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The Future of the Common Law Tradition

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I. *Introduction*

The majority of Western systems of private law is habitually divided by scholars into civil law systems and common law systems. Eastern Canada fortunately partakes of both traditions — the civil law in Quebec and common law in the other provinces. One difference between the two traditions is the greater and earlier emphasis that was placed on the teaching of civil law in universities. In conformity to this, Quebec had three university law schools before the common law provinces had any; they were McGill (established in 1848), Laval (established in 1854), and Laval in Montreal (in 1878). But Dalhousie was the first of the common law schools, a fact that makes me especially pleased to be involved in these celebrations.

Many reasons make me particularly proud to be invited to give this speech. I am a Scot in New Scotland. Edinburgh University, where I was the Professor of Civil Law from 1968 to 1979, provided the model for Dalhousie University. When I became a law student at Glasgow University in 1954, I found the situation so delicately etched for times at Dalhousie by John Willis in his *History of Dalhousie Law School*¹ of one full-time professor, the others being practitioners. Memories flooded in when I read that splendid book, and I remembered the student frustration, so gently hinted at, and the devotion of so many hard-pressed practising teachers. Last, but surely not least, here I am at a time when the Premier of Nova Scotia is a member of my own clan.

In a recent book, *The Making of the Civil Law*,² I argued that the same legal elements — including Roman law, Germanic customs, cannon law, and feudal law — had permeated the two main strands of the Western legal world, namely, the common law and civil law systems. The factor that accounts for the well-known distinctions between the two types of systems is that civil law systems, unlike the common law systems, accepted Justinian's *Corpus Juris Civilis*

*Professor of Law, University of Pennsylvania.

1. (Toronto: University of Toronto Press, 1979).

2. (Cambridge, Mass.: Harvard University Press, 1981).

as the organizing instrument. In short, the legal tradition itself plays an enormous role in legal development.³ The civil law systems share much substantive law, much of which comes directly or indirectly (as a result of later elaboration) from Roman law.⁴ But what is more significant is a shared tradition of ways of looking at law, including the parameters of solutions, the divisions of the law, the systematics, the structure (as well as codes), and the sources of law.

A common organizing instrument is not essential for a shared legal tradition; it merely enables the similarities to be more easily recognized and, hence, the role of factors of change to be more readily identified. When we turn from civil law systems to common law systems, we are presented with a rather different problem for understanding the particular tradition and what is inherent in it. This is so, first, because the common law has no organizing instrument akin to the *Corpus Juris*. Second, England was for so long the sole representative of the system to have survived until the present day.⁵ And third, the other modern instances have their roots in English law.

We are not directly concerned here with the early period before the establishment of English colonies in North America. But one point, which was decisive for the future, should be mentioned. A system that treats law as resting primarily on custom will give particular prominence to judicial decisions. This is true whether a decision or a line of decisions is, or comes to be, treated as binding precedent or not. The reason is that, in practice, the local custom is often hard to find, customary law is difficult to determine,⁶ and court cases usually constitute the best evidence of customary law, no matter what procedure is followed in the court for discovering

3. See also A. Watson, *Legal Change: Sources of Law and Legal Culture* (1983) 131 University of Pennsylvania Law Review. pp. 1126 ff.

4. Much of the shared substantive law is also to be found in the common law. In large part, this is the result of the same phenomenon, borrowing directly or indirectly from Roman law.

5. I use this formulation because for a long time English law was not the only Western system that failed to use the *Corpus Juris Civilis* as an organizing instrument. Much could be learned with regard to the impact of the legal tradition — as distinct from local political, social, and economic factors — on law in England from a study of Scots law until around 1660, of law in Northern France until as late as the French Revolution, and of law in Germany until, say, 1495.

6. For illustrations of these difficulties, see Watson, *Sources of Law; Legal Change and Ambiguity* (Philadelphia: University of Pennsylvania Press, 1984.)

the custom.⁷ The role of judges, whether as law finders or lawmakers, becomes central,⁸ and the time comes when they regard themselves, and are regarded by practitioners and text writers, as guardians of the law, the keepers of the law from time immemorial. (There is an exaggeration here, of course. Often custom is recent; for example, the Gloss suggests that ten years is enough. But the exaggeration is not mine. Contemporaries who were responsible for writing down customary law often stress its age. “This law is brought to us from antiquity by our forefathers,” wrote the author of the rhyming prologue to the *Sachsenspiegel* in the early thirteenth century, and in 1613 the Maître-Echevin of the town of Metz wrote of collecting the customs to be found in the judgments, memorials, and instructions “which mossy antiquity left in the strong boxes of the town.”) In these circumstances, judges, practitioners, and jurists will regard statute law as an intrusion, and they will resent it and interpret it narrowly. Both Coke and Blackstone⁹ complain bitterly of the mess made of English common law by legislation, and a century and a half later Roscoe Pound wrote of “the indifference, if not contempt, with which that output [of legislation] is regarded by courts and lawyers.”¹⁰ Pound also stated that the orthodox common law attitude toward legislative innovation in his day was that the courts “might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.”¹¹ Hostility to statute still emerges occasionally, but in general that attitude is a thing of the past.

