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# A Common Law for the Age of Statutes

Louis Vogel  
*University of Paris II*

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# BOOK REVIEW

A Common Law for the Age of Statutes. By Guido Calabresi.  
Cambridge, Mass.: Harvard University Press, 1982 Pp. 319. \$25.00.

LOUIS VOGEL\*

*A Common Law for the Age of Statutes* does not deal simply with the dating of statutes and the possible responses by courts to such statutory obsolescence. In other words, Professor Calabresi's monograph does not take place in the series of sunseting proposals<sup>1</sup> which started in the United States with Thomas Jefferson<sup>2</sup> and which continue to have authoritative proponents today.<sup>3</sup> Calabresi instead points out that the aging of statutes is not merely chronological and that, in point of fact, the province of its proposal is not limited to statutes as such but could concern the common law itself.

The doctrine developed by Calabresi in order to respond to the phenomenon of obsolescence of laws is much more important than the phenomenon itself. Indeed, the work is a first attempt to develop a consistent jurisprudential theory of the legal system conceived as a whole, its operation, and its relations with the social structure. This conception is exposed in the context of updating statutes but its implication transcends the context of its exposition. The transition from updating to structuring is realized through the criteria which Calabresi proposes in order to determine when courts should act in order to keep the law up to date. In his view, "the court's judgment must be based primarily on whether the statute fits the legal landscape, because that is what a court is good at discerning and because 'fit' is correlated with majoritarian support."<sup>4</sup> Thus, updating law means in reality recognizing and enforcing consistency within the legal system.

The concept of the legal system as worked out by Calabresi is very complex. It is altogether contextual, complete and interactive, and dynamic. First, the author does not view the "legal topography" as an isolated set of consistent rules and principles but instead perceives the

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\* Lecturer-in-Law, University of Paris II. LL.M. Yale; Diplôme D'Etudes Approfondies en Droit, Paris; Licence en Droit, Paris; Diplôme de l'Institut d'Etudes Politiques de Paris; Member of the Paris Bar.

<sup>1</sup> In the United States, Thomas Jefferson was the first to propose that all statutes and constitutions should last no longer than nineteen years. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 59 (1982).

<sup>2</sup> *Id.*

<sup>3</sup> Modern partisans of sunseting include U.S. Supreme Court Justices Hugo Black, *id.* at 60, and William O. Douglas, *id.* at 60 n.5, as well as Professor Theodore J. Lowi. *Id.* Ten states have enacted sunset laws, most of them concerning regulatory agencies only. *Id.*

<sup>4</sup> *Id.* at 121.

legal landscape negatively, that is, through what it excludes. For example, a statute which favors a particular social group is enacted precisely to be inconsistent with the legal environment. The legal landscape is therefore consistent but surrounded by complementary inconsistencies resulting from willful policies. The appropriate task of the courts is to put the legal system in context by discriminating between those inconsistencies which are wanted and those which are not.

Second, the legal environment is complete, that is to say that it integrates statutes as well as common law. Different rulemaking processes do not harm such a fundamental rule identity. A comparative perspective particularly enlightens this proposition. Civil law countries continue to maintain a sort of pre-Landis view<sup>5</sup> of law: new statutes remain outside the codes. Equilibrium thus becomes artificial or dichotomous. In Calabresi's view, equilibrium is total. This is especially important because it leads to an interactive conception of the systemic structure. The gravitational pull of statutes can change the common law. On the other hand, common law and statutes do not constitute two distinctive blocks. Each statute is immersed in the legal structure and surrounded by common law. This will result in interactions which themselves will induce a move towards a consistency which could be described in systemic terms as the manifestation of the absorption power of the legal structure.

Finally, the legal system is not fixed but dynamic. The engine for change is constituted by the permanent discrepancy between the majoritarian desires and the legal framework. This dichotomy induces interactions and trends towards the unity of the system itself, whatever the origin of the legal rules. In this regard, Calabresi's conception entails elements for a jurisprudential theory. In his view, the difference between what is going on and what is reflected in the law is the source of the dynamic of the legal system. Calabresi adds, however, that the discrepancy between a legal system and its social reality will never be so great as to put them asunder. He affirms that although this is impossible to prove, the legal fabric reflects the underlying needs and wants of society as they have evolved. I assume that this is of application outside of real crises. Thus the maintenance of consistency within the legal system generally contributes to the realization of the relative adequacy between the legal system and social system.

It is submitted that this affirmation is true if one considers consistency in a dynamic perspective and not as a rigid absolute. Without such qualification, moves towards new consistencies would be perceived as inconsistent with the former legal order. It seems that accretional decision-making in common law countries, combined with the broad directives of

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<sup>5</sup> Dean Landis clearly pointed out that statutes, because of their increasing importance, could not continue to be considered apart from the common law itself. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934).

codes in civil law countries, allows decisionmakers who are aware of the "underlying popular attitude" to create new fits. Contrary to the classical continental West European position which advocates a normative system that is completely independent from the social process,<sup>6</sup> Calabresi perceives the social and legal system as deeply interrelated.

