie dell'assolutismo giuridico (Ripensare, oggi, la lezione metodologica di Tullio Ascarelli)*, in *Diritto privato*, III, 1997, pp. 485-550; cfr. B. Libonati, *Ricordo di Tullio Adcarelli,* in *Studi offerti ad Antonio Venditti*, Napoli, 2009, pp. 783 ss.; F. D'Urso, *Funzione economica e struttura giuridica nell'opera di Tullio Ascarelli,* in *i-lex, Scienze Giuridiche, Scienze Cognitive e Intelligenza artificiale* (online), 18, 2013; M. Grondona*, Premesse per una discussione sul rapporto tra continuità e discontinuità nel diritto civile. A partire dalla lezione di Tullio Ascarelli*, in *Specula Iuris. An International Journal on Legal History and Comparative Jurisprudence*, 1, 2 2021, pp. 153-178; S. Pagliantini, C. Pasquariello (a cura di), *Su Ascarelli,* (conv. Siena 3-4 ottobre 2019), Torino, 2021, whit written of G. Amadio, A.M. Benedetti, C. Camardi, G. D'Amico, E. Diciotti, A. Gentili, M. Grondona, M. Maugeri, S. Mazzamuto, M. Stella Richter *jr*., S. Pagliantini, M. Palazzo, A. Palmieri, B. Pastore, A. Pugiotto, E. Stolfi; possibly, F. Casa, *Tullio Ascarelli. Dell'interpretazione giuridica tra positivismo e idealismo*, Napoli, 1999, pp. 117-180.

9 Of great interest in this sense is also T. Ascarelli, *Pensieri e lettere familiari*, edited by P. Femia, I. Martone, I. Sasso, Naples, 2017; M. Stella Richter *jr*., *Racconti ascarelliani*, Napoli, 2020, pp. 81-94.

10 N. Bobbio, *Ritratti critici di contemporanei, Tullio Ascarelli,* in *Belfagor,* 1964, nn. 4 e 5, pp. 411-424 e 546-565.

11 L. Caiani, *La filosofia dei giuristi italiani*, Padova, 1955, pp. 149 ss.

12 F. D'Urso, *Funzione economica e struttura giuridica nell'opera di Tullio Ascarelli,* cit., pp. 166-167.

13 T. Ascarelli, *Prefazione* a *Studi di diritto comparato e in tema d'interpretazione*, Milano, 1952, p. XXIX.

14 Note the influence of M. Ascoli, *La interpretazione delle leggi. Saggio di filosofia del diritto* (1928)*,* Milano, 1991, pp. 36-40.

15 M. Grondona, *Tullio Ascarelli tra "inerzia giuridica" e "dinamica del diritto", in Rivista delle Società*, 2020, pp. 1229-1235.

16 T. Ascarelli, *Interpretazione del diritto e studio del diritto comparato,* in Id., *Saggi di diritto commerciale,* Milano, 1955, p. 487 (nt. 4); but also Id., *Dispute metodologiche e contrasti di valutazione* (1955), in Id., *Saggi di diritto commerciale*, cit., pp. 472 ss. (nt. 2); cfr. P. Grossi*, Scienza giuridica italiana. Un profilo storico 1860-1950*, Milano, 2000, pp. 145-146.

17 M. Grondona*, Premesse per una discussione sul rapporto tra continuità e discontinuità nel diritto civile*, cit., pp. 159-163.

18 T. Ascarelli, *Il codice civile e la sua "vigenza"*, in Id., *Saggi di diritto commerciale*, cit., p. 426 (nt. 2).

19 Id., *Antigone e Porzia*, cit., p. 6.

20 A. De Gennaro, *Crocianesimo e cultura giuridica italiana*, Milano, 1974, p. 586.

21 M. Meroni, *La teoria dell'interpretazione di Tullio Ascarelli*, Milano, 1989, pp. 222 ss.

22 T. Gazzolo, *Una doppia appartenenza,* cit., pp. 83-99.

23 See P. Chiassoni, *Tecnica dell'interpretazione giuridica*, Bologna, 2007, pp. 49-168; more recently cf. G. Pino*, L'interpretazione giuridica*, Torino, 2021, pp. 174-270.

the relationship between the text to be interpreted and the interpretative result, not least because, in this perspective, legal interpretation still represents the meaning of a given signifier, it suspends any discussion on the descriptive or prescriptive character of such theories. And yet, neither is Ascarelli's theory of interpretation superimposable on those theories devoted to legal interpretation, in which legal interpretation assumes a well-defined meaning in relation to the philosophical conceptions that orient it; this was evidently the case with much of Italian legal neo-idealism[24]. But this category seems also to apply to the whole important philosophical-legal production that is in some way linked, by different ways and references, to the lesson of Gadamer and Ricoeur, in which in some cases the theory of legal interpretation becomes a true legal philosophy[25].