What the common law systems share — and for our purposes we will look at those in Canada, the United States, and England — is first a set of legal rules and a system of law that was developed primarily by judges who had this deep suspicion of legislation.

7. Actually, I would go further, though such theoretical elaboration is not needed here, and claim that customary behavior only becomes customary law when it is expressed in the proper institutionalized form, namely, in judicial decision; see *An Approach to Customary Law*, to appear in *Illinois Law Review* (Symposium on Legal History).

8. As systems come under the sway of Roman law, this role of judges changes, and its previous importance becomes obscured with the rise in prestige of academic jurists.

9. *Commentaries on the Laws of England* 1 (first edition, 1765), pp. 10f.

10. *Common Law and Legislation* (1908) 21 *Harvard Law Review*, pp. 383 ff. at p. 383.

11. *Supra*, note 10 at p. 385.

Imposed upon that are legal systematics which were borrowed in large part from the civil law.¹² Finally, the common law systems share an overwhelming amount of statute law (which includes subordinate legislation and administrative regulation). To a considerable extent, these three common elements each occurred at distinct times, although they did not occur simultaneously in all of the jurisdictions: the set of legal rules and the system of law were transplanted from England to her colonies; the systematization occurred largely after the Declaration of Independence; and the enormous proliferation of statutes is a twentieth century phenomenon. (It should be understood in what follows that I use the term "common law systems" not to designate case law, but to set off, in contrast to "civil law systems", that group of legal systems that are commonly so called, whatever their sources of law.)

It is not the use of the same sources of law — in this case, statute law and precedent — that leads to the development of the same legal tradition or the same continuing tradition. Rather, it is the result of the systems approaching the sources in the same way, of legal education being approached from the same basic set of values, and of the legal elite — those persons capable of having an impact on legal change — sharing the same presuppositions about law and the same legal values in their different territories. Here one must point to some vital differences between the three countries under discussion. First, England differs from Canada and the United States in not having a written constitution. The existence of a written constitution not only provides checks on the bodies that make law, but it also informs attitudes toward law. The power to declare legislation unconstitutional elevates the stature of the Supreme Court and inculcates a critical spirit toward legislatures. The notion of constitutionality, above all else in the United States, invades whole areas of the law that seem to one from England to be remote from such a concern. Marriage law is an example. For instance, can one impose one set of requirements for the validity of

12. See above all, A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law* (1975) 91 *Law Quarterly Review*, pp. 247 ff. But the systematization under civilian influence was occurring long before this time; see Blackstone's *Commentaries on the Laws of England*, which, although first published during the period from 1765 to 1769, was by no means free of it. The same applies to several prior works; for discussion of this, see A. Watson, "Justinian's *Institutes* and Some English Counterparts", in P. Stein, ed., *Essays on Justinian's 'Institutes' in Memory of J.A.C. Thomas*, (London: Butterworths, 1983) pp. 181 ff. at p. 185.

marriage, such as a minimum age, parental consent, and forbidden degrees of relationship, on one racial or religious group and a different set of requirements on another? Can one allow one group, but not another, to practise polygamy? In England, the subject called “constitutional law” is not only relatively unimportant; it is also greatly restricted in scope. The new Charter of Rights opens new and exciting vistas in Canada. The attitudes and the work of judges of the House of Lords are different from those of the Justices of the United States Supreme Court, and those of the judges of Canada’s Supreme Court lie somewhere inbetween the two, since that court deals with both constitutional and nonconstitutional issues.

A further important difference between England, on the one hand, and Canada and the United States, on the other, is that the former does not comprise a federation. This means not only that Canada and the United States have a plurality of provincial and state jurisdictions that imparts a vitality of insights into the possibilities of law reform,¹³ but that they also have separate systems of federal and provincial or state courts with largely different concerns. But Canada and the United States also differ, in that, as a matter of course in Canada, the provincial courts exercise jurisdiction in cases involving federal law,¹⁴ and the federal courts are, relative to those in the United States, much less significant. The different approaches in the two constitutions to the relationship between federal and state or provincial power also has an impact on both legislation and judging.

