

Antigone and Portia (*) (**)

Tullio Ascarelli †

1. The problem of the law is a problem of all men, and is one that each of us must confront on a daily basis. Therefore, maybe, when symbolising its terms, we can call upon wise men before appealing to academics, and upon poets before turning to scholars.

And this is why the mind naturally shifts its focus onto what is, possibly, the most perfect of all plays: Sophocles' *Antigone*. Indeed, it is no coincidence that Hegel frequently refers to it in his *Philosophy of Right*. Let us recall the tragedy. Oedipus, who gouged out his own eyes, abandons Thebes upon learning of the tragic fate that had led him, unaware of the truth, to kill the cruel traveller who was actually

* Conference delivered in 1955 at the Italian-Chilean Institute of Culture in Santiago, published in *Rivista Internazionale di Filosofia del Diritto*, 1955, 756-766. For a more in-depth analysis of some ideas mentioned herein, see – in addition to the studies contained in this volume – the preface to my work entitled *Studi di diritto comparato e in tema di interpretazione*, Milano, 1952, and my paper *Interpretazione del diritto e diritto comparato*, republished in *Saggi di diritto commerciale*, Milano, 1955; and for examples as regards the difference between *regulae juris* and concepts pertaining to a typological reconstruction of reality (a distinction which ENGISCH now has also referred to), in addition to the above, see also my papers *Considerazioni in tema di personalità giuridica* and *Sul concetto di titolo di credito*, republished in the aforementioned *Saggi di diritto commerciale*. This paper is dedicated to the memory of Filippo Vassalli and will be included in the studies in memory of the late Professor. (*Ascarelli's original note*)

** Translation by Camilla Crea, Associate Professor of Private Law, University of Sannio, School of Law. Thanks to Keith Bayerstock and to an anonymous referee for their precious advice in some translating choices. This translation refers to the text of the essay 'Antigone and Portia' republished in T. Ascarelli, *Problemi giuridici*, I (Milano: Giuffrè, 1959), 3-15 (henceforward DOC B) for it is the most quoted. Significant discrepancies with the first version (published in *Rivista Internazionale di Filosofia del Diritto*, 1955, 756-766: henceforward DOC A), as well as with the latest version of the same essay included in *Studi giuridici in memoria di Filippo Vassalli* (Torino: Utet, 1960), 107-117 (henceforward DOC C) are documented in the translator's footnotes.

the father he had never known; and then to take his own mother as his bride upon obtaining the kingdom awarded to him for saving his city, freeing it from the Sphinx whose riddle he answered correctly. Oedipus' legitimate successor is Creon. And the two daughters born from Oedipus' incestuous relationship – Antigone and Ismene – reside at the court of Creon. But Antigone's two brothers, Oedipus' sons, Eteocles and Polynices, take up arms against each other, with Polynices forming an alliance with Argos, in order to seize Thebes. The Argive army is repulsed and both brothers die in the ensuing battle, each one killing the other. Polynices dies as an enemy of Thebes and Eteocles as its defender. Burial rites are granted to the latter, but refused for the former and Creon orders the death penalty for anyone daring to defy the law he has imposed. But Antigone rebels against the law and attempts to bury her brother, proudly reminding Creon of the unwritten laws of the Gods which decree the equality of all men before Dis Pater. However, Creon intends to carry out the sentence, even failing to succumb to the pleas of his own son, Haemon who is hopelessly in love with Antigone. Antigone is buried alive inside a tomb. But Tiresias appears, foretelling Creon of the divine vendetta. In the end Creon gives in, but it is too late. Furious with his father, Haemon reaches Antigone in her tomb and takes his own life, throwing himself upon his beloved's body.

The preordained tragedy unfolds inexorably. Marked by fate, it shows us a conflict which is present at all times and in all places, and which occurs over and over again. Its real subject is man in his universally and eternally human dimension. Man is Oedipus' answer to the Sphinx's riddle; man who the Chorus of Antigone sings of, in his industriousness and in his dignity.