Better, Tullio Ascarelli's theory appears to be the theory of interpretation of a jurist, or rather of an accountant, who is aware of history[26] and at the same time of the responsibility of applying to the "effected legal reality" categories and norms that social and economic transformations have rendered inadequate[27]. His production was neither born "within the Jewish religious and juridical tradition"[28], nor does it appear referable to a precise philosophical or philosophical-juridical position, as it may be. He was definitely extraneous to neo-Kantianism and personal events must have made him also disinclined to natural law doctrine[29], which was anyway far from his formation, although he might have had a stereotyped view of it[30]. He was certainly influenced by neo-idealism, not as a philosophical doctrine though, but by virtue of the important significance that the act of interpreting had assumed in it[31].

On the other hand, the path taken by Ascarelli on the subject of interpretation constitutes an almost obligatory way, if one intends to react to the merely deductive character of the interpretative activity of positivist matrix and does not intend to opt for a natural law perspective. Certainly, an itinerary made even more obligatory by the rapid spread in Italian legal-philosophical culture of certain postulates of legal neo-idealism, in particular the postulate of the necessary historicity of law, of the merely conventional character of legal concepts and of the necessarily evaluative nature of the interpreter's activity (on which we will discuss *below*).

Third observation.

It would be wrong to say that Ascarelli's legal-philosophical thought underwent a profound evolution in his more mature writings, as compared to those of the 1920s. There is no doubt that in the production of the late 1940s and throughout the 1950s there was an increasing interest in the themes of interpretation, declined above all with reference to its relationship with dogmatics, history and legal technique, in an attempt to grasp the discontinuity of legal experience within the continuity of legal systems. And yet, it is equally true that the theoretical problem was the same as in his youthful writings, read now from a strictly juridical perspective, now from a visual angle that opened onto history, the evolution of society and politics. And one of Ascarelli's most recent clarifications, the one between interpretative technique and legal technique, also points in this direction. In fact, the first is a "technique of active understanding of law", and as such constructive of law. Better still, reconstructive, since, as a technique, it cannot but use dogmatic methods and tools, which however allow dogmatics to unfold in the direction of a political nature that is entirely intrinsic to the legal system[32].

On the other hand, already in the early 1920s, on the occasion of his intervention in the debate on the gaps in the legal system, while supporting

24 M. Ascoli, *La interpretazione delle leggi.,* cit.; G. Maggiore, *L'interpretazione della legge come atto creativo*, Palermo, 1914.

25 F. Viola, *Il diritto come pratica sociale*, Milano, 1990.

26 M. Stella Richter, *Tullio Ascarelli*, in *Dizionario biografico dei giuristi italiani (XII-XX secolo),* Bologna, 2013, pp. 108-111.

27 M. Bianchini, *La contrattazione d'impresa tra autonomia contrattuale e libera d'iniziativa economica,* II, Torino, 2013, p. 115; the crisis of the categories is still discussed today; see A. Gentili, *Crisi delle categorie e crisi degli interpreti*, in *Rivista di diritto civile*, 2021, pp. 633-660.

28 T. Gazzolo, *Una doppia appartenenza,* cit., pp. 10-11, 98-99.

29 T. Ascarelli, *Antigone e Porzia*, cit., pp. 5-6.

30 Id. N*orma giuridica e realtà sociale* (1955), in Id. *Problemi giuridici*, cit., pp. 82-83, on the subject see cfr. F. Gentile, *Politica aut/et statistica,* Milano, 2003, pp. 109-299; recently, F. Viola, *1990-2020. Una storia del diritto naturale*, Torino, 2021, pp. 127-162.

31 Just think, if only to leave out Emilio Betti, of G. Maggiore, *L'interpretazione della legge come atto creativo*, cit.; E. Cammarata; *Contributi ad una critica gnoseologica della Giurisprudenza,* Roma, 1925; G. Gorla, *L'interpretazione della legge* (1941), Milano, 2003.