A little more on these matters must be said about England in relation to continental Europe. In 1951, the United Kingdom ratified the European Convention on Human Rights, and as a result, the United Kingdom may be judged before the European Court of Human Rights in Strasbourg. Thus, British legislation, court decisions, and executive action may be determined to be contrary to the Convention. Therefore, there is, in a peculiar sense, a Bill of Rights in England. But the court that can rule on the legality of

13. The term “reform” is used not to suggest that any change is necessarily beneficial, but that it is thought to be beneficial by those proposing it. England can, of course, take account of other common law insights. But there is a different feel to taking note of what happens elsewhere in a federal nation from taking note of what happens in a foreign country.

14. See, for example, B. Laskin, *The British Tradition in Canadian Law* (Hamlyn Lectures, 21st series, London: Stevens, 1969) pp. 112ff.

legislation and on other related matters is not an English court. The House of Lords can declare no act unconstitutional; hence, the English courts are unaffected in their attitude toward the legislation of the United Kingdom Parliament. The European Convention on Human Rights, it should be noted, is not incorporated into English law. Furthermore, when the United Kingdom joined the European Common Market in 1973, all the appropriate European Community law, which was concerned mainly with economic affairs, automatically became part of the law of England. Hence, England is part of a federation. But I confess that, in matters of domestic law, I see no fresh impact of European legal attitudes on English judges or academics.

There is a further significant difference between England's approach to the sources of law, on one hand, and that of the United States and Canada, on the other. The former takes a very strict approach to the binding nature of precedent. The House of Lord's practice statement of 1966,¹⁵ in which it was announced that it would no longer regard itself as being bound by its own previous decisions, does not apply to the Court of Appeal, which is still bound by its own precedents. And the House of Lords only rarely makes use of its power to overturn its previous decisions.¹⁶

In legal teaching, the emphasis is much more practical in the United States than it is in England, both with regard to the subject matter of the courses and to the approach, which involves detailed study of a small number of cases, rather than a systematic exposition of a branch of the law.¹⁷ An American leaves law school with a perspective different from that of his English counterpart. He is much more problem-oriented, much less willing to take legal rules on trust, and much readier to distinguish cases. By contrast, the new Canadian lawyer seems to me to be very similar to his American counterpart. Still, one factor provides some cohesion between the common law systems, namely, the movement of academics from one jurisdiction to another, in the process of which they take their particular expertise with them and share their

15. [1966] 1 W.L.R. 1234.

16. See, for example, A. Paterson, *The Law Lords* (Toronto: University of Toronto Press, 1982), pp. 162ff.

17. I am talking here only of teaching and not of published scholarship. The concerns of American and English scholars are often different, but the writings of American professors are at least as theoretical.

approaches with their new colleagues and students. Very recently, for instance, G.H. Treitel, A.W.B. Simpson, S.F.C. Milson, and G.H. Jones spent at least a semester teaching in the United States, while P.B. Carter spent some time teaching in Canada and G. Calabresi and J.O. Honnold were in England. There seems to be rather less movement of senior academics between Canada and other countries, but this is made up for by the relatively high proportion of Canadian law professors who have studied in another common law country.

Overall, it seems that the legal traditions in Canada, the United States, and England share few common features. But perhaps the similarity is not so weak as one might be inclined to think. One very significant detail must not be overlooked. In private law, at least, it is, as I have said, perfectly feasible for a professor from one common law jurisdiction to go to another for a semester and teach a perfectly respectable course in the current local law. Some extra work will be necessary of course. However, a professor from a civil law country would have a (virtually) impossible job teaching the local law of a common law country, even in his or her own field of specialization; the vocabulary, the constructs, the underlying assumptions, the procedure, and even the relationship between procedure and substantive law would all be new.

Of course, political, social, and economic factors also account for changes in law, particularly in its substance. These factors will not be insisted upon here, not because they are unimportant (though they can be overstressed). But they differ greatly at times from one province to another while those in one common law province or state may have considerable similarities with those of a civil law jurisdiction.

What, then, can one say about the common law tradition as it will develop in the relatively near future? (I write from the long-term perspective of one who, for several years, did not venture for his scholarship into the Christian era and whose work kept taking him further back.) Projection into the future is much more difficult than, with the aid of hindsight, explaining the natural evolution of the past. Yet, the comparative legal historian does have some tools at his disposal. He can look at what has happened, not just once but regularly, in the past, and can talk about the lessons of history. What is being suggested, of course, is not that what has regularly happened in the past will always occur in the future. Rather, in the absence of new and unforeseen circumstances (which can always

occur), what has been the tendency to occur in the past will have the tendency to occur in the future. In terms of the future development of the common law systems, three facts seem certain and decisive. In the first place, there has been, as a matter of observable fact, a great shift in the balance of lawmaking in the common law world from judicial precedent to legislation, which together comprise the two main sources of law.¹⁸ In the second place, there is a deep awareness in the common law countries of a crisis in lawmaking, an awareness that is probably stronger and more widely shared among the elite of lawyers than at any other time in the history of the common law. In the third place, and consequently, the future of the common law will depend above all on what, if anything, is done to resolve this crisis in the sources of law.

