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# INSUFFICIENCY OF THE LEGAL NORM AND LOYALTY OF THE INTERPRETER

*by*

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IN CLARIS NON FIT INTERPRETATIO. This saying, though not classical Roman, is hallowed by long tradition and famous among jurists the world over.[1] Modern scholars, however, are increasingly alive to the fact that the view reflected in it, viz. that the rule, especially if "clear", "speaks for itself", is somewhat naive. Another person's thinking cannot act within us unless we absorb it, unless there is on our part precisely that cooperation which constitutes the interpretative process, whether it be laborious and tiring or effortless and even unconscious. In the latter case, too, there is interpretation, and the very ease and certainty with which it is done permit us to conclude that the text or conduct in question is clear.

Actually, the Latin dictum is no truer — if we may venture the comparison — than the statement that digestion is unnecessary in the case of light food. Here, too, the ease and speed of digestion prove the food's lightness, which otherwise has no meaning whatever.

But interpretation is not a mechanical or physiological process. It is the reconstruction of another person's thinking — normative thinking, in the case of legal interpretation — and by no means comparable to material transfusion from one vessel into another, to the reflection of an image in a mirror or to photography. To interpret is to transpose the thinking of another into one's own mental universe; it is possible only through the activation of one's own thinking.

Moreover, interpretation — at any rate, legal interpretation — is much more than its description as an ancillary discipline suggests. It is impossible for the interpreter to derive from his legal sources all the elements

1 See, *e.g.*, Article 14 of the *Mejelle*, as translated by HOOPER: "Where the text is clear there is no room for interpretation" (HOOPER, *The Civil Law of Palestine and Trans-Jordan*, I, London, 1938, p. 18).

needed in order to determine to which of the concrete cases presented by reality one rule or another is applicable, *i.e.* to subsume certain cases under a particular legal rule. The text — in the case of written law — or the conduct — in the case of unwritten law — is insufficient, inadequate, even where it exists, *i.e.* where there is no actual *lacuna*, so that the difference between a *lacuna* and its absence is merely a difference in degree. The interpreter is thus called upon to cooperate with the sources, to supply what is missing in them. He will have to make his own evaluations (even though these must be consonant with the system in question) where the task of interpretation is to apply the rules to any given case and where, therefore, he may not refrain from a decision on the score of *non liquet*. Moreover, it is practically impossible that there should be absolute consistency between the ideas inspiring the various rules, that the whole legal system should be dominated by one single idea, which the interpreter would simply have to carry to its logical conclusions; frequently, therefore, he will also have to resolve more or less marked contradictions.

We may even now, without further discussion, accept the two above propositions, viz., that the interpretative element is indispensable whenever a rule is applied[1] and that interpretation does not confine itself to mere transposition, but is, by nature, creative. These two propositions have in fact been largely absorbed into the consciousness of contemporary jurists. The frequent assertion of earlier generations that rules are sufficient for any possible case, the dogmatic attitude once characteristic of scholars, the "megalomania" of the pandectists, are all the subject of criticism, and even irony, on the part of recent writers. In the meantime, new conceptions of the nature of language have gained ground, and the objective meaning of words, *i.e.* their meaning independent of the mental universe of the person to whom they are addressed, tends to be increasingly denied. Moreover, new philosophic trends have arisen and are finding expression in the general view of life, in science and even in art. They oppose, *inter alia*, legal Platonism and legal Aristotelianism in that they deny that a rule can embrace all possible cases, even those that could not have been known to its author. We have here a necessary, and healthy, reaction to the dogmatic views mentioned above.

However, there is occasion for asking whether that reaction has not sometimes overshot the mark. As against the complete negation of the interpretative element — at any rate *in claris* — and the denial of the creative

1 Clearly the basic problem is no different when dealing, not with a law, but with a precedent, although in this case English terminology speaks of "judicial reasoning" rather than of interpretation.

quality of interpretation — at any rate outside the sphere of the *lacunae* — some thinkers now adopt the opposite extreme. Not content to affirm that rules cannot solve all questions, they go so far as to repudiate rules altogether as a useful directive for the interpreter. Instead of extolling the rule as omnipotent, they now proclaim its complete impotence and seem to delight in stressing that impotence, and in describing confidence emanating from the existence of norms as an illusion.[1]

Even before the Free Law Movement arose in Continental Europe, Judge Oliver Wendell Holmes, Jr., in the United States, made two statements which led to momentous developments. One was the assertion that "the life of law has not been logic; it has been experience",[2] the other was the *obiter dictum* that "general propositions do not decide concrete cases."[3] In time, these utterances found wide attention and were taken to mean that judges do not derive their decisions from rules. The American "realists" have come to regard rules as no more than a myth, and no longer ask whether and to what extent judgments can be faithful to rules. At most, they are willing to concede that rules may be one feature of the legal scene.

We do not wish to dwell here on these tendencies of the American realists, but rather to pay special attention to the thinking of the late Tullio Ascarelli, an Italian-Jewish jurist prominent in the fields of commercial and comparative law, who devoted numerous essays to the problem of interpretation.

Let us repeat: the question is no longer whether to recognise any element of creativeness in interpretation, but on the contrary, whether and to what extent such creativeness is kept in bounds by the existence of rules, whether and to what extent the interpreter remains subject to the system of positive law.[4] It is of course with the faithful interpreter that we are concerned, the interpreter who is willing to obey rules as far as rationally possible.

Legal rules attach certain legal consequences to a certain fact. This fact is defined by several elements, but in the great majority of cases the definition remains abstract and therefore inadequate. Even if the legislator, or the author of some other rule, seems to refer the interpreter to the spoken language, or to some other branch of learning, for enlightenment on the meaning of his words, or if he multiplies the elements of his definition, this will not solve the question finally,

1 *E.g.*, KELSEN, *Reine Rechtslehre* (Vienna, 1934), p. 96, 99 *seq.*

2 *The Common Law* (Boston, 1881), p. 1.

3 *Lochner* v. *New York*, 198 U.S. 45 (1905), p. 76.