32 Id., *Interpretazione del diritto e studio del diritto comparato,* cit., p. 501 (note 2).

the traditional thesis of "completeness", he had proposed addressing the problem of the "gaps in law" from a different point of view: "the problem of completeness of the legal system comes down to that of the abstractness of its norm, the abstractness of the legal norm, i.e. its mere generality and therefore its inability to regulate the concrete case; not this or that new concrete case, but each and every concrete case as such and because such"[33]. In fact, going back to a "philosophical-historical" perspective, as opposed to a "scientific-juridical" one (another ambivalence), he admitted the existence of so-called *de iure condendo lacunae*; that is, gaps which are not conceived with reference to a legal system other than the state one, but which are physiological, insofar as they originate from the abstractness of the norm[34]. It is true that this position seems to recall Gentile's opposition between "abstract logo and concrete logo"[35], but Ascarelli's dualism is also and above all Crocian[36] and neo-idealist[37]. As is well known, in fact, Ascarelli's problem was to propose a legal science that could not be resolved only in a dogmatic classification, consisting of generalizing and abstract concepts but devoid of cognitive capacity (Croce's "pseudo-concepts"), since they relate to the changing contingency of legal norms[38]. Indeed, the pseudo-concepts of Croce's science are "conventional, convenient, practical, economic knowledge, they are knowledge that is not really knowledge, knowledge that is impure, improper, erroneous, irrational; or rather irrational as knowledge"[39], but useful from a practical point of view[40]. Yet, the conventional knowledge of pseudo-concepts is contrasted by the "universal" knowledge of "pure" concepts, which manifests itself in judgment, as the unification of the "intuitive" with the "intellectual" element, which is an activity of historical judgment[41].

It follows, then, that it is true that norms are necessarily changeable, but since they are suited to regulating the facts of life, they must be continually interpreted, and therefore brought back to human action through historical judgement; this is not an easy task for legal science, as the study of dogmatics is qualitatively different from the study of interpretation. The one confined to the naturalism of pseudo-concepts, the other to the historicism of legal interpretation[42].

3. Dualisms, oppositions and ambivalences; a possible settlement

The same opposition appears to have to be reproposed with reference not only to the relationship between law, understood as a system resulting from legal interpretation, and law as the will of the legislator, but also between the categories of dogmatics and the history of a specific legal system. Indeed, "the arsenal of concepts through which legal discipline is expressed may occasionally be enriched by the legislator, but constitutes, in principle, a datum provided to the legislator, who can neither disregard nor alter it, nor therefore dictate solutions that in some way cannot be expressed in the language at his disposal"[43].

The legislator is therefore not free, but neither is the interpreter; both must "come to terms" with their value judgments[44]. Furthermore, the interpreter cannot disregard the continuity of the system; he must find the *voluntas legis*, which however must be adapted through interpretation to the historical-political

33 T. Ascarelli, *Il problema delle lacune e l'art. 3 disp. prel. nel diritto privato*, Modena, 1925, p. 12.

34 *Op. cit.,* p. 13.

35 N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria del diritto,* Milano, 1977, p. 227.

36 See B. Croce, *Lineamenti di una logica come scienza del concetto puro,* Napoli, 1905.

37 See W. Cesarini Sforza, *Sulla possibilità di una scienza giuridica pura* (1914), now in *Vecchie e nuove pagine di filosofia, storia e diritto,* Milano, 1967; F. Battaglia, *Diritto e filosofia della pratica. Saggio su alcuni problemi dell'idealismo contemporaneo,* Firenze, 1932; A.E. Cammarata, *Formalismo e sapere giuridico,* Milano, 1963.

38 B. Croce, *Riduzione della filosofia del diritto alla filosofia dell'economia* (1926), Milano, 1940, pp. 35 ss.

39 Id., *Lineamenti di una logica come scienza del concetto puro,* cit., p. 62.

40 *Op. cit.,* p. 63.

41 *Op. cit.,* pp. 52-53; see *La filosofia dei giuristi italiani*, cit., p. 61 (nt. 71).

42 B. Croce, *Lineamenti di una logica come scienza del concetto puro,* cit., p. 62.

43 T. Ascarelli, *La funzione del diritto comparato e il nostro sistema di diritto privato*, in Id., *Saggi giuridici*, Milano, 1949, p. 46.

44 M. Libertini, *Due contributi di giuscommercialisti alla teoria generale del diritto*, in *Orizzonti del Diritto Commerciale* (2020), 1, pp. 291-307.

contexts in which it is called upon to operate. Hence the interpreter's need for a constant balancing between ethical-political reasons and technical-applicative reasons[45].