For the future of the common law as a group of systems sharing the same traditions, a lesson to be drawn from the history of these systems is that the rules of substantive law that are accepted are of less importance than the attitude taken toward, and the relative importance of, the sources of law. It is possible, or even probable, that nothing drastic will be done to reform the sources of law. A further lesson of history is precisely that grave deficiencies in the sources of law which impede certainty and clarity in the law and hinder its capacity to meet glaring social needs can go unchanged for centuries, even when the deficiencies are well known to those persons in command of lawmaking.¹⁹ (As I write the first draft of this paper, I recall that it was only yesterday evening at dinner that a distinguished American judge remarked that Calabresi had got it wrong! The saving grace of law was precisely that the legislature did not intervene more often with changes in the law; doing nothing was what it did best. The remark, I believe, should not be construed as indicating satisfaction with the present state of the law and how it is created, but rather fatalism at the idea of reforming Congress and the Senate. The judge should know: he was a legislator.) Yet, I think this time *some* reform is likely in the (relatively) near, but not foreseeable, future. In 1981, after centuries of authoritative discontent, the Lord High Chancellor of Great Britain, Lord Hailsham of Marylebone, claimed that "Parliament in general and

18. I am including subordinate legislation of all kinds within the term "legislation".

19. See Watson, *Sources of Law*, *supra*, note 6, and *Legal Change*, *supra*, Note 3.

the House of Commons in particular has long since ceased to believe that its main business is to act as an efficient legislature".²⁰ In 1983, the Chief Justice of the United States Supreme Court, Warren E. Burger, characterized the situation by saying: "But I suggest the analogy of the early pioneer who, looking out the window of his log cabin, saw a pack of wolves destroying his livestock, killing his chickens and clawing at his smokehouse with its supply of food. Someone in that situation need not be apologetic about calling for help — if there is anyone within hearing who can help — as you who are within hearing can help".²¹ And in 1982, a leading academic, Guido Calabresi, devoted a book to the dilemma facing the courts, namely, that of statutes that do not fit the legal landscape, and to the "lack of current legislative support." In the book, Calabresi analyzed suggested solutions and proposed his own. When things such as these occur, then we may hope that sooner or later one common law system will opt for reforming the sources. Then the other systems, one by one, may follow at their own pace. This, at any rate, has been the experience in civil law systems with codification. The reasons are complex, but unifying: the need for drastic reform has long been felt; the systems are, in fact, ripe for an overhaul; and the example of one system concentrates the attention of the other on the defects of the existing structure of lawmaking, and inculcates the spirit of competitive progressiveness and reminds the lawmakers of the need to appear concerned about the public good.

I will approach the issue of what the future will be in four stages, as follows:

1. What are the advantages and disadvantages of these individual sources of law when they are working as well as can reasonably be imagined in an age of statutes?
2. What are the advantages and disadvantages of these individual sources as they typically work in the common law world in which we live?

20. "Obstacles to Law Reform", in *Current Legal Problems* (1981), pp. 279 ff. at p. 286 (34). For other authoritative expressions of the ineffectiveness of Parliament as a legislature, see Watson, *Sources of Law*, *supra*, note 6.

21. Justice Burger was adverting to the danger that, after sixteen years of exposing the vast overloading of the Supreme Court, he might be regarded as "crying wolf"; see *Annual Report on the State of the Judiciary*, New Orleans, Louisiana, February 6, 1983, p. 1. He also stated that by now a clear majority of the court had spoken on the issue and that they "are essentially of one mind: that there is indeed a very grave problem and that something must be done"; see p. 9.

3. When these sources of law are working as well as can reasonably be imagined, what would the best combination of them be and what should their respective spheres be, accepting always that, for our purposes, they are conceived of as working in a representative democracy?
4. How fundamental are the solutions to the problems with the sources which are likely to emerge?

Statute law, as it may be imagined at its best in the best possible world dominated by statute law, will systematically set out the rules of a whole branch of law in a way that is comprehensive in dealing with broad issues and is reasonably comprehensible. The rules will give the people affected by them what they want and need as that is determined by the dominant theory in the society (although at times statute will also have an educational function). The rules in the statutes will change with the serious needs and desires of the people affected, but will not be subject to perpetual motion as the result of every sudden change of opinion.²² Stability in law is an obvious virtue, as is the law's responsiveness to social needs.

