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# THE CONSTITUTIONAL COURT: A BULGARIAN RESPONSE TO OBSOLESCENT LAW

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It is essential to understand that while the Bulgarian Constitution of 1991 provides a social structure that represents a quantum leap from the stagnation of the Communist era of Todor Zhivkov, many of the most progressive and democratic ideals of that document have yet to be fully implemented, due in part to the economic situation and the inability of the legislature to pass needed legislation. As is true with any State in transition, circumstances may change rapidly, therefore the article reflects information understood to be accurate as of the time it was written. Any errors or omissions are the sole responsibility of the author.

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## I. INTRODUCTION

We live in an age of reactive lawmaking, a time where statutory responses to societal ills create an increasingly complex network of legislation lacking the evolutionary qualities associated with classical common law theory. The question arises, how are we, as a nation rooted in the common law tradition, going to deal with positive law that grows obsolete, even counter-productive to the laudable goals it possessed when newly passed? Guido Calabresi, in his seminal work, *A Common Law for the Age of Statutes*,<sup>1</sup> identifies the problem of outdated statutes which are outside what he terms the "legal landscape",<sup>2</sup> examines various methods of legislative reconsideration of dated laws,<sup>3</sup> and suggests a judicial means by which courts may deal with statutes in much the same way they treat common law.<sup>4</sup>

This paper considers proposals made by Dean Roscoe

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1. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Guido Calabresi, formerly Dean of the Yale Law School, was appointed by President Clinton to the Second Circuit in 1994.

2. *Id.* at 21, n.18. "That a statute is out of phase neither entails nor requires that the statute be old, in terms of the number of years since its enactment. Rather, a statute is out of phase when it no longer fits with the legal landscape . . . ."

3. *Id.* at 16 (court's use of Alexander Bickel's "passive virtues" theory to prompt legislative review); at 59-62 (legislative "sunsetting" or predetermined periods of statutory validity); at 63 (use of joint legislative/executive review commissions); at 63-64 (advisory law commissions as proposed by Judge Cardozo).

4. *Id.* at 82.

Pound,<sup>5</sup> Judge Henry Friendly,<sup>6</sup> and Justices (then Judges) Benjamin Cardozo,<sup>7</sup> and Ruth Bader Ginsburg<sup>8</sup> for a body which would be authorized to consider problematic legislation and surveys both state<sup>9</sup> and federal law revision panels.<sup>10</sup> It then examines the experience of the Bulgarian Constitutional Court, a judicial body created by the post-Communist Bulgarian Constitution<sup>11</sup> to rule on the compatibility of domestic legislation and international legal obligations with the Constitution.<sup>12</sup> Finally, this paper

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5. Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC'Y 142 (1919).

6. Henry J. Friendly, *The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

7. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

8. Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995 (1987).

9. *See, eg.*, CAL. GOV'T CODE § 8289 (Deering 1992) California Law Reform/Law Revision Commission authorized to:

(a) Examine the common law and statutes of the state and judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms . . . (c) Receive and consider suggestions from judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law. (d) Recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into harmony with modern conditions.

10. 2 U.S.C. § 285b (1993).

11. BULG. CONST. ch. 8, art. 147-52 (DV No. 56, July 13, 1991). Note: "DV" is a citation abbreviation for "DURZHAVEN VESTNIK" (State Gazette). Under Bulgarian law, positive law is required to be published in DURZHAVEN VESTNIK within 15 days of its passage by the legislature. *Id.* at ch. 3, art. 88(3).

12. *Id.* at art. 149(1-4).

considers the viability of using such a body in the United States as a means of contending with statutory anomalies existing outside Calabresi's "legal landscape."

## II. STATUTORY OBSOLESCENCE

### A. *The Problem Identified*

Guido Calabresi identified a fundamental shift within the framework of American law, a movement away from the evolutionary, judge-made common-law toward a greater reliance on statutory pronouncements. To Calabresi, the traditional common law represented an organic process of principled decision-making on the part of an educated judiciary. The changes in the law were incremental, and developments in the law were the result of a gradual series of decisions by individual judges driven by given facts within a societal context.<sup>13</sup> Statutes were so infrequent that dated legislation remained on the books with very little detrimental effect to the corpus of law.<sup>14</sup>

As the Roosevelt administration crafted new and more minutely detailed legislative initiatives as part of its New Deal, America became increasingly attracted to statutes. The specificity of these statutes drafted in response to the unprecedented economic pressure of the day was in marked contrast to the earlier, more generalized examples of legislation, and New Deal era legislation was ultimately accepted by later generations of lawmakers as the legislative norm.<sup>15</sup>

The very detailed nature of these laws, which enabled them to deal effectively with pressing social need, creates a problem of

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13. CALABRESI, *supra* note 1, at 4.

14. *Id.* at 4-5.

15. *Id.* at 5.

obsolescence.

When these laws were new and functional, so that they represented in some sense the majority and its needs, the change presented few fundamental problems. Soon, however, these laws, like all laws, became middle-aged. They no longer served current needs or represented current majorities. Changed circumstances, or newer statutory and common law developments, rendered some statutes inconsistent with a new social or legal topography.<sup>16</sup>

As a realistic proposition, a legislature finds it much easier to pass a law than to take steps to ensure its continuing validity,<sup>17</sup> while rapid developments in our society serve to render reactive legislation obsolete at a faster pace.<sup>18</sup>

Calabresi speaks of a broad "legal landscape" made up of both case law and statutory pronouncements.<sup>19</sup> Laws are consonant with this legal landscape when they are in conformity with the underlying principles of its legal framework.<sup>20</sup> This internal consistency is one of the virtues of the gradual process of

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16. *Id.* at 6.

17. *Id.*; see also Friendly, *supra* note 6, at 792. "What I do lament is that the legislator has diminished the role of the judge by occupying vast fields and has failed to keep them ploughed . . . [I]t matters very much if legislators, having gone so far as to stunt the law-creating role of judges, fail to keep on creating law themselves."

18. CALABRESI, *supra* note 1, at 133.

19. *Id.* at 98. Elements of the legal landscape include common law decisions, legislation, "scholarly criticisms" derived both from legal and extra-legal sources such as philosophy and economics, jury decisions, and administrative rulings. *Id.*

20. *Id.* at 6.

common law.<sup>21</sup> Statutes, on the other hand, because of their quality of immediacy, may represent a conscious decision on the part of the legislature to break with prior treatment of an issue.<sup>22</sup> Such legislation is the product of the will of the people through majoritarian support of a legislative initiative.<sup>23</sup> It is therefore possible to have a statutory pronouncement which represents an abrupt shift in the law, lacking other statutes or decisions which are based upon its rationales.<sup>24</sup> In time, the "gravitational pull" of the statute will cause the legal landscape to conform to it,<sup>25</sup> or the statute may remain a legislative oddity, a law with seemingly little effect on jurisprudence.<sup>26</sup> To Calabresi, even the latter is acceptable so long as the lone statute retains majoritarian support.<sup>27</sup>

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21. *Id.* at 103. Indeed, to Calabresi, because the common law changes gradually over time in response to changing societal forces, it may, at any given time, be more reflective of majoritarian will than is a statute. *Id.*

22. *Id.* at 132. "[A] newborn statute may be the result of . . . overreaction to a particular set of events, or a legislative response to a temporary majority at war with more persistent societal views." *Id.*

23. *Id.* at 55. "When a legislature does act and its actions result in statutes, it is fair to assume that, at least for a time, the differences, preferences, and inconsistencies it ordained are desired by the governed and are legitimate." *Id.*

24. *Id.* at 44. Calabresi suggests that much of the New Deal legislation was a reaction to the economic crises of the day with little regard for the long-term effect of these statutes. It was at this juncture that Calabresi feels that perhaps the separation of powers doctrine was weakened due to political necessity and the popularity of President Roosevelt. *Id.*

25. *Id.* at 107-108.