Yet, interpretative activity is, at the same time, merely declaratory of all that is already present in positive law, but also necessarily creative[46], considering the physiological inability of positive law to foresee and regulate all the cases that confront it every day. The problem arises "from the inevitable contrast between the continuous evolution of life with its needs and any historically constituted *corpus iuris*", "from the contrast between the necessary and constant schematic and abstract character of law and the concreteness and variety of cases"[47].

The interpretation of a legal norm always takes place between two extremes: on the one hand, the inevitable incompleteness of any legal system, necessarily connected to its very abstractness; on the other, the unrepeatable novelty of the concrete cases of life. It is necessary to harmonise the interpretative solution with the pre-established norm[48], and thus establish a necessary continuity between the former and the legislative datum. A continuity that can never be merely logical or deductive[49], since "the interpreter does not just make explicit a solution already implicitly contained in the interpreted norm, as the latter, abstractly, always admits different possible interpretations: among them the interpreter must make a choice"[50]. This choice can never be arbitrary, because the interpreter is bound by the continuity of the legal system[51]. It is equally true, however, that the process of interpretation affects any norm, "for any norm cannot be applied without being interpreted"[52]. Indeed, interpretation is, rather than deduction from given premises, a position of premises[53], also the result of the interpreter's evaluations[54], so that it is the jurist who always constructs the norm, even if bound by a criterion of continuity with the given system. Finally, the spirituality of creative activity makes it possible to overcome any dichotomy between law and interpretation[55].

The very typological reconstruction of reality proposed by Ascarelli constitutes the mediation between two oppositions. In fact, it is true that it makes any legal system indefinitely completable, but social reality ends up conditioning the legal norm, at least as much as the latter constitutes an autonomous evaluation of this reality[56]. It configures a procedure which results in transforming concrete life experiences into ideal models of behaviour, on the basis of which it then becomes possible to evaluate the very empirical reality from which they were drawn.

In these same terms, the contrast between jurisprudence of concepts and jurisprudence of interests can also perhaps be reconciled through the activity of legal interpretation[57]. These are two constant orien-

45 M. Grondona*, Premesse per una discussione sul rapporto tra continuità e discontinuità nel diritto civile*, cit. pp. 159-163.

46 T. Ascarelli, *Prefazione* a *Studi di diritto comparato e in tema d'interpretazione,* cit., p. XXII.

47 T. Ascarelli, *L'idea di codice nel diritto privato e la funzione dell'interpretazione*, in Id., *Studi di diritto comparato e in tema d'interpretazione*, cit., pp. 182-183.

48 C. Camardi, *Creatività, storicità e continuità nella teoria dell'interpretazione di Tullio Ascarell*i, in *Rivista trim. dir. proc civ*., 2020, pp. 69 ss.

49 See E. Betti, *Interpretazione della legge e sua efficienza evolutiva,* in *Ius*, Milano, 1959, p. 212.

50 T. Ascarelli, *L'idea di codice nel diritto privato e la funzione dell'interpretazione*, cit., pp. 188-189; the theme of the answer to every possible question is evidently addressed by T. Gazzolo, *Una doppia appartenenza*, cit., pp. 46, 83-99; D. Corapi, *L'idea di codice nell'insegnamento di Tullio Ascarelli e l'attuale evoluzione delle codificazioni di diritto commercial*e, in *Cont. e imp*., 2016, pp. 1289 ss.

51 T. Ascarelli, *Interpretazione del diritto e studio del diritto comparato,* cit., p. 487.

52 See Id., *Prefazione* a *Studi di diritto comparato e in tema d'interpretazione,* cit., p. XLIV.

53 Id., *Interpretazione del diritto e studio del diritto comparato,* cit., pp. 490-498.

54 Id., *Prefazione* a *Studi di diritto comparato e in tema d'interpretazione,* cit., p. XX.

55 Gazzolo also discusses this (Id., *Una doppia appartenenza*, cit., pp. 69-82); on the concept of continuity, as a criterion of coherence and correctness of interpretative activity, and the consequences that Ascarelli drew from it in terms of creative nature of interpretation, see N. Bobbio's criticism, *Dalla struttura alla funzione,* cit., pp. 59-60, who defined it a form of "radical idealism"; more recently, also M. Meroni seems perplexed, see *La teoria dell'interpretazione di Tullio Ascarelli*, cit., p. 295, as according to him "it is not clear in what sense this inevitable relationship of continuity can be seen as a limit to the discretion of interpreters".

