

4-1-1953

Saggi Giuridici. By Tullio Ascarelli.

Arthur Lenhoff

University at Buffalo School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Arthur Lenhoff, *Saggi Giuridici. By Tullio Ascarelli.*, 2 Buff. L. Rev. 342 (1953).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol2/iss2/24>

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

BOOK REVIEWS

SAGGI GIURIDICI. By Tullio Ascarelli. Milano: Dott. A. Guiffre. 1949. Pp. 474.

The noted author has assembled into one large volume twelve disquisitions of varying content and size. The first five essays are devoted to subjects of universal jurisprudence (if I may use this expression). The others deal with important problems of private law, such as those monetary debts which are subject to revaluation, indirect transactions (contrasted with simulated and, therefore, invalid acts), questions related to the law of corporations and negotiable instruments, and a historical investigation of the legal theories on money.

The key-note in all parts of the voluminous work—500 pages of this Italian type of printing are the equivalent of about 800 pages in the usual size of an American law book—is comparative law. Dr. Ascarelli loves it. Since he knows French, German, and Latin-American law as intimately as his Italian law and is also familiar with Anglo-American law, his position even among comparatists is unique. To make a comparative law study means to compare, under the aspect of the identity of their functions, completely different institutions of foreign legal systems. One will, therefore, agree with the author's example taken from our trust concept. To non-Anglo-Saxon laws, the word and idea of trust are unknown. Nevertheless, they may reach the same practical, *i. e.*, socio-economic, effects as a trust through the use of the following concepts: juristic person (corporation or a foundation),¹ usufruct,² mandate and that peculiar Roman institution called *fideicommissum*, and the like.

Turning to another problem, one notices that according to Dr. Ascarelli's views, law and state are not identical. He, therefore, associates the rise of the idea of codification historically with the emergence of the "state monopoly of law," "centralized" government, and the nationalistic type of the "ideal" state. This is an ingenious proposition, however fallacious it seems to be to this reviewer. Who can dispute that the legal source of English common law was the state acting through its courts? On the Continent, the emergence of the modern state brought about an identification of law with written law, an evolution which had

1. A "foundation" is constituted of assets perpetually bound to serve a certain purpose. It is a juristic person perpetuating itself independently of any individuals. See 2 RABEL, *THE CONFLICT OF LAWS* 13 (1947).

2. An excellent example for the use—in Germany, *e. g.*—of a "usufruct" as a substitute for a trust is the *Opel* transaction, described in *Uebersee Finanz Korporation A. G. v. McGrath*, 343 U. S. 205 (1952).

BOOK REVIEWS

greatly been promoted through the deductive method cultivated by the Romanists and Canonists. Neither can the reviewer agree with the statement that the natural-law movement of the era of enlightenment—called *guisnaturalismo* by Ascarelli—contrasted a law “based on reason” with the traditional law on one hand and the state-created law on the other. The Austrian Civil Code is the foremost representative of that era;³ but, in the first place, it is on the whole merely declaratory of the “traditional” law. In the second place, its draftsmen adhered so strongly to the “all-law-is-written-law” principle that they thought that unless the Code stated expressly that analogy and natural law are subsidiary sources for reaching a decision, judges would not be allowed to resort to statutory analogy and natural law. Thus, an express statement to this effect was included.⁴

It is understandable that historians are likely to look to a formulation of universal tendencies, but it is the reviewer’s painful office, petty as it may appear, now and then to qualify broad formulations. Thus, a dissent must be filed from the author’s opinion that in the Anglo-American view, statutes call for a strict construction; this was not true at the time of Plowden and of Coke, and it was not until the second half of the nineteenth century—under the impact of modern social ideas advanced by legislation such as the emancipation of women, and measures of social policy—that many American courts, notably the Supreme Court, came to look with disfavor on legislation.

Dr. Ascarelli’s discussion of “gaps” (59-61) relates to spurious gaps.⁵ According to Dr. Ascarelli, gaps “constitute a macroscopic [contrast to microscopic?] example of the creative function of an interpreter” through “the necessary process of adjusting the pre-designed law to new social demands in an uninterrupted course of evolution.”