26. *Id.*

27. *Id.* at 6-9.



It is where the statute no longer commands majoritarian support, and is dissonant with the legal landscape-or was never a part of the legal landscape-that Calabresi maintains the statute inhibits the legal process.<sup>28</sup> Such statutory anomalies, while lacking majoritarian support, are seldom revised or discarded, either through legislative inertia or the lingering political force of special interest groups.<sup>29</sup> These statutory relics, while perhaps just and equitable when current, remain on the books, forcing courts to resort to a variety of common law discretionary doctrines when faced with hard cases.<sup>30</sup> Calabresi is critical of such methods, particularly the resort to constitutional adjudication as a means of dealing with statutory obsolescence.<sup>31</sup> Calabresi argues that:

[J]udicial use of constitutional adjudication to replace obsolete laws does not return us to the traditional judicial-legislative balance. Once the courts have modified or invalidated a statute on constitutional grounds, they have done much more than act in an area of legislative inertia. If the court's aim is only to update in an area of inertia, and if they are wrong in their judgment that a statute which does not fit the legal fabric no longer has majoritarian support, their use of constitutional

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28. *Id.* at 9. Calabresi maintains that when a court is confronted with such a "legislative anachronism" which is "dead, in both a majoritarian and consistency sense, even though it retain[s] some sting" that it does a favor to itself, the parties, and the legislature by striking down the statute.

29. *Id.* at 6.

30. *Id.* at 16. Such judicial devices include doctrines such as delegation of powers, void for vagueness, desuetude, and *cessante ratione legis, cessat et ipsa lex* (the reason for the law ceasing, the law itself ceases).

31. *Id.* at 12-14.

adjudication makes legislative correction of their mistake impossible.<sup>32</sup>

To Calabresi, the repeated use of constitutional doctrines such as equal protection weakens the adjudicative process resulting in accusations of judicial activism and counter-majoritarianism.<sup>33</sup>

Calabresi instead sees a need to prompt the legislature to take a "second look" at statutes in order to assure their continued viability.<sup>34</sup> He rejects the use of purely administrative agencies, that quintessential New Deal body of "scientific experts," as becoming too closely identified with the legislation to be able to objectively view the fit of the statute within the legal landscape,<sup>35</sup> and he asserts that, as a practical matter, agency independence is always suspect due to the political pressures of the Congressional budget process.<sup>36</sup>

"Sunsetting," or the mandatory reconsideration of a bill after a fixed period of years, is a popular form of legislative review, although Calabresi rejects it as an ultimate solution for statutory obsolescence. To Calabresi, the age of a statute *per se* is not indicative of the viability of a statute having continued majoritarian

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32. *Id.* at 11.

33. *Id.* In fact, the use of the equal protection doctrine is often an exercise in perspective. What is equality depends on the viewpoint of the observer. See BERTRAND RUSSELL, AN OUTLINE OF PHILOSOPHY 157-66 (Meridian ed. 1963) (1927) (discussing objectivity and subjectivity).

34. CALABRESI, *supra* note 1, at 19. The purpose of the "second look" is "to force majoritarian bodies like legislatures to face the issues and state openly whether or not they intend to abridge what, over time, had become near-constitutional guarantees." *Id.*

35. *Id.* at 46-53.

36. *Id.* at 53-54.

support.<sup>37</sup> Furthermore, in a context of widespread sunseting regulations, the legislature would be tempted to reapprove old laws *pro forma* without true reconsideration.<sup>38</sup>

In addition, Calabresi dismisses the effectiveness of law revision commissions such as those proposed by eminent jurists like Cardozo as being overly restricted by their legislative mandate. Calabresi argues:

This limited focus of the commissions in the past is no accident and makes it unlikely that they could perform differently now. They are not elected or responsive to an elected body; neither can they claim that their subservience to principle and precedent gives them the legitimacy traditionally accorded to judicial actions. For these reasons they have been given no authority to do more than recommend changes. And nothing can destroy the force of such recommendations as to have them systematically ignored.<sup>39</sup>

Calabresi sees little possibility that requisite authority would be given to such a body and, absent the granting of both the power and authority of a real court, there would be little incentive to resort to such a commission.<sup>40</sup>

Calabresi views such legislative and executive review commissions as performing essentially judicial functions when making principled decisions regarding the fit of a given statute

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37. *Id.* at 21, n.18.

38. *Id.* at 59-62.

39. *Id.* at 64.

40. *Id.* at 63-4.

within the legal landscape.<sup>41</sup> The assignment of new judicial functions to bodies outside the normal judicial system is more in keeping with European than American practice.<sup>42</sup> Similarly, Calabresi rejects the concept of a constitutional court as the body most able to determine the continued viability of an aging law.<sup>43</sup> He states that nomenclature notwithstanding, placing a continued pressure on a non-judicial body to review laws causes it to behave more and more like an actual court:

[I]n many countries, constitutional court judges are appointed in ways very different from ordinary judges, and the constitutional court is not part of the ordinary trial or appeal court system. It remains a judicial body nevertheless because its functions are judicial . . . What is ironic about some of these suggestions for noncourt reviewing bodies is that the suggestions then try to make the body function more like a court (i.e., more judicially) in order to perform the reviewing function well. In short, this sort of suggestion ends up seeking a body that is fundamentally judicial in function, if not in description.<sup>44</sup>

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41. *Id.* at 63. Commissions which make principled reviews of statutes are fulfilling an essentially judicial function.

42. *Id.*

43. *Id.* at 112, n.82.

44. *Id.* (internal citations omitted).

## B. *The Calabresian Solution: "A Useful Step"*

Calabresi's solution is to permit judges to treat statutes in "precisely the same way that they treat the common law."<sup>45</sup> They would be able to modify the application of a statute to suit a given set of facts or to entirely abandon a statute when the justification for it no longer exists.<sup>46</sup> To Calabresi, judges are ideally suited to this role, and

[t]he moment one accepts the legal fabric as an acceptable starting point, because it reflects the values of a people, it becomes easy to understand why a legal system might give the power to make conditional or temporary rules to people who by training, selection, and relative independence are reasonably adapted at discerning that framework and its changes.<sup>47</sup>

Such judicial power would either permit the judges themselves to make questionable legislation adhere to the legal landscape, or by the actual or threatened exercise of judicial authority induce legislatures to act in determining continued majoritarian support and legislative viability.<sup>48</sup> Calabresi challenges us by asking: "[i]f there is a fabric of the law that defines, justifies, and delimits judicial lawmaking, if statutes are a part of this total fabric of the law, and if courts are to perform their role of treating like cases alike, why should they fail to exercise

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45. *Id.* at 82.

46. *Id.*

47. *Id.* at 98.

