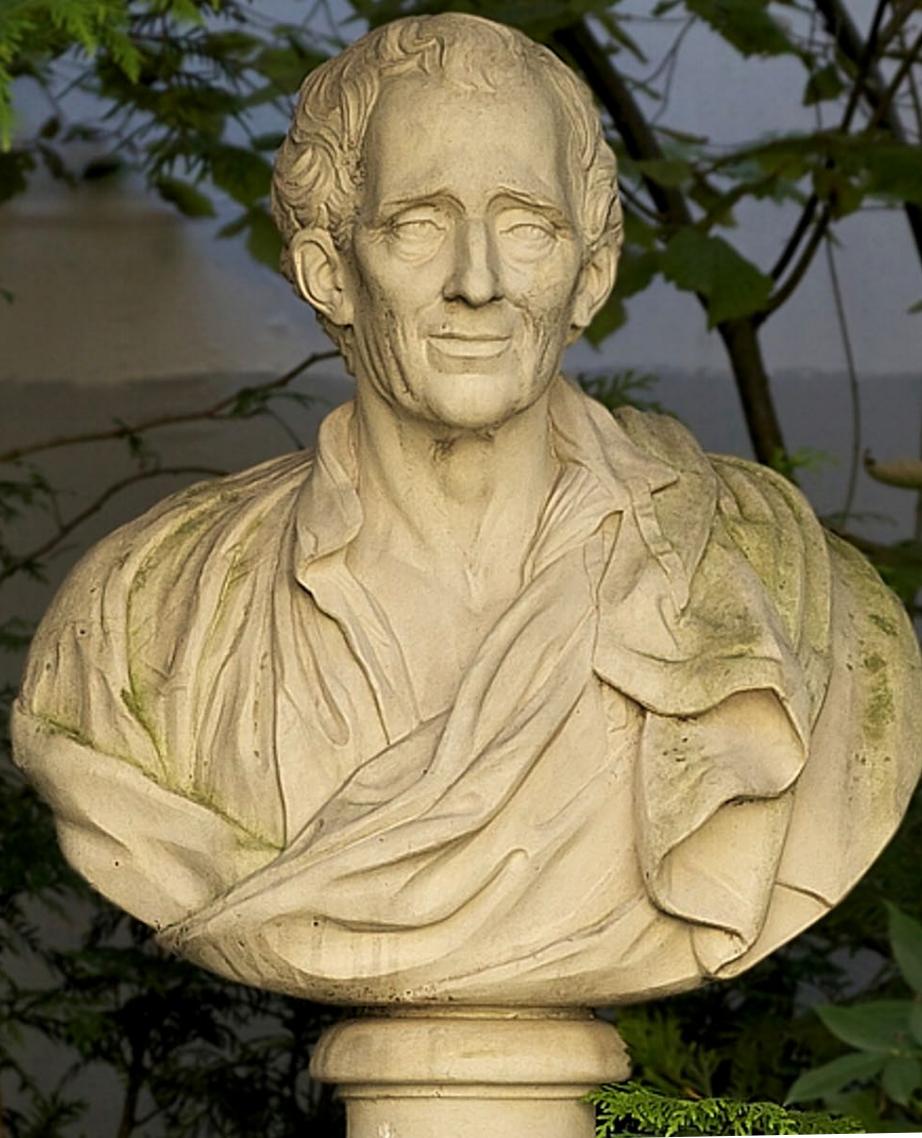


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The absurdity of the law, following an exposition of Racine and Kafka
Professor Jean Carbonnier, with a commentary by Emeritus Professor Jean Hauser



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Dialogues:

The absurdity of the law, following an exposition on Racine and Kafka

Professor Jean Carbonnier

An excerpt from *Flexible Droit, Pour une sociologie du droit sans rigueur*, 10th edition (2001), Paris, LGDJ, pp 432 – 433 Translated to and published in English by kind permission.

"Absurd" – now there is a grand word: laws, justice, social pressures... the entire apparatus of the law is absurd. According to Racine, the law is a rational mechanism open to abuse by madmen; for Kafka, it is a demented mechanism that draws the individual into its madness. The thing is, from Racine's time to Kafka's, the ways in which society works have undergone radical changes; the State has become an anonymous, multi-faceted, many-tentacled thing; its edicts have become so numerous, complex and fickle that, materially, it is no longer possible to know them, never mind understand the reasoning behind them. As to the rest, if the premise is that society knows better than the individual what the individual must do, why would society waste its time reasoning with him? Thus, at the time when each person came into increasingly frequent and inevitable contact with the law, the law was frighteningly strange and unintelligible. A fog of law-induced insanity has spread through peoples' lives. No mind can resist completely, but the effects vary from person to person. For some, like Kafka, it is crushing. For others, it is a kind of legal anaesthetic: the citizen remains unmoved by the law; he lives (either as a criminal or as a wise man) as though the law did not exist.