This conception of the legal system has direct effects on decisionmaking. Professor Calabresi's *plaidoyer* for recognizing the power of adjudicative institutions to update laws which no longer fit entails a choice in favor of isolating one of the permanent functions of decisionmakers in the context of a legal system, that is, the maintenance of systemic consistency. Consciously or not, courts and legislators when making decisions always take into account that these decisions will have to find their place in a whole set of past and future decisions. A specific decision not only concerns the individual parties or the group which triggered the decision-making machinery, but also affects the legal system as a whole. One of the purposes of the enactors of the European codes was precisely to furnish guidelines to decisionmakers in order to make them respect the total legal structure. Calabresi's proposal results in advocating the creation of a new kind of decision-power which would be vested in courts of justice and which would allow them to order the legal landscape by making decisions about decisions. Calabresi's proposal thus constitutes not only a response to statutory obsolescence but more generally to the need for consistency of the legal structure which has been affected by the multiplication of so-called sources of law and especially by the "orgy of statute making."<sup>7</sup>

Calabresi's innovative approach leads in fact to a real explosion of the concept of decision itself. Indeed, the author's reflections are initiated with observation of the use by courts of legalistic devices, such as constitutional rhetoric, interpretation, or Bickelian "passive virtues,"<sup>8</sup> in order to perform their function of updating the law or of bringing about consistency. From this starting point, the author develops a concept of legal system which takes into account the realities which he observes and which leads to a new concept of decision. In fact, all "good" decisions contribute to consistency, unless the legislature intends to bring about inconsistency.<sup>9</sup> The problem posed by Calabresi through the examples he presents is that in some decisions the ordering function is overwhelming, and that sometimes the other purposes of the decision serve only to hide

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<sup>6</sup> G. CALABRESI, *supra* note 1, at 73.

<sup>7</sup> The phrase of the late Professor Grant Gilmore. G. GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977).

<sup>8</sup> The "passive virtues" theories developed by the late Professor Alexander Bickel and Dean Harry H. Wellington emphasize judicial inaction as a means to force legislatures to re-examine statutes. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 *HARV. L. REV.* 1 (1957).

<sup>9</sup> Cf. *supra* text accompanying note 5.

the performance of the ordering function. Some decisions therefore hold statutes unconstitutional not because they are contrary to the Constitution but because they do indeed no longer fit. The distinction is subtle because the Constitution itself is an important part of the systemic structure. This importance also explains why constitutional rhetoric can so easily be used in order to maintain consistency. One of the most important and innovative conclusions of the book is that ordering the legal system has now become a function independent of the day-to-day operation of this system. This ordering function can no longer be accomplished through the current functioning of decisionmaking. Thus the explosion of the concept of decision could induce an entirely new approach to the decision-making process itself.

The same decision performs different functions simultaneously. For instance, each decision performs conflict resolution, maintains systemic consistency, and at the same time assures decision communication in different degrees. Indeed each decision is self-communicating; that is, each decision communicates its own decision. Once one distinguishes among these different functions, one can try to optimize the performance of each of them. In this perspective, Calabresi's proposal means that when the ordering function becomes too important in a specific case, a specific instrument becomes necessary to accomplish this function. Not to have a specific instrument would pervert the performance of other functions or reduce the efficacy of the ordering function itself.

This judgment can be extended to the communication function. In this context, Calabresi advocates a "choice for candor"<sup>10</sup> corresponding to the specificity of the discretionary power he proposes to vest in courts. In fact, a "good" decision realizes an equilibrium between the different functions which it performs. Not just any legal subterfuge can be used. When the difference between what is done and what is communicated becomes too great, even the communication function cannot be accomplished in an optimal fashion. Internally, this difference would not correspond to the interrelations existing among varying functions; externally, it would hurt people's expectations. The choice between honesty or dishonesty with regard to communication therefore must be made in function of a criterion of optimality in decisionmaking.

Finally, if one considers decisions as abstracted from their formal content, at the level of their degree of fit, one can rethink the action of courts in terms of decisional macro-policies detached from the micro-relational level of the specific questions and parties involved. The author elaborates a whole scheme of strategies based on action (or nonaction) and threat which courts traditionally use in order to perform their function of ordering. This scheme leads to an interactive concept of legal system with systemic features incorporating channels of communication

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<sup>10</sup> G. CALABRESI, *supra* note 1, at 178-81.

which exist at a second level and which permit them to transmit signals beyond the micro-level and to maintain a dialogue between decision-makers. The picture drawn is highly complex and requires the invention of new conceptual instruments, such as concepts of non-decision (you decide when you do not decide), legitimating function of processes, and double meanings of legal symbols. In this regard the book constitutes a first attempt to study interactions within a legal system and to submit them to willful monitoring.

The need for developing the ordering function of courts corresponds to the basic features of the American legal system. Indeed, the American decision-making model is centrifugal.<sup>11</sup> Consistency is not the main concern of the American judge. The purpose of decisionmaking is justice as it appears in a given case. This conception differs from that developed in continental European legal systems where the decision-making model is centripetal.<sup>12</sup> In the continental model, conflict resolution is not the primary goal of judicial adjudication. The main concern of West European judges has always been to make their decisions fit into the larger scheme of the legal system as a whole. Perhaps this approach constitutes an explanation for the lack of concern in continental Europe with respect to this particular function of courts.

In conclusion, Calabresi's scholarly book bears a personal message. It is an opinion, not a theory. It is based on personal experience and encourages personal choice. If one pierces the veil of absolutes, choices appear. *A Common Law for the Age of Statutes*, in the final analysis, is also a contribution to humanism.

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<sup>11</sup> See generally, Vogel, *Dynamics of Legal Systems and Legal Education: Interactions in the United States and Continental Europe* (\_\_\_\_\_, 19\_\_) (unpublished manuscript).

<sup>12</sup> *Id.*