48. *Id.*

common law powers over statutes?"<sup>49</sup> Calabresi recognizes that his identification of the problem of statutory obsolescence and a proposed common law solution constitutes a "useful step" requiring further development to become viable in practice.<sup>50</sup>

### C. *Criticisms of Calabresi's Theory*

Scholars have criticized Calabresi's book as a "romantic view of the common law judicial artist",<sup>51</sup> which is "remarkably casual in addressing some of the practical, as well as constitutional, objections that his proposal inevitably raises."<sup>52</sup> Questions arise of federalism,<sup>53</sup> separation of powers,<sup>54</sup> and the ease with which judges could "conjure up material for rationalizing blatantly dishonest decisions under Calabresi's new doctrine."<sup>55</sup> Moreover, real world judges would be faced with a difficult task in determining what constitutes Calabresi's "legal landscape."<sup>56</sup>

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49. *Id.* at 89.

50. *Id.* at 3.

51. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 217 (1983).

52. *Id.* at 222.

53. *Id.* at 222, n.31.

54. *Id.* at 245. Calabresi's premise is based upon communication between the judicial branch and legislatures or regulatory agencies. CALABRESI, *supra* note 1, at 166.

55. *Id.* at 253.

56. *Id.* at 225-27.

### III. LAW REVIEW COMMISSION: AN AMERICAN APPROACH

Guido Calabresi was not unique in his recognition of the need to periodically reevaluate laws in a contextual perspective. Judges such as Benjamin Cardozo,<sup>57</sup> Henry Friendly,<sup>58</sup> and Ruth Bader Ginsburg,<sup>59</sup> along with noted legal scholars such as Roscoe Pound<sup>60</sup> have set forth proposals aimed at updating the laws. The result has been the creation of state law revision commissions<sup>61</sup> which have operated with varying degrees of success.

#### A.      *Roscoe Pound and "Anachronisms in the Substantive Law"*

Roscoe Pound, in a 1919 address to the American Judicature Society, spoke of "anachronisms in the substantive law" which were a result of common law adjudication.<sup>62</sup> He recognized a need for the creation of a "ministry of justice" to survey the law in order to identify areas needing improvement. Pound specifically asserted that

[w]e need a body of men competent to study the law and its actual administration functionally, to ascertain the legal needs of the community and the

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57. See Cardozo, *supra* note 7.

58. See Friendly, *supra* note 6.

59. See Ginsberg, *supra* note 8.

60. See Pound, *supra* note 5.

61. See, e.g., N.Y. LEGIS. LAW §§ 70-72 (Consol. 1993).

62. Pound, *supra* note 5, at 146.

defects in the administration of justice not academically or *a priori*, but in the light of everyday judicial experience and to work out definite, consistent, lawyer-like programs of improvement.<sup>63</sup>

Pound's Ministry of Justice conception was in many ways the spiritual precursor of Calabresi's "judicial artist" surveying the "legal landscape" for statutory obsolescence.<sup>64</sup> Pound further argued for an advocate to fill the role of Minister of Justice, and that

[i]t would be his responsibility to see to it that the law in general and, as a whole, not in particular cases, was a means of furthering justice, to prepare legislation on the basis of critical, scientific study, to watch the law and the operation of legal and judicial machinery, locating leaks and diagnosing defects, and to find the means to stop and remedy them.<sup>65</sup>

It would, however, take the influence of Judge Cardozo and the creation of the New York Law Revision Commission for Pound's vision to become reality.

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63. *Id.*

64. CALABRESI, *supra* note 19.

65. Pound, *supra* note 5, at 147.



**B.      *Benjamin Cardozo: A Ministry of Justice***

Judge Cardozo, acknowledging the work of Roscoe Pound,<sup>66</sup> spoke of the problems associated with antiquated laws<sup>67</sup> and called for the creation of an impartial body charged with "view[ing] the field [of law] in its entirety"<sup>68</sup> in the determination of the continued vitality of a given rule of law. Recognizing the concept's European antecedents,<sup>69</sup> Cardozo saw the body fulfilling a primarily advisory role, namely, that of informing both the public and the legislature of the need to change an outdated or inconsistent law. This communication leaves the final decision on the law up to a majoritarian legislature.<sup>70</sup>

Cardozo observed that courts and legislatures traditionally operate "in proud and silent isolation" from one another.<sup>71</sup> The legislature, not aware of the practical problems of their laws on the courts "patches the fabric here and there, and mars often what it would mend."<sup>72</sup> To Cardozo, the solution would be the creation

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66. Judge Cardozo wrote that the concept of a ministry of justice "has been developed by Dean Pound with fertility and power." Cardozo, *supra* note 7, at 114.

67. *Id.* at 118. Cardozo cited to Pinnel's case, 5 Coke 117 and Dumpor's case, 2 Coke 119 as examples of common law which "maintain a ghostly and disquieting existence in the ancient byways of the law." *Id.* at 118, n.13, 14, and accompanying text.

68. *Id.* at 119.

69. *Id.* at 114. "In countries of continental Europe, the project has passed into the realm of settled practice." *Id.*

70. *Id.* at 125.

71. *Id.* at 114.

72. *Id.* at 113-114.

of a specialized commission, a "ministry of justice" authorized to

view the field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule working in its working, and not, as judges watch it, in its making, and who viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion.<sup>73</sup>

Cardozo proposed an inter-disciplinary,<sup>74</sup> formalized agency which evaluates current law drawing from diverse sources including scholarly legal treatises, social science journals and foreign law, *inter alia*.<sup>75</sup> Ultimately, Cardozo concluded that in order for a ministry of justice to prove effective, its mandate must be specific, and its goal defined in terms of bridging the communications gap between the courts and legislatures:

Doubtless, there will be a need to guard against the twin dangers of overzeal on the one hand and of inertia on the other - of the attempt to do too much and of the willingness to do too little. In the end, of course, the recommendations of the ministry will be recommendations and nothing more. The public will be informed of them. The bar and others

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73. *Id.* at 119.

74. *Id.* at 124. "There should be representatives, not less than two, perhaps even as many as three, of the faculties of law or political science in institutes of learning. Hardly elsewhere shall we find the scholarship on which the ministry must be able to draw if its work is to stand the test. There should be, if possible, a representative of the bench; and there should be a representative or representatives of the bar."

75. *Id.*

interested will debate them. The legislature may reject them. But at least the lines of communication will be open.<sup>76</sup>

Drawing on Judge Cardozo's concepts, in 1934, the state of New York created the Law Revision Commission<sup>77</sup> "for the purpose of discovering defects and anachronisms in the law and recommending needed reforms."<sup>78</sup> Early successes included reforms of the laws governing contributory negligence and criminal extradition.<sup>79</sup> The Law Revision Commission was later instrumental in prompting revisions of the 1951 text of the Uniform Commercial Code.<sup>80</sup> At present, thirteen states and the District of Columbia have some form of law revision commission.<sup>81</sup>

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76. *Id.* at 125.

77. Bernard L. Shientag, *A Ministry of Justice in Action: The Work of the New York State Law Revision Commission*, 22 CORNELL L. Q. 183, 184 (1937).

78. N.Y. LEGIS. LAW § 72 (Consol. 1993).

79. Shientag, *supra* note 77, at 186.

80. JAMES J. WHITE and ROBERT S. SUMMERS, Introduction to the Second Edition of *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 4, at 11 (2d ed. 1980).