56 A. De Gennaro, *Crocianesimo e cultura giuridica italiana*, cit., p. 662.

57 See T. Ascarelli, *Tullio Ascarelli e il ragionamento tipologico*, edited by M. Stella Richter *jr*., C. Angelici, G. Ferri *jr.*, Milano, 2022.

tations of legal thought, each of which, in relation to specific historical needs, may prevail over the other, but cannot totally disregard it. In fact, the activity of the jurist cannot only aim at discovering the premises for the decision of unforeseen cases, nor, conversely, can the methodological monism of *Begriffsjurisprudenz* prevail, "which superimposes the context of demonstration over the context of invention, [in the belief] that deductive techniques are the way to discover new rules of law and at the same time justify them; with the consequence that only the solutions deducible from the principles laid at the foundation of the system can be admitted"[58]. In this way, he feels the urgent need to highlight the limits of certain traditional theories and to suggest a method to bridge the gap between the unfailing principle of continuity and the value judgments of the interpreter, the existence of which becomes immediately evident in the typological reconstruction of reality. Between the legislator who is forced to express himself in an abstract and therefore equivocal manner, on the one hand, and the judge who must instead try to adapt his decision as much as possible to the characteristics of the concrete case, on the other, the jurist-interpreter must establish a necessary continuity from which the circularity of all legal experience derives.

And so any form of opposition between sociologism and pan-juridicism, between equitable decisionism and abstract logical deductivism, can be addressed, provided that it is realised that interpretation cannot disregard the interpreter's evaluations: "the object of the interpreter's work is not the given norm, but a normative evaluation of reality in continuity with the evaluations made; the knowledge of the norms of the pre-established *corpus iuris* places itself as a moment in a process which leads to laying new norms which cannot be reduced to mere logical developments of the former"[59].

Finally, here is another contrast, inasmuch the task of the interpreter begins where the task of the legislator ends, precisely because it is necessary "to make the whole new reality penetrate the legal system, to articulate law in the infinite variety of concrete cases, to realise the thought of law in the solution of new questions continually proposed; thus the jurist stands as a true collaborator of the legislator, because he must continually complete the latter's work"[60].

In this way, the opposition between "a legally valid law and a socially recognized norm" also falls apart; "law and interpretation are not opposed as creation and knowledge of law, but rather concur in the position of norms that are always the generally accepted ones, so that legally valid law always results in what is understood as such and for whose position the law or the individual interpretation constitute moments in a process"[61].

He proceeded in the same way in a volume published posthumously, comprising a collection of texts by Hobbes and Leibniz[62] that, belonging to the late maturity of the former and the youth of the latter, are practically contemporary with each other. According to Ascarelli, both proposed the same need for certainty, which in Hobbes derived from a revolution that had overthrown absolute monarchy to impose a dictatorship, followed by a profound social transformation. In Leibniz, on the other hand, it developed as a result of the situation created in Germany after the Thirty Years' War. Hobbes' is a historicist conception of interpretation, while Leibniz's analysis, assuming a law already "given" and "handed down", proposed a merely logical arrangement for the purposes of its application. These historical premises made it possible, above all, to relativise the differences between the discussions about the birth of the new secular and constitutional state in England and the disputes about the rational foundation of German law.

Lastly, Antigone and Portia are also contrasting figures. It is true that both face the problem of comparing the indications of their own conscience and their evaluations with the fixity of the legal norm. However, if in Antigone the confrontation becomes tragedy, because there is no solution to the relationship between conscience and history (at least as

58 L. Mengoni, *Diritto e valori*, Bologna, 1985, p. 86; cfr. V. Pescatore, *Tullio Ascarelli e Luigi Mengoni o della forma giuridica e del contenuto economico*, in N. Irti (a cura di), *Diritto ed economia,* Padova, 1999, pp. 229 ss.

59 T. Ascarelli, *Prefazione* a *Studi di diritto comparato e in tema d'interpretazione,* cit., p. XXXI.

60 See Id., *Appunti di diritto commerciale,* Roma, 1936, pp. 31-36.

61 T. Ascarelli, *Prefazione* a *Studi di diritto comparato e in tema d'interpretazione,* cit., p. XXXI; cfr. M. Libertini, *Il diritto della concorrenza nel pensiero di Tullio Ascarelli,* in *Annali del Seminario Giuridico* (dell'Università di Catania), VI (2004-2005).