4 On this question in England, see latterly A.G. GUEST, "Logic in the Law" in *Oxford Essays in Jurisprudence*, edited by A.G. GUEST (Oxford, 1961), p. 176.

but merely shift the difficulty. Let us assume, *e.g.*, that in laying down that a contract is voidable in the event of duress, the legislator wishes to define precisely what he means by duress. He will define it as a threat to life, health or freedom or the threat of some other serious damage, under circumstances likely to impress a reasonable person. In view of such a definition, we shall have to ascertain what a threat is, what health is, what serious damage is, what circumstances as aforesaid are, what a reasonable person is, etc. The interpreter will find the answer neither in the law itself nor in dictionaries nor in other branches of learning (such as medicine in respect of "health" and economics in respect of "damage"). For, the legal question is not identical with the questions confronting other branches of learning, and the interpreter has to take into account the specific intention of the rule concerned; this is why dictionaries, or a criterion borrowed from a particular branch of learning, cannot say the final word. It is evident, moreover, that the interpreter will never find an empirical confirmation for one or another interpretation. It follows that he must rely on his own evaluations in order to determine what is included in the rule and what is not.

On the strength of such considerations, Ascarelli is of the opinion, not only that a legal text can never do away with the freedom of interpretation, but that, in strict logic, it cannot even curtail it, since, as he says, quantitative criteria are inapplicable here.[1] If this were true, we might conclude at once that both the concept "legal rule" and the concept "interpretation" dissolve into nothing; the former because the effectiveness of the legal rule would be nil, the latter because interpretation would cease to be such.

"In view of the constant presence of the interpreter's evaluations," goes on Ascarelli,[2] "several traditional questions, such as the problem of incorrect judgment and the problem of *lacunae*, reveal themselves as spurious problems." This reasoning is easily understood. A judgment can never be correct — in the sense of "in conformity with the legal system" — if the legal system can give no effective directions to the interpreter; and the problem of the *lacunae* disappears if the law is all *lacuna*.

Ascarelli nevertheless continues to speak of a positive, pre-established system of rules. But he finally reaches the conclusion that the injunctions concerned do not deserve the name of rules (*i.e.* norms), but are mere "text", so long as an interpreter does not interpret them in connection with a particular case. Only then do they become rules. But

1 Ascarelli, *Problemi giuridici* (Milano, 1959), p. 208.

2 *Ibid.*, *ibid.* and p. 847.

such an interpretation, he says, again becomes a "text" in respect of future cases.[1]

If, therefore, a rule — as distinct from a text — is something in respect of which a question of interpretation does not arise, it is to be feared that in Ascarelli's system the rule becomes a kind of meteor or even mirage.

This is all the more so as even a judgment (*i.e.* an instance of interpretation in connection with a concrete case), and a statute dealing with a particular situation are subject to interpretation, not only in a formal sense, as we have seen, but sometimes also for the purpose of settling some doubtful point. Ascarelli himself points out elsewhere that interpretative doubts arise even with regard to the simplest order, such as "open the door."[2] Does this necessarily mean opening it wide, or will just a crack do, and does it have to be immediately or may it be later, and if it may be later, how much later, etc. etc.? A judgment certainly may contain such orders. The need for interpretation arises even with regard to judgments (or other specific decisions or concrete interpretations of an abstract rule) which do not relate to the future, but merely state legal consequences already produced. In sum, we may say that the problem of interpretation is made more difficult by the abstract character of the rule in question, or by a change in circumstances between the time of the formulation of the rule and the time of its interpretation, but is not completely eliminated even where the order is not abstract[3] and does not relate to the future.

Ascarelli's view leads to the elimination from the world of law of anything that is not a concrete, immediately relevant order — such as in his opinion subsequently becomes a "text" for any other interpreter (and, we may add in accordance with Ascarelli's system, for the author of the order himself at any time subsequent to issuing it). The existence of the text does not, in his opinion, limit in any way the freedom of the interpreter, who, in fact, has ceased to be an interpreter and has become a creator, even though his creations are short-lived or, perhaps, evaporate instantly.

No one will deny the gravity of these conclusions. With the disappearance of abstract rules — and, as we have seen, not of these alone — law itself will disappear, at any rate law in the sense accepted since the dawn of history. We shall have to say that in believing it possible to regu-

1 *Ibid.*, p. 145.

2 *Ibid.*, p. 144.

3 Ascarelli himself discusses the question of interpretation in connection with Portia's argument in "The Merchant of Venice", thinking it immaterial that the reference there is to a contract and not to a law. See *ibid.*, p. 11.

late future human behaviour by law mankind has for thousands of years been cherishing an illusion. Incidentally, those views are calculated not only to eliminate law from civilization and consciousness, but to make the Tower of Babel the symbol of history, both legal and non-legal.

Ascarelli's sophism consists in equating the inadequacy of directives — as ordinarily encountered in applying the rules of a particular legal system — with the total absence of directives, as though lack of complete control were tantamount to complete powerlessness.

Even before logical arguments are advanced, such a paradox is repugnant to common sense. Common sense rejects it just as it rejects solipsism. Of the latter, it has once been said that it may be extremely difficult to disprove by logical argument, but that it is comparable to a fortress which, though impregnable, lacks offensive power, and may therefore be safely disregarded by the invader and left in the rear. This was said by a great philosopher;[1] one who is no philosopher at all should be excused from philosophically refuting that paradox. It will be sufficient to demonstrate Ascarelli's error by a number of indications, some of which are derived from his own thinking.

Those of his views from which we started seem to us to lead logically to the death of law as a rule laid down prior to the legal proceeding, and to the death of legal theory. If we adopt these views with all their implications, we may as well discontinue legislation as futile, and theoretical interpretation as incapable of future application — that is to say, discontinue all scientific activity in the field of law (except purely historical research), since Ascarelli equates all legal theory with interpretation in the wider sense of the term. It is very significant, however, that there is no trace of any such corollaries in the writings of Ascarelli, who opposed the Free Law School and recommended the careful, precise drafting of laws,[2] and who carried on research assiduously until his premature death.