Man is unable to accept a social rule¹ simply because observed or imposed by a higher authority. He seeks justification for it which

¹ Within the Italian law tradition the term 'norm' means legal norm: eg N. Bobbio, 'Trends in Italian Legal Theory' 8 *American Journal of Comparative Law*, 329-340 (1959). 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. This is why we have opted for a literal translation of these terms. For further explanations see also our essay in this issue C. Crea, 'What is To be Done? Tullio Ascarelli on the Theory of Legal Interpretation' 1 *The Italian Law Journal*, 181-205 (2015).

cannot be provided solely by the frequency with which it is observed, or by the authority's efficiency in ensuring an effective sanction. He wants to attribute it to an order whose ultimate justification also lies in a concept and in a belief which marks right and wrong.²

In this way, the norm places itself in opposition to the rule actually observed, setting itself as a criterion of judgment of the latter. And the conflict reproduces itself between any historically imposed norm and the norm whose imperative the individual feels in his conscience. It reproduces itself within the very conscience of the individual as a deep conflict between an accepted norm and a divergent evaluation of the said norm, as the gentle figure of Ismene would also seem to remind us, attracted and frightened at the same time by Antigone's audacity.³

And so there is the eternal dialogue of Antigone and Creon, eternal dialogue and eternal and preordained tragedy because it springs from the contrast between two equally present positions that are shown to us in their purity in Sophocles' tragedy.

On the one hand, the historically imposed and justified norm; on the other, the individual conscience which refers to the absolute which she feels as a divine command. Positive law and natural law are set against each other as opposing states.

Creon is not the tyrant Antigone thinks he is. Antigone is not anarchic as Creon thinks she is. Because they represent the antipodes of the dialectic of law in the ongoing opposition of any rule or norm and its evaluation.

Ongoing opposition. Creon's law does not just respond to the

² DOC C (n ** above, 108) also includes: 'The history of civilisation is the history of ethics, the history of human industriousness that cannot be separated from the concepts connected with it; these concepts are not superimposed on it, but rather are identified with it, are prompted by it and, together, are its instrument. Because we cannot go forward in our daily activity without being aware of the justness of this, without being aware of the justification of our actions'.

³ DOC C (n ** above, 108) also includes: 'The imperative shall be experienced by the believer as a divine command and found once more in a divine revelation; it shall be singled out by the logician in a pre-established rational order; in any case, it shall impose itself as an absolute accepted in its conscience by the individual who cannot, therefore, refuse to obey it, whatever the scope of the historically imposed norm it opposes. So the historically imposed norm is counterposed to the imperative's absoluteness, freely assessed by the individual, who can, therefore, condemn it when faced with the imperative of the individual conscience, and refuse to obey it.'

State's human needs. It was imposed prior to the event and in compliance with the limit of non-retroactivity. It was imposed while exercising legally-acknowledged sovereignty. It is based on the human conflict between the city's enemy and its defender. But Antigone opposes a greater law to Creon's human law, invoking the high, unwritten laws of the Gods which Creon is unable to disregard. She opposes the equality of all men in death to the human distinction between the city's enemy and defender. And the reasoning behind both viewpoints can be argued, as commented by the Chorus in the dialogue between Haemon and Creon. Both argumentations are well-founded, since they are on different levels. And they are the argumentations of the dialogue of law. On the one hand the positive law as interpreted by self-proclaimed jurists, on the other the voice of conscience, which always judges and is able to judge the justice of each and every human law.

This dialogue has come to the fore again within the contemporary European scene, shaken by the torment and bloodshed that has marked our recent history. It seems to want to fall back on man's eternal problems rather than on social and individual conflicts and events,⁴ and so returns to the tragedy and representation of ancient myths.

France represented the same belief in its resistance and sacrifice in Anouilh's *Antigone*.⁵ And what strikes us in this new presentation of an eternal motif is the humanisation of Creon, almost justified within the limits of his position. Nevertheless, a humanisation from which Antigone's resistance and revolt draws greater awareness and intensity. At this stage the tragedy has lost its terribleness because not only is its unfolding preordained, it is also well-known. Creon attempts to explain the reason for his position and to show how the

⁴ DOC C (n ** above, 109) is partially different: 'social and individual conflicts that grabbed the attention of 19th-century playwrights'.