But what statute cannot do, as has been recognized by the best legislators,²³ is foresee every situation that will arise in practice, make clear provision for every eventuality, and leave no gaps in the law. Two different types of situations will occur which will give rise to dispute regarding the legal rules and which will, if the parties involved press their claims, eventually come before a court: the first is those cases where the statute is not wholly unambiguous and the legal answer has to be sought for, and the second is those cases where the statute simply provides no answer. In at least the second situation, if the court's decision is taken as being authoritative in other similar cases, then the judge is a lawmaker.

Again, in the best possible world judicial precedent will harmoniously reflect what is generally wanted from the law by those affected, it will establish clearly the legal rule which is regarded as being exemplified by the decision, it will pave the way for the constructive development of the law in subsequent cases, and it will be educative for the legislature in that it will indicate trends. But more cannot be demanded from judges than they can reasonably

22. In a fully worked out program, phrases like "serious needs and desires" would require definition.

23. See, above all, Portalis, Tronchet, Bigot-Préameneu, and Maleville, in *Discours préliminaire du premier projet* in the anonymous *Conférence du Code civil I* (Paris: Firmin Didot, at XIII = 1805) p. xxvii.

give. Development by individual precedent cannot be wholly systematic, since the judge is concerned with the case before him. He cannot settle the outlines of a whole institution. Again, whole areas of the law, if left to be settled by precedent, will remain underdeveloped because no one individual has sufficient incentive to pursue the matter before a high enough tribunal.²⁴

Even this short sketch indicates that, as has often been stressed before, the functions and the arts of the legislature and of the judge with regard to lawmaking are different: the legislature lays down the basic framework of the law and the judge fills in the details.²⁵ This is not to deny the importance of good judging or even the enormous significance that an individual decision may have. However, it is the case that legislation proceeds from the broad premise, and judicial precedent from detailed facts. There is a further vital aspect to the different functions and arts. The legislature is not, in theory, bound by what has gone before. With the stroke of a pen, it can create an entirely new branch of the law and can change an entire legal institution; it can also render whole libraries obsolete.²⁶ A judge does not have the same freedom. He is first bound to establish what the law is. Only when he finds that there is no law is he free to go to the next step, accept that there is no law, and hence make law. Yet even here his freedom is limited. He cannot make his decision and justify it just as he pleases. Rather, he is bound by the rules of the game, namely, the tradition of judging. In a very real sense, his justifications are backward-looking. His main arguments are based on analogy (with similar rules or with other legal institutions) and on established authority (within his own system or within another, which must, in its turn, be regarded as acceptable). Even when he innovates law expressly on the grounds of social policy, he will feel bound to explain why appeals to existing analogies or authorities are not appropriate. These alternatives have to be positively excluded before his justification can be deemed acceptable.

A glance here at the famous first article of the Swiss *Code Civil* of 1907 is instructive regarding perceptions of the role of judges:

24. In some circumstances this particular problem may be mitigated by the existence of class actions.

25. Under a different system, where there is little or no legislation, judging may also provide the framework. Yet that process takes a long time and a large number of judges, and systematization is lacking.

26. In practice, the drafters of legislation are bound by their training and knowledge, as well as by their imaginations.

Statute regulates all matters to which the letter or the spirit of one of its provisions apply.

In the absence of an applicable statutory provision, the judge pronounces according to customary law, and in the absence of a custom, according to the rules that he would establish if he had to act as legislator.

He will be inspired by the solutions consecrated by academic opinion and case law.

The judge, then, may have discretion. He may even be able to decide by the rules he would establish if he were acting as a legislator. Yet, he is not given the freedom of legislators here. Rather, he must take academic opinion and case law as his guide, both in this case and in interpreting the wording or spirit of statute or customary law.

It is here, I think, that I detect a weakness in Calabresi's argument. In proposing that in particular circumstances the court should be able to nullify or modify statute law, he writes: "The courts' 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."²⁷ He does admit, though, that the legal landscape and majoritarian support are far from the same. Of course, the court is good at discerning the legal landscape. The function of the judge, and his art, consist of fitting decisions in hard cases into the existing legal landscape. But statute is different, Calabresi continues: it can cause an earthquake which drastically changes the legal landscape, and old though the statute may be,²⁸ the landscape remains changed. The statute need not harmonize with the preceding landscape. The flaw in Calabresi's argument is not so much his correlation of the legal landscape with majoritarian support²⁹ — an assumption that he never attempts to prove — but his claim that as a result of the correlation a court should base its judgment as to the

27. G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982), p. 121.

28. Calabresi is thinking of statutes which have become old.

29. I rather have the impression that Calabresi's choice of terminology — specifically, "fit the legal landscape" — causes some imprecision. He cannot mean that the statute in question is no longer in force because it is inconsistent with the rules set out in a subsequent statute. He seems to mean, if I read him correctly, both that the statute could no longer be passed and that it is inconsistent with the "spirit" of the people.