81. Jurisdictions having some form of law review commission include Alabama, ALA. CODE § 29-8-1 (1993); California, CAL. GOV'T CODE § 8289 (Deering 1993); Connecticut, CONN. GEN. STAT. § 2-85 (1992); the District of Columbia, D.C. CODE ANN. § 49-402 (1992); Florida, FLA. STAT. Ch. 13.90 (1992); Louisiana, LA. REV. STAT. ANN. § 24:201 (West 1992); Michigan, MICH. COMP. LAWS § 4.1401 (1992); New Jersey, N.J. REV. STAT. § 1:12A-1 (1992); New York, N.Y. LEGIS. LAW § 70 (Consol. 1993); Oregon, OR. REV. STAT. § 173.315 (1991); Rhode Island, R.I. GEN. LAWS § 22-11-3.4 (1992); Tennessee, TENN. CODE ANN. § 3-12-101 (1993); Washington, WASH. REV. CODE § 1.08.025 (1991); and Wisconsin, WIS. STAT. § 13.93 (1991-92).

C. *Henry J. Friendly: The Prevalence of Statutes*

Judge Henry J. Friendly, writing over forty years after Cardozo,<sup>82</sup> recognized that the problems facing judges had shifted from obsolete common law to a surfeit of statutes.<sup>83</sup> To Friendly, a legislature, with its ability to find facts independent from those of individual litigants, to not feel bound by strict *stare decisis*, and to be responsive to the popular will, possesses distinct advantages over traditional common law development.<sup>84</sup> Nevertheless, the increased reliance on statutory law limits the ability of judges to deal with defective statutes.<sup>85</sup>

Friendly identified two defects in statutes: 1) those statutes that "literally [say] something that [the legislature] probably did not mean,"<sup>86</sup> and 2) the more common problem of "rather detailed statutes-that are ambiguous and are left so for decades."<sup>87</sup> Efforts by courts to correct the problem results in the criticism that of courts rewrite statutes the public should be able to rely on. Friendly observed that "rectification of error does not appear to

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82. See Friendly, *supra* note 6.

83. *Id.* at 789-90. "Vast areas once the province of judges have been enclosed by the legislature." *Id.* at 790.

84. *Id.* at 791-92.

85. *Id.* at 792. "[Friendly's] criticism is directed . . . at cases in which the legislature has said enough to deprive the judges of power to make law even in such subordinate respects but has given them guidance that is defective in one way or another, and then does nothing by way of remedy when the problem comes to light." *Id.*

86. *Id.* at 792.

87. *Id.* at 793.

enjoy a high priority on legislative calendars."<sup>88</sup>

Citing to the successes of the New York Law Revision Commission,<sup>89</sup> Friendly posited a federal law revision committee attached to the legislature.<sup>90</sup> Unlike Cardozo's inter-disciplinary model, Friendly's proposal relied on legal professionals, the chair and ranking minority member of the Judiciary Committees of the House and Senate, a federal judge as chairman, and others "drawn from the ranks of legal scholars, retired judges, and lawyers who have attained the age where such public service is more attractive than continued professional success."<sup>91</sup>

Friendly's proposed committee would be designed to study laws and recommend changes to the appropriate legislative committee, which "ought to welcome an agency that would aid them in the politically unrewarding task . . . of the 'petty tinkering of the legal system which is necessary to keep it in running order.'"<sup>92</sup> This federal law revision committee "would have a passion, if not for anonymity, at least for the background,"<sup>93</sup> and would maintain a retentionist bias toward borderline statutes.<sup>94</sup> Despite Judge Friendly's scholarly influence, a House Office of the

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88. *Id.* at 799.

89. Shientag, *supra* note 77.

90. Friendly, *supra* note 6, at 804. "It would seem elementary that an agency whose task is to formulate legislation and secure its enactment should be attached to the legislature . . . . The legislature thus does not regard the commission as an alien usurper." *Id.*

91. *Id.* at 805.

92. *Id.* at 805-06 (quoting Pound, *supra* note 5, at 145).

93. *Id.* at 806.

94. *Id.* "[I]ts watchwords should be deliberation rather than speed, discretion rather than valor . . . ."

Law Revision Counsel, with a more modest mandate, was not created until 1974.<sup>95</sup>

**D. *Ruth Bader Ginsburg: A Judicial "Plea" for a Second Look***

Justice Ginsburg, then a member of the D.C. Circuit, recognized that statutory ambiguity created problems of increased litigation, intercircuit disagreement, and charges of judicial activism as judges struggled to fathom the meaning of an obscure law.<sup>96</sup> Ginsburg called on Congress to "install a system of legislative review and revision under which [it] would take a second look at a law once a court opinion or two highlighted the measure's infirmities."<sup>97</sup> In this model, the courts remain the bodies which identify problematic statutes and prompt the legislature for the law revision needed to curb or to cohesively resolve litigation.<sup>98</sup>

Rather than wait for the "grand designs" of Cardozo and Pound, and the creation of the "Ministry of Justice,"<sup>99</sup> Ginsburg proposed expanding the role of an already existing legislative review body already in existence, the House Office of the Law Revision Counsel.<sup>100</sup> The Office was conceived as an impartial body whose principle purpose is to "develop and keep current an

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95. 2 U.S.C. § 285 (enacted Dec. 27, 1974, effective Jan. 2, 1975).

96. Ginsburg, *supra* note 8, at 996.

97. *Id.*

98. *Id.* at 1001.

99. *Id.* at 1012.

100. *Id.* at 1015; *see also* 2 U.S.C. § 285 (1975).

official and positive codification of the laws of the United States."<sup>101</sup> It is also designed to review all public laws passed by Congress and "submit to the [House] Committee on the Judiciary recommendations for the repeal of obsolete, superfluous, and superseded provisions . . . ."<sup>102</sup> Furthermore, the Office is authorized to, one title at a time, propose amendments and corrections to the U.S. Code, and to "remove ambiguities, contradictions, and other imperfections both of substance and of form."<sup>103</sup>

The present activity of the Office of Law Revision Counsel is much less sweeping than that proposed by Justice Ginsburg. According to Fred Willett, Law Revision Counsel to the House of Representatives,<sup>104</sup> the Office functions in more of a caretaking role in relation to the Code. Currently involved in a long-term recodification project, the Office examines all laws within a title in an attempt to identify obsolete, superseded or irrelevant date-specific provisions. When it finds such "deadwood," typographical errors, or other technical flaws, it compiles the corrections in a "repealer table" in the back of that Code title.<sup>105</sup> For the Law Revision Counsel to operate as proposed by Justice Ginsburg, namely, as an arbiter of statutory interpretation, it will need a much more explicit legislative mandate.

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101. 2 U.S.C. § 285a (1975).

102. 2 U.S.C. § 285b(2) (1975).

103. 2 U.S.C. § 285b(1) (1975).

104. Telephone interview with Fred Willett, Law Revision Counsel, U.S. House of Representatives (Mar. 10, 1994).

105. See, e.g., 8 U.S.C. § 1 (1970) *passim* (prior history of repealed or amended laws).

#### IV. THE CONSTITUTIONAL COURT: A BULGARIAN APPROACH

The Balkan nation of Bulgaria has historically been marked by long periods of political and social stability contrasted with abrupt societal shifts. These contrasts are strikingly reflected in the adaptations made by the Bulgarian legal system. Today, the Constitutional Court is the body authorized by the Bulgarian constitution<sup>106</sup> to deal with laws rendered obsolete by political change.