On the other hand, those views represent an extreme position in the development of his thinking and are not reflected in all his writings. They are contradicted by other views, even in his latest works and in late revisions of the earlier ones.

Admission of a certain limitation of the freedom of the interpreter is probably implied in Ascarelli's statement that *sometimes*, in the logical process called interpretation, the number of steps that do not require new evaluations by the interpreter himself is *relatively* small,[3] or in his

1 SCHOPENHAUER, *Die Welt als Wille und Vorstellung* (Leipzig 1873), § 19, p. 125.

2 *E.g., Studi di dir. compar. e in tema di interpretaz.* (Milano, 1952), p. xliii; *Problemi giur.*, p. 189–190.

3 *Studi di dir. compar.* etc., p. xxii (italics mine — G.T.).

remark that the typological reconstruction of reality achieved by the interpreter *in accordance with the rule* cannot be provided *entirely* by the rule itself,[1] or, especially, in his comparison of the relation between the rule and the interpretation to the relation between the seed and the plant,[2] inasmuch as a particular seed will produce only its particular kind of plant, and not just any plant. The same implication may be contained in his recommendation of research aimed at ascertaining the historical meaning of a given rule, its actual application, and the discrepancy between the two.[3]

If the rule were incapable of being reflected in its (purported) application, it would be so even where the interpreter accepts its authority and guidance in good faith and without mental reservations; for his faithfulness would be a mere illusion. Ascarelli admits, however, that in certain historical circumstances (*e.g.*, in France and Russia after the French and Russian Revolutions) interpretation distinguished itself by loyalty to the laws, unlike what happened in the past and takes place in the present in different circumstances. Again, in the latter case, interpretation masks its unfaithfulness by various devices. But if norms are unsubstantial shadows, why all this effort at camouflage and dissimulation? Those tricks are an implied admission, just as hypocrisy, according to La Rochefoucauld's famous maxim, is a tribute which sin pays to virtue.

Ascarelli holds that in choosing between different trends of interpretation, the opinion of jurists must be decisive, so that the consensus of experts has something of the status of legislation. Apart from any other consideration, let us observe here from the point of view of our subject that it is impossible, in Ascarelli's system, for the opinion of jurists to stave off the anarchy threatened by the doctrine of the inadequacy of the rule. For, the opinion of jurists is no less abstract than law, and reliance on it is no less precarious than reliance on rules. On the other hand, if we think that the dominance of the *communis opinio* may be, not an illusion, but a reality, then this means that the dominance of the rule may also be real. — If we counterpose the "positive law" and "the new positions which have a dialectical relationship to the earlier ones",

1 *Problemi giur.*, p. 232; *ibid.*, p. 855: "Precisely because the solution is not independent of evaluations by the interpreter..., the jurists' attempt at objectivity in examining what is the correct solution *under a particular legal system*, becomes valuable"; *ibid.*, p. 854: "The criterion 'as the case may be'... is not... a legal criterion, because the law is a permanent rule although it is for ever developing" (italics mine — G.T.). *Cf. Saggi di dir. commerc.* (Milano, 1955), p. 470.

2 *E.g.*, *Problemi giur.*, p. 845.

3 *Ibid.*, p. 326.

"in a relation of continuity... which is also renewal",[1] we shall certainly see that both the "positive law" and the "new positions" are capable of ruling the legal scene, provided that its, or their, authority is accepted.

Ascarelli says that we should not distinguish between a supposed normative reality and interpretation, because the norm, according to him, has no validity outside interpretation and can thus not serve as a basis for criticizing it.[2] Here we must ask: Does this refer to interpretation generally or to a particular interpretation? Is it not possible to distinguish between a well-founded interpretation and an erroneous one?

As to the measure of logical force attributable to a legal rule, a controversy has recently taken place between two well-known jurists, Professor H.L.A. Hart, of Oxford, and Professor Lon L. Fuller, of Harvard. The former distinguishes between what he calls the core and the penumbra of the rule.[3] Let us suppose, he says, that a rule prohibits the introduction of vehicles into a public park. It is evident that this prohibition applies to motorcars, but what about bicycles, roller skates, toy cars? And what about aeroplanes? Are they vehicles, as the term is understood in this rule? Both ordinary words and legal terms — such as "vehicle" — have a core, a typical, universally accepted sense, regarding which no doubt can arise, and a penumbra of uncertain cases, regarding which we cannot say that the term clearly applies or does not apply to them. Like Ascarelli, Hart observes that empirical proof of the correctness of one or another interpretation is impossible with regard to all those cases which lack any one of the qualities of a "standard case" and which thus constitute the "problems of the penumbra"; nor can we apply the deductive method to them. The logic of the decision is not here based on a logical relation to certain premises — *i.e.* the rules — but, according to Hart, on the interpreter's concept of what the law ought to be.

In his reply, Fuller[4] says that the problem of interpretation does not usually centre upon the meaning of some individual term — so that all we would have to do (at least in a standard case) would be to determine that meaning as something objective. Even in Hart's example, the relative ease with which several cases covered by the rule can be identified

1 ASCARELLI, *Studi di dir. compar.* etc., p. xxiii.

2 *Problemi giur.*, p. 74.

3 H.L.A. HART, "Positivism and the Separation of Law and Morals", *Harvard Law Rev.* 71 (1957/8), p. 593, *seqq.* (*cf.* p. 606 *seqq.*).

4 LON L. FULLER, "Positivism and Fidelity to Law — A reply to Prof. Hart," *ibid.*, p. 630 *seqq.* (*cf.* especially p. 601 *seqq.*). R.A. WASSERSTROM, *The Judicial Decision* (Stanford, 1961), p. 180, doubts the correctness of Fuller's interpretation of Hart's views.

depends, according to Fuller, on a clear conception of the purpose of the rule rather than on a core of objective meaning attaching to the term "vehicle". "What would Professor Hart say", Fuller asks pointedly, "if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the 'no vehicle' rule? Does this truck, in perfect working order, fall within the core or the penumbra?"