validity of the statute on the test of whether it fits the legal landscape.³⁰

There is a sad divergence from the ideal in the three common law countries we are considering. In all of them the following three points are well recognized: statutes remain in force long after they cease to correspond to what the populace or the leaders need or want; the law is often contained in a number of statutes, since new legislation frequently does not expressly abolish the old (which remains in force insofar as it is not inconsistent with the new legislation); and legislation is often confused, partly because of poor draftmanship, partly because of clauses inserted to achieve compromise, and partly because of alterations that were made as the bill was passing through the legislature. Such defects in American legislation are the starting point for Calabresi's appeal for reform, and English authorities have long been loudly vocal about the failings in their system.³¹ With regard to Canada, Samuel Freedman, once Chief Justice of Manitoba, said when discussing the difficulties of law reform by the courts that "another line of thinking says, 'leave it to the legislature.' But action from that source is an uncertain thing; legislative time is notoriously limited, and reform, therefore, may not come."³² What is significant about this statement is the tone, (for everyone knows reform may not come from the legislature).

But the courts are not in any better shape. Warren Burger stresses the overwork of the Supreme Court. I would point to the difficulties — which in theory, at least, are insurmountable — of finding the ratio decidendi of a case when, as is usual, the judges do not declare it. I would also point to the flexibility and frequent injustice caused by stare decisis.³³ To the extent that stare decisis is not absolute³⁴ and judges do not declare their ratio decidendi, ambiguity and uncertainty result. The sorry shape of statute and precedent for lawmaking today, which is not caused by any absence of talent, need not be insisted on further.

30. See, for example, A.J. Mikva, *Review of Calabresi* (1982) Harvard Law Review 96, pp. 534 ff. at p. 540.

31. See those cited by Watson, *Supra*, note 6.

32. *Continuity and Change — a Task of Reconciliation* (1973) University of British Columbia Law Review 8, pp. 209 ff. at 212.

33. *Supra*, note 6.

34. See, for example, G.F. Curtis, *Stare Decisis at Common Law in Canada* (1978) 12 University of British Columbia Law Review, pp. 1 ff.

The heart of the issue for good lawmaking in an age of statute — and it is also the heart of the question of whether one will be able in the near future to say that American, Canadian, and English law belong to the same legal family — lies, I believe, in the relationship between lawmaking by the legislature and lawmaking by the courts. This, I believe, was perceived by Calabresi, who wished that the courts would, in certain circumstances, be able to overrule statutes even without declaring them unconstitutional.³⁵ This, however, is to misconceive the relationship between lawmaking by statute and lawmaking by judicial decision, a relationship which I believe is inherent in the nature of legislation and precedent. The point and the art of legislation is to lay down the broad rules of the law systematically and to establish the social principles that are regarded as desirable. The point and the art of judicial decision when faced with a statute — which, in an age of statute law, is most of the time — is to determine the result in a particular, narrowly defined, factual situation and *in accordance with the statute*. The judge must interpret the statute; in other words, the statute is supreme. It is not necessary here to raise the issue of whether it is proper for a judge, who is not popularly elected, to go against the will of the popularly elected legislature. The supremacy in law of statute over judicial decision-making remains in a democracy, in an oligarchy, in a monarchy, and even in a tyranny.³⁶ Even when a court declares a statute unconstitutional, this relationship between legislature and court is unaltered; the court is merely declaring that the statute is inconsistent with higher legislation. In an age of statutes, both judges and legislators make law, but they do not make it in the same way or even in the same sense. Specifically, judge-made law is subordinate law.³⁷

35. See Calabresi, note 27.

36. This is so in legal theory. But, of course, in practice a judge's decision may be morally superior to the statute he is supposed to be interpreting, and at times a judge may be morally bound not to follow a statute.

37. Any other solution invites confusion. For instance, it might be argued that in a democracy a judge (especially one who is elected) should not follow legislation which could not be passed in the circumstances prevailing at the time of his judgment. But even the most recent legislation would then be in question because the members of the present legislature responsible for the legislation would not all be re-elected if the election were held on the day of the judgment. Similarly, the judge could not even rely on previous judgments, not even his own. Indeed, he should not even have the right of judging unless it were certain he would be re-elected at the time of judgment. In addition, there is the problem that the judge

The crux of this issue lies in the phrase “in accordance with the statute.” That phrase can only mean “following the spirit of the statute,” which in turn can only mean “in accordance with the intention of the legislature.” Let us leave aside the practical difficulty of establishing precisely what the legislature’s intention was. Let us also treat as of limited significance the issue of a factual situation arising which the legislature just did not foresee. In this last situation, one can say (if one leaves aside the practical difficulties) that the judge has to decide in accordance with the perceived spirit of the statute.