⁵ He is referring to Jean Anouilh's *Antigone* (perhaps that of Paris: Didier, 1942; this play was adapted and translated in English by L. Galantière as *Antigone* (London: Samuel French and New York: Random House, 1946)). It was an implicit commenting on the Nazi occupation in France, an encouragement to resist the usurpation. For a comparison between Sophocles' *Antigone* and that of Anouilh see S. Tiefenbrun, 'On Civil Disobedience, Jurisprudence, Feminism and Law in the *Antigones* of Sophocles and Anouilh' 11 *Cardozo Studies in Law and Literature*, 35-51 (1999).

State cannot be ruled with The Lord's Prayer, to cite as Machiavelli. But as regards the position of Antigone – who clearly confesses that the sole reason for her conduct is her conscience, that her actions are for herself and to satisfy an intimate need – it is strengthened rather than weakened by this, revealed in its necessity.

2. Legal thinking has repeatedly tried to overcome the contrast by refusing to classify the unjust norm as legal, and by classifying as legal only the norm which, in turn, can be justified⁶ by the commandment related to a divinity, or by a rationally determined moral order. Violation of the said norm cannot help but be accompanied by a divine sanction through the mysterious actions of a Fate or the anger of a God. Tiresias' voice admonishes Creon and foretells the tragic sequence unleashed by the law he imposed which goes against the divinely acknowledged equality of all men before Dis Pater.

But the dramatic nature of human life and, at the end of the day, its freedom, lies in this ongoing presence of a positive norm, imposed throughout history and approved by humankind, even if subject at all times to evaluation in the event of a different request in the individual's conscience.

And the contrast arises and unfolds throughout history, through each individual's effort to create an order that complies with his or her own conscience. The process of composing throughout history, in the sense of ongoing mastery and creation which each individual is called upon to contribute to in accordance with his conscience, is set against the insolubility of the contrast. This contrast is expressed in the timeless tragedy which constantly repeats itself, setting an unchangeable, never-to-be accomplished order against a life downgraded to necessary sin. So the dialogue between Creon and Antigone becomes the dialogue of the development of law throughout history. And the need for moral conscience translates into the need for reform or revolution, into the need for a new order which is accomplished in the dialectic of history, into norms which are approved by positive law and then always interpreted and improved on. Natural law is no longer abstractly counterposed to

⁶ DOC C (n ** above, 110) also includes at this point: 'in a norm removed from history, its contrasts and its strengths'.

positive law, but represents the need for its improvement as regards each positive law.

So, what is a necessary tragedy in the pessimistic Greek concept – doing away with blame or responsibility given the fatal preordainment of each individual's actions, inexorably connected in accordance with a mechanical causality – becomes a drama of the individual conscience when asserting its own freedom and responsibility. The moral imperative independently experienced by man replaces the mechanically operative fate that makes Oedipus blinder even while his eyes are still open. Drama replaces tragedy with the assertion of freedom, which signifies confident assertion of history, positive and dense with meaning, where man is called upon to cooperate. Assertion of history, that is, assertion of an unfolding of events which surpasses a timeless, reversible mechanicality.⁷

3. Proof of the conflict and drama is the sacrifice and suffering with which the individual's need is certified as compliant with an ethical imperative. Antigone is well aware of the fact that she risks death by defying Creon's law. She is aware that her defiance would have no value without the sacrifice that shows its purity and reveals the absoluteness of the imperative with which her action complied. The triumph of the new need is only accomplished with performance of the sacrifice; solely in that way the ethical imperative can, in turn, aspire to become a positive norm.⁸ The initially bold Creon starts to show uncertainty at the announcement of the tragedy involving both Antigone and Haemon. And so the Chorus, still hesitant in following the opposite reasoning of Creon and Haemon in their dialogue, urges the king to revoke the punishment and violate the law. Creon rushes to do so in order to prevent the tragic ending which will seal the victory of the principle Antigone asserted so magnificently, but it is too late to change the course of events. The said principle consists in having the same compassion for all the dead, erasing conflict and hostility, making friends and enemies equally deserving of a compassionate burial, because conflicts historically generated by our

⁷ These last three sentences are not present in DOC A (n ** above, 760) and in DOC C (n ** above, 110).