In further support of his thesis, Fuller cites other instances in which the meaning of an individual word is conditioned by the context and by the purpose of the rule. He thinks that without the help of these elements it is often impossible to give any interpretation of a particular word. Let us suppose, he says, that we come across an incomplete sentence such as, "All improvements must be promptly reported to...". Without the completion of the sentence we cannot indicate even a "core" of the term "improvement", which remains meaningless like the symbol $x$. The same term will at once become meaningful if the sentence is completed by the words "the head nurse" or the words "the town-planning authority"; in each of the two cases, the meaning will be totally different.

In Hart's thinking we recognise the English legal tradition, which prefers the literal interpretation of statutes and approaches to "conceptual jurisprudence" (*Begriffsjurisprudenz*), while Fuller's position is that of teleological interpretation, which developed from Jhering's doctrine, was cultivated in Germany by the *Interessenjurisprudenz* school, and later flourished at Harvard, in the school of Roscoe Pound. This is not the place to disclose our predilection for either of these two trends, and in any case, the interpreter is not free to choose if his legal system is committed on the subject.

We only wish to note that both Hart and Fuller show concern for the interpreter's fidelity to the rules, and both of them — each in his own way, of course — regard it as possible within certain limits.

Hart, in fact, as far as the "core" of the rule is concerned, denies all creativeness on the part of the interpreter, who — in his opinion — applies the law "as it is."

Fuller does not share this view, but does not think that its rejection imports the impossibility of a faithful application of the rules. In his opinion, the interpreter's main concern should be, not the words, but the purpose and structure, in keeping with the tendencies of contemporary logicians and semanticists, who deny an objective meaning of words, independent of the context and the speaker's intention. Reference to the purpose requires creative activity on the part of the interpreter, but is

not therefore necessarily arbitrary; quite the contrary. Teleological interpretation no doubt has its "penumbra" problems, but it has its "core" of certainty as well.
In sum, we find that both polemists discern in the rules a "core" of satisfactory definiteness and a "penumbra" of diminishing definiteness, although they identify these two elements in different ways.

The problem so far discussed is *whether interpretation can be faithful, i.e.* whether, at least within certain limits, the abstract rule is logically capable of setting its imprint upon the concrete decision — not merely in appearance, but in actual fact.
Obviously, it cannot be regarded as a warrant for a negative answer to this question that, historically, interpretation has frequently departed from the rule (though sometimes for a commendable purpose).
It is beyond doubt that in practice, *interpretation can be unfaithful*, that is to say, a solution presented as an interpretation of the rule may not reflect it. The interpreter is fallible like any other person; moreover, it is perfectly possible that in advocating an interpretation suiting his interests or ideal aspirations he is aware of his motives and of the different meaning of the rule as taken by itself.
Here, too, there will be, in Jhering's famous expression, a "struggle for law", *i.e.* a struggle for the law desired, but there will also be a struggle against the law — *i.e.* against the law in force — waged by interpreters in certain circumstances.
Indeed, the very statement that, throughout the ages, interpreters have often deviated from the correct meaning of the rules implies that, from a logical point of view, that correct meaning could have been a basis for a faithful, exact interpretation. We have already pointed out Ascarelli's implicit admissions on this subject.
Some statements by Ascarelli and others are not clear and unambiguous (as if they, too, were intended, albeit unconsciously, to support the thesis of the uncertainty of interpretation), and it is doubtful whether they relate to historical reality or to logical necessity.[1]

1 MORRIS R. COHEN, in his paper "The Process of Judicial Legislation" (first published in 1914 and subsequently included in his well-known *Law and the Social Order*, New York, 1933, p. 112 *seqq.*), deals extensively with "interpretation as a mode of judicial legislation." But there, too, considerations as to the impossibility of deriving everything required for the decision — for any decision — mingle with the historical assertion of the fulfilment of a virtually legislative function by the courts, and with considerations as to adopted rules of interpretation (which, in Cohen's view, are not particularly appropriate, so that the conclusion suggests itself that other criteria would be better adapted to bring out the potentialities of

This may be said of a passage from Montaigne quoted by Ascarelli:

> ...little to my liking is that man's (*i.e.* Justinian's) opinion who thought by the multitude of laws to curb the authority of judges by marking the limit of their actions; he did not perceive that there is as much freedom and scope in the interpretation of laws as in making them ("*qu'il y a autant de liberté et d'estendue à l'interprétation des Lois, qu'à leur façon*").[1]

Is freedom, we ask again, meant here as a logical necessity or as a possible and likely encroachment to be feared? To the extent that one holds that there is abuse and encroachment, one surely affirms the logical force of the rule in respect of an interpreter considered to be loyal rather than bent on stultifying the laws.

Ascarelli, on his part, declares that the rule will always be what it is interpreted to be and that the interpretation may ultimately be determined by tendencies and views opposed to those of the legislator, since the final word will of necessity always be the interpreter's.[2] If this is so, if interpretation can assert tendencies and views opposed to those of the legislator, it follows that it can just as well reflect his tendencies and views, provided the interpreter wishes it, and hence that the rule can at least limit the freedom of the interpreter — contrary to Ascarelli's abovementioned claim.

We may say the same in answer to Ascarelli's comment on Kirchmann's well-known saying, "One word of the legislator is sufficient to turn an entire legal library into scrap." Ascarelli thinks that this saying ought to be reversed, since according to him the opposite happens in most cases, viz. jurists stultify legislation.[3] If this is so, we say, it is a sign that the legislation in question contains certain directives which can be put into operation.[4]

It is clear that, speaking from the "dogmatic" point of view, *i.e.* from the point of view of the system in question, *sensus non est inferendus, sed efferendus*[5] — the meaning should be gathered from the rule itself, not artificially read into it by the interpreter. The interpreter should be loyal to the rule as far as at all possible, *i.e.* as far as he finds in it any directives for his acts. This at least is certain: "whenever he can, he

the text). The meaning and scope of Cohen's repeated statement that "the courts do and must make law" thus remain vague.

1 MONTAIGNE, *Essais*, III, cap. xiii (near the beginning of the chapter); *Essays of Montaigne*, transl. by George B. Ives (New York: Heritage Press, 1946), p. 1454.