##### A. *Historical Antecedents/Sources of Law*

The birth of the Bulgarian state was the consequence of a political merger of ancient southern Slavs with invading tribes in the 7th century.<sup>107</sup> The formation of the new state was documented by the Treaty of 681 between the first Bulgarian Khan (King) Isperikh and the Byzantine Emperor Constantin Pogonat.<sup>108</sup> Sources of law from the establishment of the Bulgarian state until the conquest by the Ottoman Turks in 1393 included local customary law,<sup>109</sup> legislative decrees of ruling Kings, and certain Byzantine and other foreign laws translated into Ancient Bulgarian.<sup>110</sup>

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106. BULG. CONST. ch. 8, art. 147-52 (DV No. 56, July 13, 1991).

107. Ivan Sipkov, *The Legal System of Bulgaria* in 8 MODERN LEGAL SYSTEMS CYCLOPEDIA 38, 45 (Kenneth Redden ed., 1985).

108. *Id.*

109. This customary law was not codified or translated into written law until the early 20th century when Stefan S. Bobchev published his COLLECTION OF BULGARIAN LEGAL CUSTOMS (1896-1908). Ivan Sipkov, LEGAL SOURCES AND BIBLIOGRAPHY OF BULGARIA 1, 2 (1956) [hereinafter Sipkov II].

110. *Id.* at 1.



Bulgaria was conquered by the Ottoman Turks in 1393 and became subject to imperial Turkish law.<sup>111</sup> This Imperial law combined Moslem religious law as well as religious law from non-Islamic communities, Greek law from Byzantine sources, Bulgarian customary law, and adaptations of then-current European laws.<sup>112</sup>

Turkish rule over Bulgaria was ended by the Russo-Turkish war of 1877-78.<sup>113</sup> The Treaty of Berlin, which followed on July 13, 1878, created two regions, a Bulgarian Principality and Eastern Rumelia. The two regions merged in 1885 and, in 1908, declared itself an independent kingdom.<sup>114</sup> As part of the Treaty of Berlin, a Constitutional Assembly was convened at Tirnovo, the medieval capital of Bulgaria, and adopted the "Tirnovo" constitution on April 16, 1879.<sup>115</sup> The Tirnovo constitution was based on liberal European models of a constitutional monarchy and a parliamentary democracy.<sup>116</sup> During the transition period following the adoption of the Tirnovo constitution, Bulgarian courts continued to apply basic Ottoman substantive and procedural laws until the new Bulgarian codes were promulgated.<sup>117</sup> For example, the Ottoman Commercial Code<sup>118</sup> survived until 1898

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111. *Id.*

112. *Id.* at 3.

113. *Id.* at 4.

114. *Id.*

115. *Id.* at 5.

116. *Id.*

117. *Id.*

118. *Id.* at 6. The Ottoman Commercial Code was itself based on the French *Code de Commerce*.

when the Bulgarian Commercial Code,<sup>119</sup> compiled from German, Romanian, and Hungarian sources, was adopted.<sup>120</sup>

The Kingdom of Bulgaria sided with the Axis powers during World War II, surrendered to the Allies on September 9, 1944, and was subsequently occupied by the Soviet Army.<sup>121</sup> The Fatherland Front, a coalition which included the Communist party, gained political control.<sup>122</sup> A referendum to abolish the monarchy was held September 8, 1946, and the People's Republic of Bulgaria, dominated by the Communist party, was proclaimed shortly thereafter.<sup>123</sup> A Grand National Assembly was convened which included elected representatives of opposition parties.<sup>124</sup> Communists repudiated the mandates of the opposition deputies, outlawed the primary opposition party,<sup>125</sup> and assumed control of the Grand National Assembly. The Grand National Assembly proceeded to adopt a new constitution of the People's Republic of Bulgaria,<sup>126</sup> the "Dimitriov constitution" based on the Soviet constitution of 1936.<sup>127</sup>

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119. BULG. COM. CODE (DV No. 114, May 29, 1897).

120. Sipkov II, *supra* note 109, at 4-5.

121. *Id.* at 8.

122. Sipkov, *supra* note 107, at 44.

123. *Id.*

124. Sipkov II, *supra* note 109, at 8.

125. DV No. 119, (Aug. 28, 1947).

126. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BULGARIA, (DV No. 284, Dec. 6, 1947).

127. Sipkov II, *supra* note 109, at 8-9.

## B. *Ideological Statutory Obsolescence*

### 1. The Communist Era

The Communist upheaval brought with it the imposition of a political and social philosophy not rooted in Bulgarian tradition, thus placing very different types of demands on the Bulgarian legal system.<sup>128</sup> Nevertheless, legal necessity required a pragmatic approach. During the transition to Communist rule, old Bulgarian laws remained in effect.<sup>129</sup> Laws which were not in conflict with the political theory of the Dimitriov constitution were retained, while those in opposition were repealed or amended by the Presidium of the National Assembly subject to the approval of the legislature. Ultimately, the National Assembly passed a general repudiation of laws rendered politically obsolete:<sup>130</sup> "All laws and legislative acts enacted prior to September 9, 1944, are hereby repealed and made ineffective as being contrary to the Dimitriov Constitution [of 1947] and the socialist legislation introduced in Bulgaria after September 9, 1944."<sup>131</sup>

As a practical matter, there was a great deal of continuity in the law between Bulgarian laws enacted pursuant to the Tirnovo constitution's model of a constitutional monarchy and the Dimitriov constitution's concept of a socialist People's Republic. Under the Communist regime of Todor Zhivkov, the government did not engage in wholesale invalidation of pre-1947 statutory laws.<sup>132</sup>

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128. Interview with Rosen Alexsiev, District Judge of Atropole, in Sofia, Bulg. (July 23, 1993).

129. Sipkov, *supra* note 107, at 45.

130. DV No. 41, (Nov. 20, 1951).

131. *Id.*; see Sipkov II, *supra* note 109, at 8-9.

132. Sipkov II, *supra* note 109, at 45.

The process was evolutionary with specific provisions, such as property laws, modified, while the bulk of the codes remained unchanged. Given the fluidity of law as a societal tool, some degree of change in the legal landscape would have been inevitable during the forty-two years of Communist rule in Bulgaria.<sup>133</sup> The Dimitriov constitution was itself replaced in 1971 by the more modern constitution of the People's Republic of Bulgaria.<sup>134</sup>

## 2. Post-Communist Democracy

Communist rule in Bulgaria ended when Todor Zhivkov was deposed in late 1989.<sup>135</sup> The emerging democracy grappled with the challenge of true majoritarian rule. In June 1990, the former Communist party, reorganized as the Bulgarian Socialist Party, (BSP) won a narrow majority of the seats in the National Assembly over the primary opposition party, the Union of Democratic Forces (UDF).<sup>136</sup> The BSP was unable to govern despite having a parliamentary majority; political deadlock was

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133. Interview with Stanmir Alexandrov, Counselor, Embassy of Bulgaria, in Washington, D.C. (Mar. 17, 1993).

134. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BULGARIA, (DV No. 39, May 16, 1971).