According to the author, it is this evolutionary function for an extra-legislational progress of law, which interpretation shares with “equity.” This approach may supply a reason why a polyhistor such as Dr. Ascarelli ties Gustav Radbruch’s, or rather Aristotle’s concept of equity⁶ which underlies the concept of “the

3. Lenhoff, *On Interpretative Theories; A Comparative Study in Legislation*, 27 TEX. L. REV. 312, 317 (1949).

4. The Austrian Civil Code §7 (1811) directs that where literal and logical interpretation and even statutory analogy are of no avail for the decision of a case, the judge may resort to the “principles of natural justice.”

5. Genuine gaps are very rare. See LENHOFF, COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION 568 ff. (1949), and *Extra-Legislational Progress of Law: The Place of the Judiciary in the Shaping of New Law*, 28 NEBR. L. REV. 542, 565, 566 (1949).

6. Compare the quotation from RADBRUCH, PHILOSOPHY OF LAW 63, n. 91, with the well-known formulation in ARISTOTLE, NICOMACHEAN ETHICS c. 10 §1.

equity of a statute,"⁷ with the equity concept of Anglo-American equity jurisprudence. However, if the two notions have anything in common, it is certainly not to be found in the theory of sources of law. The former deals with individual facts, the latter espouses general ideas.

Turning then to the core of the interpretation problem—the choice between several “logically” correct conclusions—the author remarks that the rationalization expressed by an interpreter does not always reflect his actual considerations. One must not forget that Ascarelli believes that an interpreter is always “to some extent” a legislator.

It is at this point that the author used the Aristotelian concept of equity; he contends that the decision of a concrete case shall “on the one hand be in harmony with precedents, and on the other be just and equitable.” In associating those two requirements, he emphasizes that the interpreter must not decide the single case before him by a single rule formulated only for that case. He has to make his decision as if the case were a typical one to be adjudged according to its typical (not its peculiar) features by “coordinating the result with a legal principle of general character applicable to all cases of the same type.” Predictability and reliability (“*certezza*”) are indispensable for every legal system. It is for this reason that interpretation fulfills its highest function in striving for the integrality of the legal system within which it acts because “a legal order has to appear as a systematic whole, devoid of contradictions.”

Kelsen’s pure theory of law, which “frees” the concept of law from the natural-law idea of justice is, for Ascarelli, therefore, “mathematics of law.” Meritorious as Kelsen’s theory seems to him for methodological purposes, Dr. Ascarelli thinks that it proves itself entirely insufficient insofar as it identifies the test for “validity” of a legal norm with the social function of law, as the problems of interpretation and application of law demonstrate. At this point, one may differ with the author. It is true that values, *i. e.*, extra-legal factors might determine a choice between several “valid” solutions each of which could easily be reached through the subsumption of the facts “found” under a proper major premise. And it is true that Kelsen’s “basic norm” is not “value-charged”; but to do justice to Kelsen, one must not overlook that he does, of course, by no means dispute the role played in positive law, from the constitution down to a decision of a justice of peace, by extra-legal, *i. e.*, value-charged consid-

7. Note written to *Eayston v. Studd*, 2 Plowd. 459, 465; Co. Litt. 24b.

BOOK REVIEWS

erations such as economic or sociological policies, ideas, and ideologies. If this is so, the variety of juristic-logically correct decisions among which the interpreter might choose according to "legislative" considerations, does not run counter to Kelsenian thoughts. One will agree with Ascarelli's cautioning against two illusions, one of which opposes the other: The first illusion assures that a purely legalistic solution can satisfactorily dispose of any social problems whatsoever. The other leads into the belief that only "extra-legal" factors are worth considering, and overlooks the importance and efficiency of legal concepts and principles without which an arbitrary will takes the place of the law in the guidance of human conduct.

The distinguished author gives credit to the "pure theory of law" in a passing remark, by calling our attention to the transformation of non-legal notions, *e. g.*, psychological or economical concepts into legal ones by their incorporation into a legal norm. "Will" as used in criminal or testamentary law has a different meaning from the real-psychological concept of will. This is also the case with many other concepts such as "compulsion" or "mistake." However, is this always true? It is left to the law-makers to incorporate non-legal concepts with their original meaning. Our Immigration Act finds justification for deportation, in *inter alia*, alien's "moral turpitude." Courts have, in interpreting the two words, used "the moral code of mankind" as the criterion for the characterization of a person's conduct, giving little, if any, consideration to its criminal quality.

Other phases of the "transformation" problem appear in the third chapter. It is there that the author's working method of overwhelming the reader with detailed examples is used to the best advantage. I am thinking particularly of the historical process of the "transformation" of legal concepts, *e. g.*, the juristic structure of property or of credit. New social and economic conditions have necessitated new orientations.