2 *Studi di dir. compar.* etc., p. xliii.

3 See, *e.g.*, *Problemi giur.*, p. 124.

4 See ASCARELLI, *Problemi giur.*, p. 108: "An interpretative solution frequently meets the case where a legislative solution is undesirable [*scil.* to the interpreter]".

5 See BETTI, *Teoria generale dell'interpretazione* (Milano, 1955), p. 305.

must" — even if the legal system does not go so far as to proclaim that "whenever he must, he can," by which it would impose a fiction, representing a necessary creative act as an interpretation, a declaration. If a wrong interpretation is made, this does not alter the rule itself any more than an unlawful act alters the law. The contrary proposition, that the rule holds as interpreted and applied, is to be rejected from the "dogmatic" point of view, with certain reservations.

Where the legal system assigns legal force to precedent or some other form of authoritative interpretation, an interpretation which previously had to be regarded as wrong becomes a rule if given by certain organs and in a certain form — so that the legal system is altered by it retroactively. Let us note in this connection that in countries, such as Israel, where precedent is binding except on the Supreme Court, we have the odd phenomenon that the legal system obtaining in the Supreme Court is different from that obtaining in the other courts, while the citizen has to reckon with both.

With these reservations, the legal system, even after a wrong interpretation, continues to be the same system as before. There only remains the possibility of discerning, beside system "A", to which we adhered until then, a system "B", which is system "A" as altered, *i.e.* falsified, by a certain spurious interpretation, and of taking note when this latter system *de facto* acquires positive force. The same applies to system "C", resulting from a falsification of system "B", etc. etc. From a historical point of view, there certainly exists the possibility of a "permanent legal revolution," by which the rule is in fact equated with its successively accepted — though wrong — interpretations, so that we frequently pass from one system to another, which includes among its sources a mistaken interpretation of its predecessor. We are aware that this is not the only case in which such a legal revolution is possible. One need think only of an abuse practised by some agency of the state, which eventually is tolerated and recognized.

Although in an earlier publication Ascarelli affirmed the opposition between the "dogmatic" and the historical viewpoint,[1] he later appears to be repudiating any such "dual truth".[2] But to ignore the possible conflict between "dogmatic" demand and historical reality means either to negate law altogether — for law would be destroying itself if it subscribed to any fact for the mere reason that it has arisen — or to regard a historical reality which conflicts with a particular legal system as

1 "Il problema delle lacune" etc., *Arch. Giur.*, xciv (1925) and *Studi di dir. compar.* etc., p. 209; *cf.* especially p. 217 *seqq.*

2 *Ibid.*, p. 419, and *Saggi dir. commerc.*, Milano, 1955, p. 564.

merely a violation of that system, a transgression, not in itself worthy of attention and interest even from the sociological, historical etc. viewpoints.

We certainly cannot agree to either alternative.

That a particular interpretation, even though it may not conform with the rule, is accepted and applied in the courts is undoubtedly worthy of note, both practically and scientifically, as an aspect of the legal scene. The history of the interpretation actually given to the laws is of interest to history generally and to the history of law and legal thought in particular.[1] Among other things, the historian is interested in ascertaining when a climate of loyalty to the rules prevails and when, on the contrary, interpretation tends to depart from them, either because they are obsolete or because the interpreters have views, concerns and interests different from those of the authors of the rules.

In critical respect, we shall appraise non-conformism on the part of the interpreter differently in different cases and circumstances. There may certainly be conditions under which such non-conformism will appear to us as the lesser evil in the solution of a particular case, or even as the only way to legal progress.

In Shakespeare's *Merchant of Venice*, our sympathy certainly goes to Portia (whom Ascarelli represents as the heroine of legal interpretation) if we must assume that without her "management" of the rules a kind of legal murder would have been committed.

Our sympathy likewise goes to the Talmudic sages, who tempered the principle of the immutability of divine law with the maxim that the interpretation accepted by the majority should prevail. We refer, in particular, to a famous passage repeatedly mentioned by Ascarelli,[2] which is in fact a hardly surpassable instance of bold interpretation. The sages seem to be vying in boldness with the patriarch Abraham, who argued with the Almighty until He reversed His "harsh decree".

The celebrated story of the "Akhnai" oven[3] tells how Rabbi Eliezer ben Hurkanos (1st and early 2nd century C.E.) found the other sages united against him. After both sides had requested various signs from Heaven in support of their respective points of view, and the signs had

1 We do not say, however, that, even from this point of view, the rule is to be noted only as interpreted and applied in practice, as Ascarelli thinks. It seems to us that the abstract rule, as enunciated by the legislator, is history too, and as such is likewise worthy of study, even though it may not have been implemented, wholly or in part, or may not have been implemented as intended by the legislator.

2 *Probl. giur.*, p. 14, 157/8, 190.

3 *Baba Mezia*, 171. The quotation is from I. Epstein's English edition (*The Babylonian Talmud*, Seder Nezikin, Baba Mezi'a, London, 1935, p. 353). *Halachah* (or *halakha*) means doctrine.

swayed hither and thither, not solving the dispute in favour of either Rabbi Eliezer or his opponents, Rabbi Eliezer again "said to them: 'If the *halachah* agrees with me, let it be proved from Heaven!'. Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the *halachah* agrees with him!' But R. Joshua arose and exclaimed: '*It is not in Heaven.*'[1] What did he mean by this? — Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, After the majority must one incline.[2] R. Nathan met Elijah and asked him: What did the Holy One, Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, 'My sons have defeated Me, My sons have defeated Me.' "

If Ascarelli meant to use this passage in support of his allegation of the indefiniteness of the rule, the passage certainly does not lend itself to such use, since precisely in this case — no doubt in circumstances unlikely to arise frequently — we find an authentic endorsement of the exact meaning of the legislator. On the other hand, the passage might serve as an example of constraint applied by the interpreter to the intention of the legislator, for, in weighing that intention against the interpretation accepted by the majority, the latter is preferred. But this solution is "dogmatically" supported by the thesis that the legislator has empowered the interpreters — in accordance with the Jewish conception that many textual interpretations which interpreters were to reach in process of time were foreseen and approved by the Almighty at the Lawgiving on Mount Sinai. We thus find, beside the specific intention of the legislator with regard to a given rule, his general evolutionary design and his acceptance of deviation from the original intention on the part of the interpreter. It seems to us, however, that the interpreter is empowered to deviate only within the limits set by the text. The assumption underlying the aforementioned thesis is, in effect, that all interpreters hold the text to be binding and sacred, and, accordingly, it is not the majority's free will that is decisive,[3] but the majority's conception of the faithful interpretation of the Torah.