For a judge to interpret a statute rationally, he must follow the intention of the legislature; any other procedure means that he is stealing supremacy from the legislation and that he is acting arbitrarily. Yet, rationality requires that he also achieve a result which, on balance, is more desirable than any other decision, based on the consequences it will have for the litigants.³⁸ Often the judge just cannot do this, as Calabresi, for instance, is aware. The two tests for achieving rationality may conflict in practice. It may be rational to say that to find the intention of the legislature the judge must primarily study the wording of the statute, but it is not rational (though it may be reasonable in the circumstances, since the judge must reach a decision) to say that the wording is to be interpreted according to a meaning that could reasonably be attached to the wording today. Such an approach would deny validity to the intention of the legislator. In the case of old legislation where the original intention of the legislature is inappropriate today, there is no way that a judge can interpret the statute rationally. Theoretically, it is impossible in existing circumstances to construct a sensible theory of interpretation of statute because one has to say, first, that the intention of the legislature has to be followed, second, that this remains true even when the old intention of the legislature is no longer appropriate, and third, that the decision has to be appropriate to the current social context.

The impossibility of formulating a satisfactory theory of the interpretation of statute is very easily demonstrated when we look at

might not be able to determine which solution would command majoritarian support. The result is the end of law in the sense of definite rules which provide a standard.

38. See, for example, R.A. Wasserstrom, *The Judicial Decision* (Stanford: Stanford University Press, 1961) et. seq.

the attempts of civilians for whom legal theory is much more important. As a typical example, I have chosen the following quotation of Francisco Bonet Ramón, both because of his authority as a law professor and as judge of the Supreme Court of Spain and because of his clarity: "Interpretation is the mental operation by which we grasp the meaning and scope of the rule. According to the subjective theory, the meaning of the statute equals, no more no less, the intention of the legislator who sanctioned it. According to the objective theory, the meaning of the statute is not the intention of the legislator, but the intention of the statute considered objectively as a substantive being endorsed with its own strength. The informing principle is that the social life should not submit to the result of juridical principles and theory but those principles and that theory must adapt themselves to the needs of life. Though the law remains unchanged in its literal expression, the interpreter can give it a different value, the conditions of the time in which it was formulated were one thing, and the social interests which determine it and the needs for which it must provide are another."³⁹ One must honor and respect those who formulate such a theory in order to obtain satisfactory results in practice, but one must also believe that they are forced to create an artificial theory of objective intention which has no inherent validity. First, a statute is an abstract creation of the human mind. It does not exist as a sentient being and can have no intention. Second, the artificiality of the approach is demonstrated by the argument for it, namely, that "social life should not submit to. . . juridical principles and theory." It is being admitted, in other words, that juridical principles and theory do not point to the correct decision. Third, conditions have changed, but the words of the statute were chosen deliberately, we presume, to give effect to the intention of the legislator. If that intention is to be flouted, why should the interpreter be stuck with the wording of the statute (expressing the intention) which may, for present conditions, be obviously and outrageously inappropriate? It is obviously theoretically absurd that the judge has to give a new meaning to words, a meaning which the words often cannot bear without considerable ingenuity and straining of terms. Thus, the rhetorical question asked above uncovers both the theoretical and the practical

39. *Código Civil comentado* on art. 6 (2nd ed., Madrid: Aguilar, 1964) p. 39.

reason for the rule that the judge cannot alter the wording of a statute: if he did, he would cease to be an interpreter for the individual case and would become a legislator issuing general rules.

The issue is clear. A judge cannot rationally interpret a statute unless he uncovers and follows the intention of the legislator. That is a *sine qua non* of rational interpretation, yet it is not enough. The decision must also be better for the parties involved than any other decision. Hence, in an age of statute the starting point of rational judging must lie in satisfactory statutes.

In practice, too, it is often impossible for a judge to decide a case rationally. The starting point of radical reform of the common law systems must lie in a new approach to statute-making that will ensure that statute law is kept up to date and relatively certain. In addition to enabling judges to reach decisions rationally, this scheme should reduce the ambiguity of the law and reduce the case load of judges.

But in this new world, judges will have another task imposed on them: they will be expected to set out as an abstract proposition the rules or principles of law on which they base their decisions. At present, it is the task of the judges hearing subsequent suits to determine the *ratio decidendi* of previous cases. There is, no doubt, a practical reason for this. It may be felt that a judge deciding a case which introduces new features cannot determine exactly what rules or principles ought to be applied in these and in subsequent, as yet unforeseen, circumstances. The practical fear is reasonable, since a rigid statement in the instant case of its *ratio decidendi* may, if precedents are binding and are treated rigidly, lead to an unfortunate line of development. However, a solution might be to regard precedent not as binding, but as highly persuasive, and then to demand that the decision be set out as a legal rule. This would give flexibility, yet would provide for greater clarity in the law and, I believe, more certainty.⁴⁰

Technically, it would not be difficult to achieve a radical reform of the sources of law in an age of statutes, and I have elsewhere set out my proposals on how this should be done with regard to Scotland.⁴¹ What precisely these are is not important here. Rather,

40. *Supra*, note 6.