Also the reading of the pages dealing with the process through which legal innovations adopted in other countries have been subject to a "transformation"—giving the adopted institution a function different from that which it fulfills in the country of its origin—seems to me extremely profitable, especially for comparatists. Thus, despite a similar legal foundation, "shares" of a stock company in France serve a different function from shares under the law of corporations in Brazil. Ideas of an entirely different legal system have gained ground, interpretatively at first, but later legislatively, as the acceptance of the trust idea and of North American constitutional concepts in Latin-American law prove.

Such a penetration is consummated through interpretation rather than through legislation. The interpretative process uses diverse techniques for that purpose. In countries having a codified legal system, the so-called general clauses which an Italian writer properly called the "windows" in the legal mansion, are a most helpful tool. These general clauses and general terms consist of references to immensely broad concepts, such as standards of decency (*boni mores*) or requirements of good faith measured in terms of common usages or of a way of conduct as in the circumstances a *bonus pater familias* would act.

In thinking of the various approaches through which innovations might enter, Ascarelli properly includes the process of "characterization," called "qualification" abroad. It is a process which is required in every field of law, and is not restricted to cases in conflict of laws. Changes in characterization have, at times, revolutionized the law. Ascarelli refers to the canonistic prohibition against taking interest on a loan. He remarks that when the prohibition had become outdated since money loans were no longer made only by the rich to the poor for the purposes of procuring necessities of life but were made to well-to-do or rich men for purposes of production, such financial transactions were no longer "characterized" as a loan (*mutuum*). One could add that the change in the characterization of a work stoppage (for higher wages), formerly regarded as "criminal conspiracy," has become the historical fountainhead of our modern labor law.

Since space considerations limit me to treating one more interesting comparative-law problem only, my choice is for that of the "*commercialization of civil law.*" Unlike Anglo-American law, nearly all foreign legal systems—except those of the Scandinavian countries—have built up a commercial law which is distinct from civil law. One cannot read Ascarelli's explanation of the reasons for such a dichotomy without being thrilled by his comparison of the role of *ius praetorium* (*honorarium*) in Roman law and *equity* in English law with that of *commercial law* on the European continent and the Latin-American countries. His comparison of these developments demonstrates that the role was the same for all three "systems"; it was that of infusing new legal theories and principles, new standards and remedies, into the traditional law (*ius civile*), common law, and private law, respectively. After the purpose of modernizing had been fulfilled, the formerly new ideas were absorbed by the "old" legal system. The historical era of separation concludes with an "*edictum perpetuum*," or "*merger*," and the replacement of separate commercial codes with modern civil codes which adopted the leading ideas of the former. The fusion of commercial and civil codes is found in the Swiss

BOOK REVIEWS

Code of Obligations and in the most recent Italian Civil Code. The "commercialization" of these codes deprived "commercial codes" of their *raison d'être*. On the other hand, the law of Soviet Russia has adopted all of the important legal principles and theories which distinguished the commercial law of the non-Anglo-Saxon countries, although the economic structure of Soviet Russia rests upon premises which are diametrically opposite to the principles which had guided the emergence of commercial codes.

The desire to find striking analogies is deeply engrained in the legal mind, but analogies are often more apparent than real. "Equity" arose when the common law lost its creative force. Commercial law concepts answered a need for the regulation of particular activities in the economic sphere. By merging such regulations in a general civil code, the latter will necessarily become more comprehensive for it has still to deal with those particular activities. Although the new Italian legislation no longer includes a *Codice di commercio*, it devotes large chapters to the law on commercial enterprises and to the entry of a "firm" into the commercial register and partly retains the concept of a "merchant." In its function of promotor of new ideas rather than in its form, foreign commercial law has an interesting similarity to equity. These remarks in no way detract from the great merit of Ascarelli's keen perspective.

The book shows a depth very rarely reached in legal literature. Students of comparative law are very fortunate in having now united in one volume a series of articles published previously by Professor Ascarelli in Brazil and Italy. This origin of the book accounts for the frequent repetition of certain ideas. The book is so full of good things that a new edition might be expected in the not too distant future. One could also wish that the new edition be free of the—alas—misprints, particularly of proper names and foreign words.

Arthur Lenhoff

Professor of Law
University of Buffalo