But even if we disregard this "dogmatic" justification and the restrictions placed by it on the effect of the abovementioned doctrine — even if we consider the said interpretative tendencies a veiled alteration of the rules,

1 *Deut.*, xxx, 12.

2 *Ex.*, xxiii, 2.

3 Any arbitrariness of the interpreter is negated also by the hint contained in the above-mentioned *Deut.*, xxx, 11–14, which may be called a hint in the direction of "natural law".

what significance has this in respect of the problems facing us today, in a democratic state?

In mentioning and discussing these examples in connection with present-day problems, Ascarelli is apt to err and to mislead — to mistake what must be regarded as a device necessitated by circumstances in the past for an idea or ideal worthy of prevailing under totally different conditions. Devotees of history like Ascarelli often tend to set up the past as an eternal ideal and hence to try and perpetuate it — which, indeed, is utterly unhistorical.

It is of course true that some practical disagreement between the rules (be they laws or precedents) and the interpreters exists in our time as well, and with it the phenomenon of interpretation *contra legem*. Its causes are, among others, the quick obsolescence of rules in an era of great technological and social changes, the feeble interest of parliaments in legal problems of no special political significance, and the fact that lawyers belong to a more conservative class than the majority of the population.

The trend towards the discharge of a legislative function by jurists, as opposed to legislation by the legislator, may be viewed with greater or less sympathy, depending on the circumstances of the case. But in any event, trespass cannot be an ideal, even if it is tolerated in practice to such extent that both jurists and the public have become familiar with it and acquiesce in it.

Contrary to the dogmatic pronouncement of certain "realists," it is unscientific to postulate that there will always be a gap between rules and their application; and it is equally unscientific to postulate the non-existence of such a gap. Evidently, agreement will be greater or less, depending upon the time, the place and the branch of law and particular rule concerned.[1] Absolute, general agreement is unlikely, as is, ordinarily, diametrical opposition.

Since disobedience cannot be an ideal, the interpreter, upon perceiving a discrepancy between the rules and his personal views, does not always follow the latter. On the contrary, in most cases he will feel duty-bound to accept the authority of the laws and other rules and to sacrifice his individual opinions and interests; and so will not only the lawyer, but every good citizen (who does not think here of Socrates, who submitted to the laws — the νόμοι — although they were unjust to him, and sacrificed his life to them?). The exponents of positive law have always been regarded as those who, in Bacon's words, "*e vinculis sermocinantur*"

1 *Cf.* J. STONE, *The Province and Function of Law*, 2nd Printing (Cambridge [Mass.], 1950), p. 742 *seqq.*

(talk while in fetters), and they have in principle regarded themselves as such.

If the interpreters allowed themselves to be persuaded that, as Ascarelli claims, the rules are mere verbiage and the interpreters the only creators of law, they would no longer have a motive for sacrificing their personal views or for concealing the introduction of these views into the debate.[1] The result would be far-reaching: the establishment of a kind of "lawyers' government," similar to the "judges' government" envisaged and polemized over in the United States about half a century ago, but much more absolute.

We see that Ascarelli's thinking (which, as we have said, develops along somewhat contradictory lines) eventually reaches conclusions not much different from the tenets of the school of Savigny and, especially, of those inclining towards a kind of "return to Savigny" in our time, such as Vassalli.[2] Against these attempts to dethrone the legislator and to replace him by "the opinion of jurists," it has been contended that the aforementioned point of view is conservative (or, more exactly, reactionary) and anti-democratic and conflicts with the contemporary tendency to place the centre of gravity of the legal system in the written law.[3] Oddly enough, Ascarelli himself seems to have endorsed these objections at one time.[4] Nevertheless, he ultimately arrives at what we may call an idealization of abuse of office.

In the past, such abuse was often dictated by circumstances. In a democratic state, however, it is less justified than under an autocratic regime. It does not cease to be abuse for being immune from legal sanctions, as it is where separation of powers prevails. This doctrine demands that the judicial power should — in the exercise of its judicial function — be independent of the executive power and of the legislative power. This idea, for all its merits, does not seem to be devoid of drawbacks. The danger of a judge straying from the path of the law is caused not only by the possibility of pressure from the executive authority or other external pressure. We are not thinking here of possible arbitrariness on the part of the individual judge, for that — as far as humanly possible —

1 *Cf.* R. Pound, *Justice According to Law* (New Haven, 1951), p. 36 *seq.*, 91 (as to the practical consequences of the views of the American "realists", were they to be accepted).

2 See Vassalli, "Estrastatualità del diritto civile", *Studi in onore di Antonio Cicu*, II (Milano, 1951), p. 479 *seq.*, and *Scritti giuridici*, III, 2 (Milano, 1960), p. 753.

3 *Cf.* G. Tedeschi, "Private Law and Legislation Today," *Studies in Israel Law* (Jerusalem, 1960), p. 23 (and before in *Atti del primo convegno nazionale di studi giuridico-comparativi*, Istituto italiano di studi legislativi (Roma, 1953), p. 657).

4 See *Atti* etc., pp. 23, 46 (footnotes).

is sufficiently guarded against by the collective principle prevailing in part of the courts and by opportunities for appeal. But in the event of a conflict of tendencies between the legislator and the judiciary in general (or, as is frequently the case, the lawyer class in general), reliance on the loyalty of the judges to the laws of the country — even if pledged by oath — without any possible sanction to ensure it, is not by itself fully satisfactory.