⁸ The sentence differs in DOC C (n ** above, 111): 'the ethical imperative can in turn inspire a positive legal norm'.

earthly life have no sense or meaning except at the moment when opposing parties clash. And yet they subsequently come together in a broader vision which encloses them as albeit differing parts of a picture where each part finds its justification and none is lacking in a positive function.

Socrates' smile seems to respond to Antigone's sacrifice. Despite his unjust sentence, he refuses to escape as insistently urged to do so by his friends because he does not feel he can evade the laws of the city even if unjust. He is unable to evade the system which he accepted as a citizen, including the undeserved consequences. The fact is that the symbol of moral rebellion is sacrifice, and its intensity almost measures the purity of the rebellion, and hence justifies it.

4. But the dialectic of legal thinking unfolds daily, even if in more subdued manner, in the ongoing intense interpretation. It becomes dramatic when the clash between the historically imposed norm and the individual's conscience cannot but represent a revolutionary conflict which sacrifices that need of certainty – which all norms in their positivity always respond to – for a request in whose regard positive legal order appears to be real disorder. Because what then is the value of the norm? And this is where the figure of Portia comes to our aid, barely concealing an ironic smile under her robe. More clever than heroic, wise and knowledgeable rather than fanatically brave, and perhaps, in her poetic depiction, with a slight hint of astuteness, emphasised and ennobled by the feminine figure that brings out a smile while putting forward her case in the guise of a doctor of law from Padua (*dottore patavino*). Portia's intelligence, combined with a hint of probabilism and, morally speaking perhaps even ambiguity, is set against what could be defined as Antigone's Calvinist Puritanism. The human triumph of interests, defended through a winning interpretation that presents itself as a remunerable professional activity, is set against the death of Antigone who only asserts the victory of her truth by sacrificing herself.

The contrast between the two figures could not be more pronounced, and yet both of them show us the paths taken by law in its development and transformation.

Let us recall the storyline of the Merchant of Venice. Antonio asks a moneylender for a loan in order to help his friend Bassanio, who is

in love with Portia, whose hand Bassanio succeeds in winning by correctly guessing the casket containing her portrait. Shylock, offended by the unfair humiliation he has suffered as a Jew, grants the loan but only on the condition that he can cut a pound of Antonio's flesh if the loan is not repaid on time. The deadline elapses and a trial is held as the sum has not been repaid. All seems to be lost for Antonio when Portia arrives on the scene, disguised as a male doctor of law from Padua.⁹ She confirms the validity of the loan agreement but then points out that the said agreement does not allow for even one drop of blood to be shed. Antonio emerges victorious and Shylock is forced to forfeit his life and estate. He succeeds in obtaining the Duke's pardon and his life will be saved if he converts to Christianity while his estate is saved through bequeathment to his daughter and son-in-law.

And so, the *deus ex machina* of this play, which ends on a happy note, is Portia's interpretive skill. Portia confirms the validity of the loan agreement; she does not go against it, nor does she label it as unjust. But she interprets it, and through this interpretation she renders it null and void. Positive law is safe but also surpassed. The problem is not the legitimacy of the law, but its exact scope. The ethical imperative which the law condemns is replaced by a more subtle game whose premise is the legitimacy of positive law, and which is solely concerned with determining its scope in the storyline of a more complex game of conflicting interests. Drama gives way to smiles.

Portia's problem concerns the interpretation of an agreement but said agreement should be looked on as law since it would not seem that the playwright wished to make any distinction. His creativity presents us with the problem of interpreting the norm.

Which could be the law to be applied in this case? And what is then the actual scope of the law or agreement, which are always and necessarily (as well as strictly speaking as regards the latter) drafted in an abstract manner, when faced with the concreteness of the case

⁹ I would like to note, in praise of the University of Padua, an expression in Portuguese which would seem to be related to the University of Padua's reputation throughout the centuries. *Naô entender patavino* in Portuguese means to not understand, to not understand a problem which only Padua's scholars could resolve. (*Ascarelli's original note*)

with all its resolutions? Portia's reasoning serves to raise the persistent problem of interpretation in a poetic manner, the subtle determination of the exact scope of the norm when faced with a real case; this is the inevitable path to guaranteeing the application of norms and considering them positive law. Nor is it of importance, for our purposes, that the Shakespearian tragedy deals with an agreement rather than law; that the interpretation Portia defends is exemplary or unsound in the case in point.

