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Sound Ideas and Absurd Consequences: Reflections of a Legal Historian

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During the 60 years that I have been writing – and speculating – on public law (my first book on medieval criminal law came out in 1954), I have been repeatedly struck by a particular phenomenon to which I would now like to draw attention: that sound ideas and useful innovations eventually – when relentlessly taken to their extreme consequences and pushed along the abstract lines of their inner logic – lead to absurd or even nefarious results, defeating the original intention.

1. Dictatorship

The sophisticated and law-based Roman republic resorted in extreme circumstances to the appointment of a dictator: when the state was in danger, the ordinary constitutional safeguards were set aside and the fate of the land put in the hands of a saviour and supreme ruler, acting within the fundamental law of the republic. The Roman dictator took complete control, even by-passing the consuls, but his term of office was limited to a maximum of six months. In legal terms he was a magistrate of the republic and not an autocrat. The most famous name in this gallery was Fabius Cunctator who fought Hannibal. It was only in later times that the term dictator came to mean a political ruler wielding absolute power for an unlimited period of time.

The original idea was reasonable, i.e. that extreme peril demands extreme measures: the *salus populi* as the *suprema lex* was an axiom with which critical jurists could live. It is noteworthy that even the dictatorships of the 20th century were defended – at least in the initial stages – by leading lawyers. When in 1933 Hitler, in a formally legal way, came to power, he was seen as the saviour of a

state in peril. The internationally reputed Professor Carl Schmitt († 1985), author of an authoritative *Verfassungslehre* and member of Hitler's party from April 1933 onwards argued for the 'legitimacy of the German Revolution'.¹ And even Dr Hans Frank, an early and staunch follower of Hitler and President of the Academy for German Law, gave lectures in the middle of the war in several universities on the need for a law-based state for the survival of any civilized society.²

How was a reasonable Roman institution pushed, step by step and by some irresistible logic, to its extreme and ghastly consequences? The fateful moves, which all stemmed from the one fundamental idea of the concentration of all power in one hand, may be briefly recalled here. By the Enabling Law of March 1933, passed with the majority required by the Weimar Constitution, the Reichstag surrendered its legislative powers to Hitler's government for four years. It was an act of abdication that was thereafter punctually renewed every four years – dictatorships can be formalistic. When, in August 1934, President Hindenburg died, no new President of the Republic was elected. Instead, Hitler became head of state and head of government and Führer (leader) of the German people: the Constitution of Weimar was clearly dead and buried. The army's oath of loyalty to the fundamental law was logically replaced by one to the person of 'the Führer of the German Reich and people, Adolf Hitler'. The free trade unions had been dissolved and all political parties, except Hitler's own, outlawed, which meant that the Reichstag was composed exclusively of Nazi-party members. That was the parliament which, by another logical step, passed, in April 1942, a law that gave the leader the unlimited right to discipline every German – even a judge – without regard to legal rules and to punish him or her, without respect of 'the so-called acquired rights', in every way the Führer judged appropriate. Hitler had proclaimed himself already in 1934 to be *des deutschen Volkes oberster Gerichtsherr*, the supreme justiciar of the German people, and in fact the courts passed sentence in his name. How this dictatorship, which was meant to rescue the country from political chaos, ended in 1945 in the country's utter ruin is a tale that is as tragic as it is well documented.³

2. The inquisition

My second example concerns the rise around AD1200 of the inquisitorial procedure. Here again the original premises were justifiable. Indeed, the new type of criminal procedure gave the magistrates the power to prosecute suspected criminals *ex officio*, i.e. on the strength of their public office, and to inquire (*inquirere*), i.e. to establish the truth, by active and reasoned examination of the evidence, such as witnesses, material traces and various indications of guilt or innocence. The new procedure was experimented with in the second half of the

12th century in both secular and ecclesiastical courts and received its most formal and doctrinal shape under Pope Innocent III (1198–1218). It replaced the ancient form of process, which left the initiative of bringing a case to a private plaintiff – the victim or a relative – who could accuse the suspect (hence ‘accusatorial procedure’), but at his own peril. The question of guilt or innocence moreover was then settled by the *judicium Dei*, the ordeal by combat or by water or fire, the judge being a passive onlooker who watched the outcome of the ordeal and passed sentence accordingly.

It was sensibly argued that the Church and society at large were better defended against abuse and crime by empowering a person in authority to start proceedings and by putting the question of guilt in the hands of a trained judge, who actively examined the available evidence in order to reach a reasoned conclusion. However, the risk of perversion soon became conspicuous, when it was realized that the suspect’s confession was the *regina probationum*, the queen of modes of evidence. It seemed both the most convincing proof of guilt and the one that made the judge’s task so much easier, especially when conflicting witnesses and dubious circumstances led to doubt, soul-searching and sleepless nights. So the new procedure led to the overvaluation of confession, and, quite soon – already by the mid 13th century – the next logical but fatal step was taken, making the use of torture to obtain the desirable confession legitimate.

It was a perversion because it made the struggle between prosecution and defence very unequal and meant that people were condemned, not because they were guilty but because the judge had decided that they were, and tortured them until they confessed. Nevertheless, torture was practised legally for many centuries and found its most horrific climax in the *Inquisitio haereticae pravitatis*, the papal and royal tribunals prosecuting heretics.