41. *Supra*, note 6. The proposals would require considerable modification before they could apply to a federation.

what matters is that it be recognized that drastic reform, if it is to come, must begin with the way statute is made and kept up to date.

At the very least, it would be easy, given the existence of computers, to insist that when legislation is required on any subject, it cover the whole of that subject, replace all existing legislation, and be free from all internal inconsistency (even that which may be introduced during the passage of the bill). If, following on such, judgments also expressly set out the propositions of law on which the decisions were based, the law would gain further clarity.

If such radical reform of statute and precedent occurred even in all of the common law jurisdictions, then the remaining restricted unity of the common law tradition would be largely ended for three reasons. First, a large part of what unity there is derives from history. I do not mean that the legal rules are the same in the various jurisdictions. Rather, many of the rules have a common origin which still influences the understanding of them, even if they have come to diverge from one another in the different jurisdictions. Second, in the different jurisdictions it was claimed that the legal tradition itself is of great importance for developing the law. Yet, of the forms of lawmaking in the Western world, it is legislation that is the most radical and the least dependent on the tradition. Furthermore, if all legislation is treated as a new beginning in its field, there is no reason, within the tradition, why the law of Nova Scotia would remain closer to that of England and more distant from, say, that of France. Similarities will persist, of course, because of shared social, economic, and political circumstances; nevertheless, there is no reason why the law of Nova Scotia might not come to approximate that of Norway, rather than that of Pennsylvania.⁴² Third, there is the fact of the existence of a written constitution in the United States and Canada, and the absence of one in England. Since supremacy of statute for lawmaking does not establish a shared tradition, differences in approach to legislation and judicial decision-making become decisive.

But codification, which was a drastic reform of the sources of law in the civil law systems, did not end the shared tradition in those systems. Justinian's *Corpus Juris Civilis* was the organizing instrument before codification; once codification was introduced,

42. Another reason for having similar rules is cooperation, especially in commercial and industrial matters.

the universal model, either directly or indirectly, was *Justinian's Institutes* (with the sole exception of the *Allegemeines Landrecht für die Preussischen Staaten* (1794)). Hence, the shared tradition continued after codification, but on a different basis. It might be suggested that drastic reform of the sources of law in the common law systems would not end the unity. This may be so, but I am doubtful. One of the fundamental differences between civil law and common law systems is precisely that the latter have no shared organizing instrument, although they do have common historical roots. Only if the restructured law of the first common law system to engage in drastic reform of the sources was itself to become the organizing instrument would there be the possibility of a continuing shared tradition.

I think that we should not be so pessimistic about the demise of the shared common law tradition. For satisfactory lawmaking in the common law systems, drastic reform of the sources of law is needed, a reform that will also end the shared common law tradition. Reform will come, but I am almost sure that it will not be drastic. Law exists and flourishes not only in the practical world, but also at the level of ideas, as part of culture. On the cultural level, it operates on the population at large, on lawyers in general, and on the lawmakers. As culture, it impinges most directly on the lawmaker and, moreover, legal change must be mediated through the culture of the lawmakers. But the more that something is part of a culture, the more resistant it is to change and the more hostile the reaction of the members of the group will be to suggestions of change. Finally, the means for creating law are more deeply embedded in the culture than are the individual rules.⁴³ In particular, a change of the kind I have suggested would require of legislators that they give up some of the power they currently have to make laws just as they please and it would rob the judges of some of their role as creators of law. It is significant that neither Burger nor Calabresi, in stressing the need for reform, urge the need to reform the practice of Congress; nor does Hailsham produce a plan for the practical reform of the British Parliament. There is also no strong drive among legislators for reform. The last lesson of history that will be offered in this paper is that usually only someone who is largely outside of the culture can push aside its impact on himself

43. See Watson, *supra*, note 3, pp. 1156.

and be free from the pressures of his legal peer group to the extent needed for drastic reform. Indeed, reform of the sources of law is usually a sideline, almost a by-product of the person's enormous energy and drive: to wit, the efforts for the reform of codification practices made by Lipit-Ishtar, Hammurabi, Moses, Justinian, Alfonso X, Frederick the Great, Napoleon, and Ataturk. The political systems of Canada, the United States, and England, as they presently exist, do not give scope to such a person.