Portia's reasoning is the constant reasoning of all interpreters. The playwright shows us what is the possible argumentation of all jurists in the reasons put forward by the fake doctor of law from Padua. In brief he seems to want to poke fun at the picky techniques of interpretation, as well as to show us its infinite resources.

If we are to consider the case as symbolically exemplary, as we ought to, it is of little importance whether or not the Venetian laws of that time were those cited by Portia.

It is of little importance whether or not the agreement signed by Antonio was valid in accordance with Venetian laws of the period in which the play is set – Kohler was to look more closely at this. The drama is not resolved by rejecting the agreement, but by confirming its validity, interpreting it and destroying it.

Indeed, it is the interpretive criterion, at least as a point of departure, that is the first and simplest of interpretive canons, even if completed by the age-old saying of *ubi voluit dixit*. The contrast between the agreement and a moral need which condemns it, is not resolved through the revolutionary act of denying the agreement. The contrast is bypassed, as some would say, through interpretation.

Indeed, interpretation is and is not the interpreted element. It is a construction and a reconstruction of this which explains, develops, limits and essentially modifies it, relating back to the interpreted element at all times while still modifying it. Portia appears to smile at us in order to remind us that at the end of the day all laws are as they are interpreted. Every law corresponds to the interpretation of it which is accepted and, basically, this interpretation reconstructs the law and can make it different from how it was first intended; it changes it over time. It adapts and modifies it, develops or makes it worthless. The interpreter's needs and beliefs are also asserted in this interpretation so that moral disapproval – which, nevertheless, is not

brought against the norm on an ethical level by denying it – gets down to work, interpreting and modelling the norm, as a criterion of prevalence between opposing and conflicting human interests in determining the scope of the norm. Moral disapproval respects the norm (thus remaining sensitive to the need for order and certainty that the latter represents at all times) but at the same time it alters the norm and hence adapts it to an ever-changing equilibrium of conflicting forces and evaluations. An ongoing re-creation.

Because every single norm is expressed in words and every single norm refers to one legal '*fattispecie*'.¹⁰

So, the interpreter constantly creates a type of social reality according to the application of the norm, just as he organises a hierarchy of norms depending on their application. And the interpreter's hopes, traditions and beliefs are asserted in this work of creating and ordering; through the ordering of norms and the typological reconstruction of reality. So we can set the typological construction of reality according to the application of norms against the *regula juris* which simply summarises a set of law provisions. The norms would not be able to be interpreted and applied without this construction.¹¹

¹⁰ '*Fattispecie*' can be translated as 'hypothetical fact situation' (see J.H. Merryman, 'The Italian Style I: Doctrine' *Stanford Law Review*, 39, especially 49 (1965-66)). This meaning is clarified by the additional sentences included in DOC C (n ** above, 114): 'But it is the interpreter's task to determine how to frame the concrete case as regards the norm in relation to its various and different characteristics (only some of which can be taken into account by the norms). It is the interpreter's task to specify the '*fattispecie*' taken into consideration by the norm with regard to the concrete case and to make a cut in that ongoing reality where, as Manzoni recalled, it is instead absolutely impossible to place all the wrong on one side and all the right on the other.' For the record Alessandro Manzoni was an Italian poet and novelist, very famous for his *I Promessi Sposi* (*The Betrothed*), edited by C.W. Eliot, The Harvard Classics, Vol. 21 (New York: PF Collier & Son, 1909-14). This historical novel is ranked as a masterpiece of European literature of the nineteenth-century, dense of patriotic claims of the Italian Risorgimento, aimed at combining history and poetry (and invention): see, A. Manzoni, *On the historical novel. Del romanzo storico*, translated with an Introduction by S. Bermann (Lincoln and London: University of Nebraska Press, 1984), 3-50.

¹¹ The sentence differs in DOC A (n ** above, 763) and DOC C (n ** above, 114), ie: 'So we can set the categories used to order reality according to the application of norms against the *regula juris* which simply summarises a set of law provisions. The norms would not be able to be interpreted and applied without these categories'.