Referring to the problem of circumvention of the law, Jhering, with his usual incisiveness, remarks that all the wit used by the legislator to safeguard the law is hardly equal to the tricks used by life to undermine, bury or utterly undo it. He goes on to say that, to achieve his purpose, it is not always sufficient for the legislator to order and forbid; if the stroke is to be effective, it is not sufficient that his sword be sharpened, since even the most vigorous thrust is useless if it misses its aim.[1]

Even more than in respect of the citizen, the question is a serious one in respect of him who has to interpret and apply the rules in practice, *i.e.* the administrative official,[2] and especially the judge. Jhering's problem can be solved by the combined ingenuity of the legislator and the judge, who see to it that the wrongdoer does not escape the sanction by dodging the law; the position is similar, to a certain extent, in the case of the public official. But how ensure that those who wield the sword of justice and who are independent of any other authority of the state, *i.e.*, the judges, use it in accordance with the directives of the legislator?

As there is no readiness to abandon the principle of the independence of the judicial authority, there seems to be no real and direct solution to the problem from an institutional point of view.[3] Subordinating — *i.e.* once more subordinating — the judicial authority to the executive author-

1 JHERING, *Geist d. röm. Rechts*, 4. Aufl. (Leipzig, 1888), III, 1, § 57, p. 264.

2 The question is in part discussed by writers considering the attitude of the public official who, when called upon to cooperate in implementing the laws, in fact does so reluctantly or not at all; see Ripert, *Les forces créatrices du droit* (Paris, 1955), n. 154, p. 372 *seqq.*; Montané de la Rocque, *L'inertie des pouvoirs publics*, thèse, Toulouse, 1950; Cruet, *La vie du droit et l'impuissance des lois*.

3 This does not mean that there are no rules or institutions likely to promote — by their nature or in certain circumstances — the loyalty of judges to the laws or, on the contrary, the opposition of the judiciary to the will of the legislator. We need only think, *e.g.*, of the rules for the appointment of judges (*i.e.* the method of their selection), the rules governing the judicial career, the hierarchy among judges, the doctrine of precedent, institutions such as the French *ministère public*, etc. Where conservative tendencies, opposed to progressive legislation, are especially prevalent among the higher judiciary, it is clear that all the rules and institutions encouraging the conformism of the lower judiciary militate in favour of the latter trend.

ity is inconceivable. Supervision by the legislative authority of the correct application of the laws would involve a most serious drawback — the introduction of political factors into the work of the judges — and, moreover, would not in the end ensure that the supervisor was guided solely by loyalty to the laws, as originally enacted.[1]
The wise men of Chelm[2] might have hit upon a clever solution — the establishment of a new judicial body to supervise the work of the other judges and watch over their loyalty. But *quis custodiet custodes*?
It seems, therefore, that there is no choice but to be reconciled to a situation characterized by a kind of "fiduciary relationship", *i.e.* a situation in which an individual *can* do more than he is permitted to do: we must be reconciled to the possibility of abuse, just as the law must forever be reconciled to the possibility of wrong.

In view of his position as to the relation between the rule and the interpreter, Ascarelli might have been expected to be a devotee of the Free Law School (and one of an extreme type, compared with many who belonged to that school in the past).
We have seen, however, that he presents his conclusions as the result not of a preference corresponding to his taste and inclinations — in which case the description "devotee" would have fitted him — but of logical necessity. Yet, as we have likewise seen, he eventually admits, though only by implication, that the interpreter could have adhered to the rules even where he does not actually do so. And he completely abstains from criticizing such a revolt either from the "dogmatic" or from any other point of view.
Nevertheless, Ascarelli does not sympathize with the Free Law School, the arbitrariness of the interpreter and the "mere sense of *aequitas*."[3] He opposes to them the principle of continuity, believing that it serves to limit the freedom of the interpreter: the interpreter must respect it, in order that his conclusions may agree, more of less, with those of the existing legal system.[4] Ascarelli's views are given in the name of legal security, which is required, first and foremost, for ethical reasons.[5]
We might say that Ascarelli is presenting us here with a *non sequitur*. If the laws are powerless to restrict the freedom of the interpreter, so is the principle of continuity.

1 Compare R. Pound's extensive remarks on an allied subject, the exercise of judicial functions by the legislature (R. POUND, *Justice According to Law*, New Haven, 1951, p. 65 *seqq.*)
2 The Polish-Jewish "Gotham".
3 *Cf. Problemi giur.*, p. 853 *seqq.*; *Studi di dir. compar*, etc., p. xxiii.
4 *Cf. loc. ult. cit.*
5 *Ibid.*

Indeed, it sometimes seems that Ascarelli demands not real, *i.e.* substantive, but merely apparent continuity. "Continuity", he says elsewhere,[1] "obligates the interpreter to present the rule laid down by him as implicitly contained in the rule to be interpreted". If it is a question of presentation, all that is required is the camouflage of innovations, and the latter, even the most radical, will not be barred. But even if Ascarelli is not concerned with mere appearances, it is difficult to believe that his teachings can lead to even relative security or real continuity.

Ascarelli denies legal certainty completely even where the interpreter does not intend to innovate, but to apply the rule pure and simple, because the constant, necessary intervention of the interpreter's evaluations is tantamount for him to the rejection of restraining factors. All the more is legal security absent where the interpreter intends to innovate, albeit amidst observance of "continuity". The security based on Ascarelli's teachings would be so relative as to be nearer the opposite — a sort of *lucus a non lucendo*. Moreover, "continuity" is an extremely vague concept. Is there, for example, continuity in the interpretation of Shylock's contract by Portia, whom Ascarelli holds up as a model of enlightened interpretership? There apparently is, in Ascarelli's opinion, because Portia accepts the categories of the law supposed to be in force[2] and acts in accordance with them. But what legal security is there here, when until the time of the interpretation the contract would have had to be regarded as valid and then, suddenly, it is rendered practically void by the interpretation, or even more, is transformed by it into a dangerous trap for the creditor? Indeed, Ascarelli affirms explicitly and generally that his continuity represents a development of the law, a development which often involves a reversal of the propositions originally accepted.[3]

As for the "dogmatic" point of view, "continuity" is mostly an insufficient curb, though sometimes, on the contrary, it is (in a sense) an excessive one. The legal system, like any other system or idea, presupposes and requires loyalty in him who is called upon, or offers, to interpret it — loyalty, and not merely "continuity". Continuity implies departure, albeit gradual departure. But the legal system may *permit* evolutionary interpretation, to the point of complete abandonment of principles previously in force. In that case, we have to do with substantive innovation not involving illegality from the point of view of the legal system.