135. Former Communist leader Todor Zhivkov was convicted in 1992 for abuse of power involving personal expense accounts and state privileges. JOINT STAFFS OF THE SENATE COMM. ON FOREIGN RELATIONS AND HOUSE COMM. IN FOREIGN AFF., 103D CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 818 (Comm. Print 1994) [hereinafter COUNTRY REPORTS]. The Bulgarian Supreme Court later rejected Zhivkov's appeal of the seven-year jail sentence. Phillippa Fletcher, Bulgaria Convicts Dictator Zhivkov for Embezzlement, Reuters New Service - CIS and Eastern Europe, Jan. 18, 1994, available in LEXIS, World News Library, TXTEE file.

136. Robert Dahl, *Bulgaria's Political Evolution*, BULG. LEGAL DEV., Feb. 1992, at 1.

avoided by the appointment of an interim cabinet headed by Dimitar Popov, a politically unaffiliated jurist.<sup>137</sup>

On July 12, 1991, the new constitution of the Republic of Bulgaria<sup>138</sup> was signed by 309 of the Grand National Assembly's 400 members.<sup>139</sup> In October 1991, Assembly elections were held again. The UDF, with the support of the predominantly ethnic Turkish Movement of Rights and Freedoms (MRF), won by a close majority and was able to form a new government.<sup>140</sup> Eleven months later, after losing a no-confidence vote in Parliament, this government fell and was replaced by a non-party coalition government headed by the centrist economist Lyuben Berov.<sup>141</sup> In January, 1992, the Bulgarian people had their first ever direct election of a President, and re-elected incumbent Zhelyu Zhelev, a UDF member and strong supporter of democratic reforms who, in 1990, was appointed President by the National Assembly.<sup>142</sup>

After a two year tenure and the survival of a series of no-

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137. Stephan Kyutchukov, *Law on Economic Activity of Foreign Persons and on Protection of Foreign Investment*, 3 ISSUES IN BULG. L. 2 (1992).

138. CONSTITUTION OF THE REPUBLIC OF BULGARIA, (DV No. 56, July 13, 1991).

139. Kyutchukov, *supra* note 137, at 2.

140. *Id.* It is significant to note that while the Article 11(4) of the new Bulgarian constitution prohibits the formation of political parties "on ethnic, racial or religious lines," the Bulgarian Supreme Court, in a landmark decision, concluded that the Movement for Rights and Freedoms should have the same rights to political expression as other parties. The Constitutional Court later affirmed this decision. David A. Levy, *Bulgarian Supreme Court Justice Speaks at Tillar House*, ASIL NEWSLETTER, Mar.-May, 1995, at 17.

141. Anthony Robinson, *Light at the End of the Tunnel*, FIN. TIMES, Oct. 13, 1994, at 11.

142. Dahl, *supra* note 136, at -1.

confidence votes, Berov's non-party "cabinet of experts" resigned on September 2, 1994, citing the political stalemate in Parliament as a primary reason for their departure.<sup>143</sup> President Zhelev dissolved Parliament, appointed a caretaker government headed by Reneta Indzhova, the former head of the privatization agency, and set December 18, 1994, as the date for Bulgaria's third general election since the ouster of Todor Zhivkov in 1989.<sup>144</sup> The Bulgarian Socialist Party won a clear majority in the national elections<sup>145</sup> and BSP leader Zhan Videnov was named as Bulgaria's new Prime Minister.<sup>146</sup>

### 3. Constitutional Structure

The Constitution defines the Republic of Bulgaria as a parliamentary democracy<sup>147</sup> consisting of separation of

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143. *Premier Berov Asks National Assembly to Accept Resignation* (BBC Monitoring Summary of World Broadcasts, Sept. 9, 1994), available in LEXIS, World News Library, TXTEE file. *See also Berov Says Government Is Resigning So That Parliament Can Decide* (BBC Monitoring Summary of World Broadcasts, Sept. 5, 1994), available in LEXIS, World News Library, TXTEE file.

144. *Bulgaria: General Elections-President Dissolves Parliament and Calls Elections* (BBC Monitoring Summary of World Broadcasts, Oct. 19, 1994), available in LEXIS, World News Library, TXTEE file.

145. *Bulgarian Socialists Win*, WASH. POST, Dec. 20, 1994, at A35.

146. *Bulgaria: President Proposes BSP Leader Videnov as Prime Minister* (BBC Monitoring Summary of World Broadcasts, Jan. 26, 1995), available in LEXIS, World News Library, TXTEE file.

147. BULG. CONST. ch. 1, art. 1(1).

powers,<sup>148</sup> popular sovereignty,<sup>149</sup> and direct elections.<sup>150</sup> In addition, it contains a supremacy clause<sup>151</sup> and incorporates international law as part of domestic law.<sup>152</sup> The Constitution also provides for individual liberties, including property rights,<sup>153</sup> the right to privacy,<sup>154</sup> freedoms of religion<sup>155</sup> and the press,<sup>156</sup> and the rights to legal defense<sup>157</sup> and affordable health

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148. *Id.* at ch. 1, art. 8. "The power of the state shall be divided between a legislative, an executive and a judicial branch." *Id.*

149. *Id.* at ch. 1, art. 1(3). "No part of the people, no political party nor any other organization, state institution or individual shall usurp the expression of the popular sovereignty." *Id.*

150. *Id.* at ch. 1, art. 10. "All elections, and national and local referendums shall be held on the basis of universal, equal and direct suffrage by secret ballot." *Id.*

151. *Id.* at ch. 1, art. 5(1). "The Constitution shall be the supreme law, and no other law shall contravene it." *Id.*

152. *Id.* at ch. 1, art. 5(4). "Any international instruments which have been ratified by the constitutionally established procedure, promulgated and come into force with respect to the Republic of Bulgaria, shall be considered part of the domestic legislation of the country. They shall supersede any domestic legislation stipulating otherwise." *Id.*

153. *Id.* at ch. 1, art. 17 (1-3). "The right to property and inheritance shall be guaranteed and protected by law. Property shall be private and public. Private property shall be inviolable." *Id.*

154. *Id.* at ch. 2, art. 32(1). "The privacy of citizens shall be inviolable." *Id.*

155. *Id.* at ch. 1, art. 13(1,2). "The practicing of any religion shall be free. The religious institutions shall be separate from the state." *Id.*

156. *Id.* at ch. 2, art. 40(1). "The press and the other mass information media shall be free and shall not be subjected to censorship." *Id.*

157. *Id.* at ch. 2, art. 30(4,5).

care.<sup>158</sup>

Furthermore, the Bulgarian Constitution provides for an independent judiciary<sup>159</sup> with an independent budget<sup>160</sup> aimed at protecting the interests of the people.<sup>161</sup> The judicial branch is consists of courts of first instance and courts of appeal.<sup>162</sup> The theory of Bulgarian civil law is that there is an objective,

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158. *Id.* at ch. 2, art. 52(1). "Citizens shall have the right to medical insurance guaranteeing them affordable medical care, and to free medical care in accordance with conditions and procedures established by a law." *Id.*

159. *Id.* at ch. 6, art. 117(2). "The judicial branch shall be independent. In the performance of their functions, all judges, court assessors [damages experts], prosecutors and investigating magistrates shall be subservient only to the law." *Id.*

160. *Id.* at ch. 6, art. 117(3).