The history of law and the history of legal thinking end up by merging into each other since the very scope of the former depends on the development of the latter.¹²

Blood could be added to the pound of flesh; it would be shed in order to cut the flesh and therefore, would have had to flow in order to achieve the purpose clearly stated in the agreement. Or instead, should a restrictive interpretation prevail, pharisaically linked, some might say, to the wording of the agreement so as to exclude the possibility, literally not stated, of blood having to be shed? The Duke accepts the second interpretation and the scales tip in favour of this given the implicit disapproval of the agreement, thus rendered worthless thanks to an interpretive ploy whose real strength of conviction comes from a moral need. The playwright's smile seems to warn us not to mistake the interpretive ploy for a rigorous display of logic. But behind the playwright's smile there is also the conflict between the need for certainty, proudly demanded by Shylock, and the need to adapt the norm to moral evaluations; between the individual sovereignty stated in the agreement and the social needs, as someone is bound to say, which push for rejection of it. The

¹² Ascarelli added a note of clarification in DOC C (n ** above, 114, fn 2): 'Legal thinking is possibly the field where our studies are the most lacking despite Wieacker's recent work – which was, perhaps, mainly concerned with the development of Roman legal science and with development in Germany.'

In my opinion, legal systems can only be understood with regard to their relations and differences by referring to the history of legal thinking. In this way, a criterion of preliminary intelligence for their comprehension can be established. Because the various systems stand out one from the other for the diversity of their dogmatic frameworks, including the theories of sources of law and of interpretation themselves. Only through this can we become aware of that staltality of law which is, instead, presumed when classifying the different positive laws in accordance with the sovereignty of each state. In turn, the varying history of the individual countries is reflected in the diversity of dogmatic categories; the various laws do indeed take on differing characteristics through the dogmatic categories.

Perhaps, in this area, the all-important fact is the formation of the modern state as it left behind the wars of religion in the sixteenth century. It is then that the contrast between the common law and civil law systems is established on the one hand. While, on the other, a turnaround in legal thinking occurs as a result of the triumph of the sovereign state and of the renewal following humanism. That change translates into the historicism of cults, into the affirmation of legal positivism as regards legal systems by now become national, and then into the rationalist jus naturalism's anxiety for reform.'

interpretation's declarative function and its creative value are to be found in the elaboration of Portia's reasoning. Confirmation of the agreement's validity and the impossibility of changing it, of the need to apply a law or an agreement even when unjust – because otherwise nothing could be taken as certain any longer – is followed by a subtle interpretation. An interpretation which makes the agreement null and void, quashing its value with such violence as to push readers to change sides and suspend their judgment. The cruel destiny of the creditor, inhumanly scorned and convicted of money-lending, did not correspond to the harshness of the agreement, and the harsh agreement did not represent the weapon of the oppressed. So that it is Shylock himself that dramatically towers over the others in this Shakespearian play, while does Portia's clever interpretation represent, in turn, a subtle yet fierce vendetta?

In the end, the interpretation itself refers to a norm and precedent which must, in turn, be interpreted because the outcome of interpretation is, in turn, subject to interpretation.¹³ The success of this outcome is marked by general approval and the norm is made and interpreted thanks to this, with varying forces and conceptions that oppose or promote its approval, coming together in that conflicting concord which is, in any case, the path of history.

5. Perhaps someone can recall a passage from the Talmud. Two rabbis were talking about the interpretation of law. And the first rabbi, in order to prove his interpretation, called upon the waters of the river to change direction and flow upwards, thus confirming his theory. And since the second rabbi failed to accept the validity of this proof, the first rabbi invoked the heavenly voice to make itself heard thus resolving the matter. And the voice made itself heard and confirmed the proposed interpretation. But the second rabbi proceeded to object to this haughtily: 'And what role does God have to play in the arguments of men? Is it not written that the law was given to men and shall be interpreted according to the opinion of the majority?'. And when the Lord heard this bold reply, he smiled and said 'My sons have defeated me'!

¹³ DOC A (n ** above, 764) and DOC C (n ** above, 115): 'subject to individual assessment'.