Leaving aside the "dogmatic" aspect and considering the problem from

1 *Studi di dir. compar.* etc., p. xxix.

2 *Ibid.*, p. xxiv.

3 *Saggi di dir. comm.* (Milano, 1955), p. 491.

the point of view of legal development generally, we must admit that, *caeteris paribus*, continuity is beneficial. But it is not so beneficial that we should be required to sacrifice everything else to it. Where the innovator is the legislator, it will often be better — once it has been decided to change the law — to supersede the existing rule radically, by a completely different arrangement. It is with good reason that Ascarelli raises the demand for continuity not in respect of *every* legal reform, but in respect of innovation by the interpreter.

Continuity is, in fact, merely a kind of pragmatic necessity arising where the innovator lacks authority for innovation. Since he is not — as Ascarelli claims — free, but is subject to the rules, he has to camouflage his encroachments by introducing his innovations furtively. He cannot proclaim his innovations as such nor — in most cases — publicize them in advance, and any radical reform, therefore, in addition to being illegal, would appear to be utterly unjust.

It is easy to understand why Ascarelli insists so much on the principle of continuity. He assigns, in fact, the task of legal development to those not constitutionally competent for it, viz. the *communis opinio* of the lawyers.

But here, too, there seems to be some inner contradiction in his thinking. If the supremacy of the rules were indeed, as he claims, a mere illusion, there would be no justification for his absolute demand for continuity in the innovations of the interpreters. The demand for continuity (as we have already said) is understandable if both reform by legislation and innovation by judge-made law are recognized. In this case, a differentiation between the two, viz. the demand for continuity in innovation by judge-made law is justified because in judge-made law (otherwise than in legislation) innovation is retroactive. But in a conception in which the rule — as Ascarelli claims — in fact arises only at the time of its (so-called) interpretation, every rule is always retroactive, and so there is no room for differentiation; every alternative disappears, and judge-made law need not anxiously conceal its creations *contra legem*.

Since Ascarelli denies the subjection of the interpreter to the rules, there is no other way, in the resulting chaos, but to recommend "continuity" and to rely on the interpreter's "wisdom". "Continuity" is supposed to slow down his pace, and "wisdom" to guide him to an enlightened decision. We may say that for Ascarelli these two are magic words, capable of warding off the danger of that arbitrariness and that "sense of *aequitas*" which he, too, fears.

One certainly needs great wisdom if, like the king under the oak tree, one dispenses justice without the solid support of a set of rules.

But those who disagree with Ascarelli, who regard the imposition of normative discipline as logically possible within certain limits and also — under ordinary conditions — desirable, will consider loyalty in the interpreter a quality to be required even before wisdom. It is a prerequisite for anyone who proposes to interpret the opinion of *another* and who, therefore, must approach his task in a spirit of "selflessness" and "subjection". It is, we would venture to say, as if the laws—Socrates' νόμοι—addressed themselves to him *in limine* with the question, "Art thou for us, or for our adversaries?"[1]

Loyalty is of course not the only quality required in the interpreter. The full understanding of the rule, permitting the ascertainment of its true implications, and the legal understanding of the actual case under consideration, may demand a wide culture and keen intelligence. But even these are often not enough. As we have admitted, the rules can never serve as the only source of the decision the interpreter is called upon to make. He must also have wisdom — so much insisted on by Ascarelli — which, in our opinion, is no different from justice, if the latter is understood as true justice, conscious of facts and consequences, *i.e.* taking account of all the factual elements, all the interests involved in the question under consideration, and all the consequences likely to arise from the decision with regard to both the parties and the community.[2] Ulpian, defining *iuris prudentia* as *iusti atque iniusti scientia*, already calls it also *divinarum atque humanarum rerum notitia*.[3]

1 *Josh.*, V, 13.

2 Justice is often represented as a blindfolded figure. Clearly, this means the exclusion of all personal bias, and not the refusal of regard for any of the elements alluded to above. Still, it cannot be denied that Greek thought and scholastic tradition conceive of an almost mathematical justice, which is found to be inadequate inasmuch as justice requires evaluation, and frequently the evaluation of different aspects which are mutually contradictory, so that a sort of balance has to be achieved between them. Let us suppose, for instance, that we are faced with the question of how to divide an estate among the heirs, the children of the deceased. The solution corresponding to the aforementioned conception is to allocate to each of them an equal share of movable and immovable property and thus, *inter alia*, to divide the only existing field among them, although it may be very small and its division uneconomic. But factors that militate against this solution — such as threatening economic loss, the ability of one of the heirs to cultivate the field and the inability or unwillingness of the others — are also worthy of consideration in the interests of a just settlement. In this case, we cannot say that perfect equality is perfect justice. Similarly, when postal carriage rates are the same for long and short distances, we cannot say that they are unjust, disregarding practical considerations which necessitate equality of remuneration for small and greater services. The solutions of which Roman jurists said that they were adopted *utilitatis causa* were also, for the most part, in accordance with true justice as above defined.

3 *Dig.*, I, 1, 10, 2.

But, in "dogmatic" respect at least, that wisdom should be understood as in harmony with the system of positive law, and never as contradicting it. It should be understood as destined to supplement the rules where they are deficient or inadequate. It therefore cannot be opposed to the loyalty of the interpreter; loyalty is, at least, its beginning. "The fear of the *law*" — if we may be permitted to vary the passage of Proverbs[1] — is the beginning of wisdom."

*Read* 3 April 1962

1 *Prov.*, ix, 10.