There are no preventive measures at hand against this kind of legal psychopathy, to say nothing of the treatment that slightly eludes lawyers.

First of all, the legal knowledge that law faculties are tasked to impart contributes directly to the prevention of evil. It is a sign of the times that they are increasingly frequented by the masses. Many of those jostling each other there wish to learn not so much a science (required only for a small number of professionals) as a general familiarity with the beast, so as to render it less terrifying in their eyes.

But there is a duty incumbent upon the legislature, above all, to organise the prevention of the anxiety that spreads all around it. It ought to think to itself that any law, however excellent in its content, is harmful in view of the disturbance it produces in the psyche of its subjects. The legislature must always weigh up all the social advantages that it expects from a law against the disadvantages of the heavy-handed and damaging influence that any regulations may exert on any citizen's nervous system. Nowadays, the hubbub in Paris is pierced at any given moment by the strident call of sirens: the fire brigade, police, ambulances... Who will compare the social cost of the emotional fright caused with the time saved for the emergency services?

The legislature would do well to agree to use its own emergency siren only when faced with real danger. It could even give up that siren; in legislating less, it would legislate more gently. Let the law drop its aggressive tone, that rasping, megaphone voice that it has all too often taken on and which has shattered the frazzled nerves of citizens. Let the law speak conversationally, explain its reasons, follow the rules of courtesy (non-retroactivity being one of them). Great progress will have been made, and legal psychology could make a decisive contribution, when we come to notice that freedom – and, indeed, order – is not only a matter for abstract declarations, but a pure and simple need for good mental health.

Commentary by Professor Jean Hauser:

The worrying expansion of the legal apparatus is a recurrent theme, particularly in politics, but the debate yields concrete results. Indeed, there was in France a recent statute on the simplification of French law, which consisted in several dozen articles and many pages that were almost impossible to read!

The crux of the Carbonnier text lays in the fact that it situates this phenomenon in the history, and the very philosophy, of humankind in society. The Racine reference will take connoisseurs back to the 17th century and one of the few comedies that he wrote, *Les plaideurs*, in which a judge who has lost his mind agrees to judge a dog who has stolen a chicken. He invokes innumerable laws, including a paragraph from the Justinian Code (*Si quis canis, Digeste D6, paragrapho, messieurs, caponibus....*). The damage may have been done by the broadly Roman origins of continental European law but that would omit the fact that Roman law – at least that of the Republic – was, for the most part, practical and rooted in case law. It is doubtless the various codifications that heightened the legislative and regulatory zeal, to the extent that, in French law, there has been a proliferation of “false” codes, which are the product of multiple laws being compiled without any changes being brought to existing legislation. However, it would doubtless be unjust to limit this criticism to legislation. The constant avalanche of case law in recent years adds to the flood of legal norms.

It is an expression of a degree of decline in freedom, as legal knowledge is now the preserve of a coterie of “experts” who control (with varying degrees of success) the foreseeability of a given rule whilst reserving the right to praise or criticize it. The interested party, reduced to being an applicant in respect of case law, is “subjected” to the rule more than he understands or approves of it.

Carbonnier’s powerful assertion that “any law is an evil” echoes the reservations voiced by Portalis, at the time when the *Code civil* was drafted: “*there must be no pointless laws; they would weaken the necessary laws; they would compromise the certainty and the majesty of legislation*” (*Preliminary Address on the first draft of the Code Civil, 1 Pluviôse IX (21 January 1801)*).

Lastly, the final link established between freedom and “mental hygiene” asks the real question: the normative proliferation of laws and case law is a fundamental challenge to democracy that is neither explained nor justified by the so-called natural complexity of our society. It is the pride of modern legislators (often little versed in history) that convinces them of a power that they do not truly have. Everything is doubtless simply a question of modesty and, ultimately, of “legal psychology”, to use the author’s own words.

This gargantuan task has not yet begun in national, let alone European, law.