Creation is ongoing and man contributes to this.¹⁴

Law is never a given, but an ongoing creation to which the interpreter contributes in an ongoing manner, as does every member of society, and this is precisely why it lives in history and indeed with history.

The relationship between the law and its interpretation is not similar to the relationship between a reality and its mirror, but is like that between the seed and the plant. Hence, the law lives only with its interpretation and application, which, after all, is not just its mere declaration, but creation of law, nonetheless characterised by its continuity with the fact it springs from. The contrast between a given and static law and a purely explicative interpretation of the former needs to be replaced by the unity of a law, which unfolds and develops in its interpretation.¹⁵ Indeed the theory of interpretation has the task of making us aware of how law really develops in its interpretation while still maintaining continuity with the fact it springs from.¹⁶

6. The law, given to men and for men, is always as it is interpreted

¹⁴ For a general overview, refer to C. Tresmontant, *Etudes de métaphysique biblique* (Paris: J. Gabalda et Cie, 1955); Id, *Essai sur la pensée hébraïque* (Paris: Éditions du Cerf, 1953). For the passage of the Talmud referred to and various discussions regarding the 'Heavenly Voice', see A. Cohen, *Le Talmud* (Paris: Payot, 1950), 91.

The 'law' par excellence is the law that was given on Mount Sinai. The problem regarding interpretation of a humanly given law leads us to the problem of a law accepted as revealed.

All the tendencies of legal thinking are reflected in the problem of interpreting law. (*Ascarelli's original note*)

(Note that in DOC A (n ** above, 765, fn 2) and in DOC C (n ** above, 116, fn 3) there is an additional sentence in the same note: 'And it is always on this ground that the Platonising tendencies – which acknowledge man's actions as aimed at grasping in its purity a truth that has degraded within the world – will contrast with the historicising tendencies (or Jewish-making tendencies if we follow the interpretation of biblical metaphysics of the aforementioned works) that see an ongoing creation in the world'. (*Translator's additional information*)).

¹⁵ DOC C (n ** above, 116) also includes the following sentence: 'This unity, so obvious from the historical perspective, cannot be artificially substituted by a 'legal' contrast in a dual truth system'.

¹⁶ The following note is added in DOC C (n ** above, 116, fn 4): 'In my opinion, this also occurs inasmuch as each law, when being applied, refers to a type of social

and applied. Because, first and foremost jurists must identify the applicable law among the many produced throughout history in order to meet the need for certainty and order which, at the end of the day, the obligatoriness of positive law rests on. With the aim of remaining faithful to the need for certainty and order it springs from, jurists initially resort to a higher norm which determines its legitimacy¹⁷ when identifying the applicable law. But when all is said and done, jurists not wanting to make use of extra-human elements, must relate to a spontaneous affirmation of a norm which coincides with the observance of a rule, even if, instrumentally speaking, affirmation and rule concern the position of norms and not their content. Because, otherwise, all that jurists would have is the postulate of a primary norm, but, in this way, giving up the possibility to justify that application of the law, which alone gives meaning to law.

After identifying the norm to be applied, jurists will, in turn, class it as applicable and in view of its application.

Thus jurists will take their point of departure from history and will go back to look at history at their point of arrival.

And so the conflict arises perennially and is settled perennially. It arises and is settled in history because the various reasons are not the opposing entities of a Manichean antinomy, but rather abstractions of the moments of an ongoing evolution: between the rule and the norm; the norm and its evaluation; revolutionary contrast and interpretive reformism; with Antigone's triumphant sacrifice and with Portia's subtlety.

reality, so the interpreter is persuaded, for the same needs of applying the law, to refer to a type of reality and thus contributes to renewing the norm and developing the law.

This is why legal categories distinguish themselves from mere *regulae juris* summarising the norm, and are an instrument for their interpretation and application, in turn implying a typological reconstruction of reality. And for this reason (as subsequently clearly demonstrated in history) the history of law and the history of legal thinking necessarily merge into sides of the same coin'.

¹⁷ The sentence is different in DOC A (n ** above, 766) and in DOC C (n ** above, 117), ie: 'jurists initially resort to a formal criterion moving from each norm to a higher norm which determines its legitimacy'.