161. *Id.* at ch. 6, art. 117(1). "The judicial branch of government shall safeguard the rights and legitimate interests of all citizens, legal entities and the state." *Id.*

162. *Id.* at ch. 6, art. 119(1). "Justice shall be administered by the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeals, courts of assizes, courts-martial and district courts." *Id.*

a. "The Supreme Court of Cassation shall exercise supreme judicial oversight as to the precise and equal application of the law by all courts." *Id.* at ch. 6, art. 124.

b. "The Supreme Administrative Court shall exercise supreme judicial oversight as to the precise and equal application of the law in administrative justice. The Supreme Administrative Court shall rule on all challenges to the legality of acts of the Council of Ministers and the individual ministers, and of other acts established by a law." *Id.* at ch. 6, art. 125 (1,2).

As of this writing, however, the Supreme Court of Cassation and the Supreme Judicial Court have yet to be formed, and the Supreme Court remains the single high court. Levy, *supra* note 140.



discernible truth,<sup>163</sup> and it is the duty of the courts to ascertain the truth at issue.<sup>164</sup>

### C. *The Constitutional Court*

The Bulgarian Constitutional Court is not a court in the common law sense.<sup>165</sup> Based on the German concept of judicial review of law exercised through a powerful constitutional court,<sup>166</sup> Bulgaria established the Constitutional Court as the final arbiter of the constitutionality of laws or governmental actions. Individual citizens have no standing before the Constitutional Court, and its decisions are mandatory and binding.

The Constitutional Court is comprised of twelve justices representing the tripartite branches of the government: four justices are elected by the National Assembly; four justices are appointed by the President; and four justices are elected by a joint meeting of the justices of the Supreme Court of Cassation and the Supreme Administrative Court.<sup>167</sup> The justices serve for a single nine-year term and appointments are staggered on a three-year cycle,<sup>168</sup> thus limiting institutional inertia. Constitutional Court justices are "lawyers of high professional and moral integrity . . . with at least

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163. Interview with Virginia Haik, District Judge of Bourgas, in Dallas, Tex. (Mar. 11, 1993).

164. BULG. CONST. ch. 6, art. 121(2). "Judicial proceedings shall ensure the establishment of truth." *Id.*

165. Levy, *supra* note 140.

166. Bundesverfassungsgerichtsgesetz (BVerfGG) (Statute of the Federal Constitutional Court).

167. BULG. CONST. ch. 8, art. 147(1).

168. *Id.* ch. 8, art. 147(2).

fifteen years of professional experience."<sup>169</sup> To help ensure judicial independence, justices of the Constitutional Court are prohibited from concurrently holding any elected office or other official post, belonging to a trade union or political party, or practicing any occupation.<sup>170</sup>

The Constitutional Court was created with a broad mandate under the Bulgarian constitution which provides that:

Art. 149. (1) The Constitutional Court shall:

1. Provide binding interpretations of the Constitution;
2. Rule on challenges to the constitutionality of the laws and other acts passed by the National Assembly and the acts of the President;
3. Rule on competence suits between the National Assembly, the President and the Council of Ministers, and between the bodies of local self-government and the central executive branch of government;
4. Rule on the compatibility between the Constitution and the international instruments concluded by the Republic of Bulgaria prior to their ratification, and on the compatibility of domestic laws with the universally recognized norms of international law and the international instruments to which Bulgaria is a party;<sup>171</sup>

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169. *Id.* ch. 8, art. 147(3).

170. *Id.* ch. 8, art. 147(5).

171. It is significant to note that the Communist constitution of 1971 made no provision for the application of international treaty law as part of Bulgarian domestic law. Ivan Sipkov, *The Public International Law of Bulgaria: Development and Status*, 10 INT. J. LEG. INFO. 326, 341-42 (1982). Paragraph four's reference to "universally recognized norms of international law" seemingly

5. Rule on challenges to the constitutionality of political parties and associations;
  6. Rule on challenges to the legality of an election of the President and Vice President;
  7. Rule on challenges to the legality of an election of a Member of the National Assembly;
  8. Rule on impeachments by the National Assembly against the President or the Vice President.
- (2) No authority of the Constitutional Court shall be vested or suspended by a law.<sup>172</sup>

The Constitutional Court decides issues referred by the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, or the Chief Prosecutor.<sup>173</sup> Individual litigants are not deemed competent to make direct references before the Court. If the Supreme Court of Cassation or the Supreme Administrative Court finds a discrepancy between a law and the Constitution, it suspends the proceedings and refers the matter to the Constitutional Court.<sup>174</sup> The Constitutional Court takes an average of four weeks to render its decisions,<sup>175</sup> and relief is prospective.<sup>176</sup>

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expands the role of international law to include customary international law as part of domestic law. *Compare* *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . [and] where there is no treaty . . . resort must be had to the customs and usages of civilized nations . . .")

172. BULG. CONST. ch. 8, art. 149.

173. *Id.* ch. 8, art. 150(1).

174. *Id.* ch. 8, art. 150(2).

175. Interview with Stephan Kyutchukov, Research Fellow and Program Secretary, Center for the Study of Democracy, Sofia, Bulgaria, in Sofia (July 22, 1993).

The court's decisions lack executive power, and it is up to Parliament to alter or repeal the suspended law in order to eliminate any discrepancy or conflict with the Constitution.<sup>177</sup>

The concept of a Constitutional Court represents a departure from previous Bulgarian models of constitutional protections.<sup>178</sup> The Communist-era Constitution of 1971 gave the power of constitutional review to the National Assembly. "The National Assembly sees to it that the laws do not run counter to this constitution. It alone decides whether a law runs counter to the constitution and whether the condition for its issue required by the constitution have been observed."<sup>179</sup> It has been suggested that the rationale behind legislative review has been a traditional distrust of the independence of an ideological judiciary closely aligned with either a political party or the executive branch.<sup>180</sup>

#### D. *Transitions: Legal and Political Statutory Obsolescence*

With the fall of Communism in 1989, Bulgaria again found

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176. BULG. CONST. ch. 8, art. 151(2). "Rulings of the Constitutional Court shall be promulgated in *Durzhaven Vestnik* within 15 days from the date on which they are issued. A ruling shall come into force three days after its promulgation. Any act found to be unconstitutional shall cease to apply as of the date on which the ruling shall come into force."

177. Levy, *supra* note 140.

178. *Id.* Dr. Bobatinov, a Bulgarian Supreme Court Justice, observed that Bulgarians are not yet accustomed to reliance on the court system for protection of their Constitutional rights and that Bulgarian attorneys are having to adjust to new adversary skills when representing their clients in claims against the government. *Id.*

179. BULG. CONST. ch. IV, art. 85(1, 2) (DV No. 39, May 18, 1971).

180. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 465-66 (1991).

itself faced with a body of laws containing statutes rendered obsolete or irrelevant by changing political circumstances. The "Transitional and Concluding Provisions" of the constitution directly establish the means by which Bulgaria will cope with the problem of statutory obsolescence caused by abrupt shifts in the legal landscape. The methods chosen, except for the use of the Constitutional Court, are consistent with the pragmatic approach Bulgaria took when it was confronted with the task of making the transition from democratic to Communist law in the wake of World War II.<sup>181</sup>

Previous law remains in force until it is amended or replaced. Final decisions about the applicability of these laws remain the province of the Constitutional Court.<sup>182</sup> Perhaps the framers of the Bulgarian constitution were "overly optimistic"<sup>183</sup> in their belief that the Constitutional Court would be able to make all necessary determinations within a year to allow a general rescission by the National Assembly<sup>184</sup> and that a multiparty legislature could act quickly enough to pass all "laws expressly required by th[e] constitution . . . within three years."<sup>185</sup> In fact, the Judicial System Act<sup>186</sup> providing the necessary organizational and procedural structures for the courts was only recently passed

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181. For discussion of post-World War II legal transition, see Sipkov, *supra*, note 107.