62 T. Ascarelli-M. Giannotta, *Testi per la storia del pensiero giuridico,* Milano, 1960.

envisaged by Antigone and Creon), in Portia the interpretative reformism of the jurist prevails. Traditionally, the reading of the relationship between Antigone and Creon has always been in the sense of the relationship (and opposition) between the reasons of natural law and the reasons of state[63], although jurists have almost always read Sophocles' tragedy as the juxtaposition of two dogmatisms, which impede dialogue and deny any usefulness to the attitude, which is purely legal, of indicating and refuting the reasons underlying one's claims[64].

Ascarelli's Portia does not fall into this "trap". She submits to legal mediation and does not opt for the a priori denial of the validity of law (of the pact concluded by Antonio and Shylock), which could anyway be characterised by profiles of nullity in virtue of the absence of a synallagmatic relationship between the restitution of the price and the death of the debtor (but in these terms the reasoning would still be abstract and potentially only oppositional). Portia reads the pact, interprets it, gives reasons for her position, agrees to dialogue; just in doing so she nullifies the pact, and this through hermeneutic reasoning, without resorting to the opposition between abstract principles, by their nature conflicting and difficult to mediate. Only in this way does she save Antonio's life[65].

In this sense, then, law is pure interpretability and the interpretative process can only be understood through recourse to Talmudian hermeneutics. In fact, there is no direction there, and therefore no relationship between legal provision and norm, since the timeline is reversed: no longer from legal provision to norm, but from interpretation to law.

Evidently, this conception of time in Ascarelli's theory of interpretation is peacefully opposed to the idea that the time of law is the time of the past[66], but also to the thesis that the past is necessary to know the rule that has actually been followed, which only in the future, however, is identified for what it actually is[67].

In fact, if the past is the text and the future is the norm, as Ascarelli often repeated, it is however only the latter, for Gazzolo, which gives meaning to the former; in fact, "the text is the beginning that must be reached, it is what precedes interpretation, but can only be the end of the latter"[68]. Since there is nothing that can ensure any relationship between legal provision and norm (not even the continuity of the legal system because, as a signifier, the moment it arises, it already requires interpretation), the rigour of the so-called interpretation-activity is not what ensures correct interpretation. Legal interpretation, from this point of view, is nothing other than the (timeless) moment in which past and future coincide, since the determination of the norm cannot be achieved except through the idea of continuous transformation. Interpretation then imposes *redemption,* which is evidently Walter Benjamin's great theme*,* because it is only "through it that law can become just, in making itself a stranger to itself"[69].

And that is Gazzolo, probably still to be discussed, but undoubtedly suggestive.

It seems to us that the history of legal systems (comparative law) in Ascarelli is not after all the summation of the possible legal meanings that have followed one another over time, nor the economic, social and political reasons by virtue of which these meanings have been stratified (such as those of commercial law); nor, finally, the result of the reading of reality through the legal norm (the typological reconstruction).

In this sense, Ascarelli's theory of interpretation appears to be oriented by a sort of philosophy of history, which, however, has its main architect above all in the jurist-interpreter. Before even his aptitude for grasping the legal system in its complexity and in its particular and diverse articulations, it should be especially noted how the jurist-interpreter's proce-

63 See F. Gentile, *Politica aut/et statistica*, cit., pp. 225-227, who reconstructs the errors of Creon and Antigone in terms of betrayal of the concept of autonomy.

64 See Ciaramelli, *Il dilemma di Antigone*, Torino, 2017, pp. 99-120; 121-163 (with reference to Hegel's reading); 167-201 (with reference to Lacan's reading); see F. Cavalla, *Al principio*, Milano, 2022, pp. 142-150.

65 Of great interest, also for the treatment of the figure of Portia, see Ciaramelli, *Il dilemma di Antigone*, pp. 223-228; see in any case E. Ripepe*, Ogni persona è più persone in una. Il mercante di Venezia, l'identità individuale come identità plurale e l'impossibilità di ri(con)durre la giustizia al diritto o il diritto alla giustizia,* in D. Cananzi, A. Salvati (edited by), *Dei confini, dell'identità e di altri demoni. La diversità tra letteratura e diritto,* Torino, 2018, pp. 35-60.

66 N. Irti, *Un diritto incalcolabile*, 2016, pp. 52-55.

67 F. Viola, Viola, *Ermeneutica e ragione giuridica*, in L. Triolo (edited by), *Prassi giuridica e controllo di razionalità*, Torino, 2001, p. 232.

68 T. Gazzolo, *Una doppia appartenenza*, cit., pp. 91-94.

69 *Op. cit.,* pp. 97-99.

dures and results are understood as the very making of justice in history, which is rethought and relived by the jurist every day. Every new interpretation is given only by difference from the norm (subject of interpretation).

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