182. BULG. CONST., Transitional & Concluding Provisions cl. 3(1)(DV No. 56, July 13, 1991). "The provisions of the existing laws shall be applicable insofar as they do not contravene the Constitution."

183. Interview with Stanmir Alexandrov, Counselor, Embassy of Bulgaria, in Washington, D.C. (March 17, 1993).

184. BULG. CONST., Trans'l & Concl. Prov. cl. 3(2).

185. BULG. CONST., Trans'l & Concl. Prov. cl. 3(3).

186. Judicial System Act (DV No. 59, July 22, 1994).

by Parliament in July 1994, and amid political controversy.<sup>187</sup>

## V. AN AMERICAN CONSTITUTIONAL COURT?

Would an American Constitutional Court, based on the Bulgarian civil law model, be a viable solution to the problem of statutory obsolescence? A Constitutional Court would potentially be an ideal arbiter of the legal landscape. Indeed, Calabresi points to the decisions of the German Constitutional Court as examples of communications to a legislature that statutes formerly possessing majoritarian support are "moving 'toward unconstitutionality.'"<sup>188</sup>

What would be the Constitutional support for the creation

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187. The Judicial System Act, as passed by Parliament, contained several controversial provisions which included a requirement that membership in the Supreme Judicial Council be restricted to judges, prosecutors, investigators, or academics with five years experience in these posts. Supreme Judicial Act, art. 16(1). These posts were formerly reserved for members of the Communist Party and effectively limited membership on the Council to ex-Communists, prompting President Zhelev to veto the Act. Phillipa Fletcher, Bulgarian Court "DeComunises" [sic] New Judicial Law, Reuters News Service - CIS and Eastern Europe, Sept. 15, 1994, *available in* LEXIS, World News Library, TXTEE File. Parliament overrode President Zhelev's veto and reenacted the law. *Parliament Passes Judiciary Act Unchanged* (BBC Monitoring Service: Eastern Europe, July 19, 1994), *available in* LEXIS, World News Library, TXTEE File. The tenure provision of the law was criticized as a political attempt to remove Chief Justice Ivan Grigorov and Chief Prosecutor Ivan Tartarchev, a strong anti-Communist, who were private attorneys before their appointment. *Radio Commentary Views Fragility of Democracy After Judiciary Bill Challenge Fails* (BBC Monitoring Service: Eastern Europe, Aug. 16, 1994), *available in* LEXIS, World News Library, TXTEE File. The Constitutional Court, in a decision split six to six, declined to hold the Judiciary Act unconstitutional in whole, but subsequently interpreted the length of service requirement to be valid only for future members of the Supreme Judicial Council. *Id.* See also Phillipa Fletcher, Bulgarian Court "DeComunises" [sic] New Judicial Law, Reuters News Service - CIS and Eastern Europe, Sept. 15, 1994, *available in* LEXIS, World News Library, TXTEE File.

188. CALABRESI, *supra* note 1, at 186, n.13.

of an American Constitutional Court? Seemingly, the Article III "cases and controversies" requirement would bar such a court from hearing abstract or speculative cases.<sup>189</sup> The Supreme Court has also traditionally refused to give advisory opinions to the political branches of government.<sup>190</sup>

Not all of the framers of our Constitution insisted on strict structural demarcation. In *The Federalist* No. 66, Alexander Hamilton wrote that the Separation of Powers doctrine is not absolute, but "entirely compatible with a partial intermixture of those departments for special purposes, while preserving them, in the main, distinct and unconnected."<sup>191</sup>

James Madison had examined a "Council of Revision" as part of the Virginia Constitution in 1788. The counsel would have allowed judges and the executive to review acts of the state legislature, under which members of either branch could object to bills they deemed hasty, unjust, or unconstitutional. This would necessitate reexamination of the proposed law with two-thirds or three-fourths vote required for repassage. Madison suggested that if there were constitutional objections and the legislature overrode the council, the legislature would suspend the bill until the next election, when it could repass it with a similar margin.<sup>192</sup>

Edmund Randolph proposed a similar council of revision consisting of the President and the Justices of the Supreme Court. The council would have been authorized to examine bills passed by Congress and reject them, "unless the Act of the National

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189. U.S. CONST. art. III, §. 2, cl. 1.

190. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* 73 (2d ed. 1988).

191. *THE FEDERALIST* No. 66, at 200 (Alexander Hamilton) (Brittanica Great Books ed. 1952).

192. Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 *SUFFOLK U. L. REV.* 85, 90 (1991).

Legislature be again passed."<sup>193</sup> This would effectively permit an advisory panel to suspend application of the law and allow the legislature to give a statute a second look.

"But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised."<sup>194</sup> There is no explicit mandate for an American Constitutional Court. Arguably, unless there is a due process right to be governed by law that is current and relevant,<sup>195</sup> even the proposals for a common law treatment of statutes proposed by Calabresi<sup>196</sup> would run afoul of the doctrine of non-delegation set forth by the Supreme Court in *I.N.S. v. Chadha*.<sup>197</sup> A law revision panel that is not firmly rooted in the legislative branch would be unlikely to pass constitutional muster<sup>198</sup> necessitating a formal constitutional amendment.<sup>199</sup>

## VI. CONCLUSION

We are indeed living in a time where we are "choking on

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193. *Id.*

194. *I.N.S. v. Chadha*, 462 U.S. 919, 945 (1982).

195. Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

196. CALABRESI, *supra* note 1, at 82. See text at *supra* note 45.

197. 462 U.S. 919,945. "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Id.*

198. See 2 U.S.C. § 285b (1993) (authorizing the House Office of the Law Revision Counsel ).

199. U.S. CONST. art. V.



statutes."<sup>200</sup> The problem of obsolete common laws that caused Pound and Cardozo to call for the creation of a Ministry of Justice has been supplanted by the problem of ambiguous and dated legislation identified by Friendly and Ginsburg. While there has been success in the creation of state law revision commissions<sup>201</sup> there is no true federal analogue.<sup>202</sup> Calabresi's solution of a common law approach to obsolete statutes faces the same problems of finality and intercourt conflict that are present in the current judicial atmosphere.<sup>203</sup>

An American Constitutional Court, structured along the lines of the Bulgarian model, could be an ideal arbiter of the legal landscape. It should be impartial, apolitical, and not prone to institutional inertia like an administrative agency. If American scholars, legislators, and jurists come to recognize the need for a systematic treatment of problematic statutes, an American Constitutional Court, established pursuant to the Article V amendment process, has the potential to be an effective solution. At a minimum, the debate surrounding the proposed constitutional amendment would be, in the words of Guido Calabresi, a "choice for candor."<sup>204</sup>

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200. CALABRESI, *supra* note 1, at 1.

201. *See* list of jurisdictions, *supra* note 81.

202. The Office of Law Revision Counsel, despite its mandate 2 U.S.C. § 285b, provides essentially a technical role in relation to the U.S. Code.

203. Ginsburg, *supra* note 8, at 996.

204. CALABRESI, *supra* note 1, at 177.