The reader may well ask whether society, once it had turned its back on the ancient ways, had a valuable alternative to the inquisitorial procedure. The answer is positive, and it was in England under King Henry II that the other path was taken. I refer, of course, to the nascent common law, where prosecution *ex officio* was introduced, not by some royal official but by the ‘grand jury’ (a jury of accusation) and where the verdict on guilt or innocence was given, not by a single judge, but by a panel of jurors, the ‘petty jury’. The royal judges passed sentence according to the verdict of 12 lawful men and were not themselves engaged in the pursuit of the truth of the matter. Consequently, torture was unknown in English common law, nor was the Inquisition ever introduced there. Not having known the inquisitorial process of the Continent to begin with, the common law avoided its extreme logical outcome, confession obtained under torture. The divergence between continental and English criminal procedure, which originated in the Middle Ages, persists until our own time.⁴

3. The sovereign nation-state

For many centuries the nation-state has dominated the lives of countless citizens. It was an undeniable success, as it provided a political structure for the nations that lived in Europe after the collapse of the Roman Empire. These groups, such as the *gens Anglorum* whose history was written by the Venerable Bede († 735), were ethnic, cultural and linguistic communities that became unified kingdoms, some of which go back a long time; the English, for example, living in one kingdom by the tenth century. Spain and France followed much later, the former going back to the beginning of the 16th century, the latter shortly afterwards, when the duchy of Brittany was, in 1532, annexed by King Francis I. The German nation-state followed when the Empire was proclaimed in 1871 with the Prussian king as first German emperor.

The medieval kingdoms had accepted the overriding authority of the Roman emperor – more in theory than in practice – and of the pope – a very real spiritual supremacy. A forceful successor of St. Peter, like Pope Boniface VIII, did not hesitate to address the powerful king of France, Philip IV the Fair, as a son who had to listen to his paternal voice (bull *Ausculta fili*, ‘listen my son’, of AD1302). In other words, these nation-states were not sovereign (*superior*), as they recognized a higher power (*superior auctoritas*) above them.

It was in Modern Times, when the medieval Roman–German Empire had turned into a purely German one and when the Latin Church had broken up and papal authority was much reduced – as in France – or even discarded altogether – as in England – that the sovereign nation-state came into its own. An internal logic was at work here: that nations sought to expand their own statehood was normal and it could reasonably be expected that those successful and efficient nation-states would want to shake off any obstacle to the fulfilment of their destiny and ambitions. It may, moreover, be assumed that most Europeans were happy to live in their own country under their own king. They might, of course, have violent arguments about the way they were governed and might even, as the Puritans did in 1649, behead their king, but these were quarrels between Englishmen, who never questioned the excellence of their own nation-state.

However, the victim of this new situation was European peace. If every kingdom could expand at will at the expense of its neighbours and even go to war to further its aims under the motto ‘right or wrong, my country’, endless European wars were the logical outcome, the absurd result of a reasonable premise.

So what could be done about it? Some enlightened kings and philosophers conceived bold schemes guaranteeing peace in the *republica christiana*, but they proved to be noble pipedreams. A more realistic approach was the conclusion of great freely-negotiated peace treaties, which were supposed to guarantee at last a permanent equilibrium after protracted warfare. The Treaties

of Westphalia after the Thirty Years War are an outstanding example of this. However, a few decades later, Louis XIV embarked on an endless series of hostilities, and the promise – or illusion – of Westphalia was belied by the overwhelming ambitions of one Sun King, who clearly believed in the primacy of politics and not of law.

Some people put their trust in international law, a Law of Nations, a doctrine worked out by some leading jurists of the age and concerned with the relations between the modern sovereign states. Two of the great names deserve to be recalled here: Alberico Gentili († 1608), and Hugo Grotius († 1645) whose *De Jure Belli ac Pacis* was a path-breaking book. There was, however, no supra-national authority to impose respect of this Law of Nations, and what is the use of law without law enforcement? There was no European parliament, government or law court, consequently the doctrinal edifice of the jurists was doomed to be a brilliant product of the Schools, admired and taught by Professors in Law Faculties, but ignored by the warring governments.

If peace treaties and international law were of no avail, perhaps the hegemony of one mighty country – France or Germany – could procure a European order, based on conquest and subjection? The Napoleonic wars and the great cataclysms of the 20th century showed the inanity of those ambitions. So, after 1945, the Europeans came at last to their senses and created a European Union, where the nation-states gave up their unlimited sovereignty and accepted a common higher authority, the product of free negotiation conducted by democratically elected national governments and parliaments. Here, finally, a logical step was taken that did not lead to absurd consequences.

4. The American Constitution and the Supreme Court

Judicial review of the constitutionality of the laws is a long established feature of American life. It means that the courts – and particularly the US Supreme Court – can strike down laws passed by the state or federal parliaments by declaring them unconstitutional. The original concept, already defended in the early years of the Republic, was that everyone, even the legislators, had to act according to the Constitution and that the judges were in the best position to decide whether a particular piece of legislation was constitutional or not. Indeed, letting the legislators make out this issue for themselves meant that they would be *juge et partie*, which was against common reason. Nevertheless, not everybody agreed in those early years, because judicial review meant giving ultimate control of the law, not to elected lawmakers but to appointed judges.

However, in 1803, by the famous sentence in *Marbury v. Madison*, the Supreme Court declared itself in possession of judicial review. This settled the controversy and the principle became an undisputed part of American life.⁵ In the

course of the 19th century, judicial review was seldom practised and the Court – except in the Dred Scott case of 1857 – kept out of public controversy.

Things changed in the 20th century when the Court got involved in issues that were politically sensitive and stirred public debate. In some cases the Supreme Court took a conservative stance, most notoriously when it resisted – or rather vainly attempted to resist – President Roosevelt's New Deal. More often, the Court was in favour of liberal and progressive ideas and I shall analyse three examples.

First, I mention the Court's stance in defending the freedom of opinion. If people went to the Supreme Court because a certain law had curtailed their constitutional right to free political expression, it was only logical that their case was heard and the First Amendment's guarantee of free speech (1791) upheld. Nevertheless, it was only in 1931 that a majority was found in the Supreme Court to enforce the famous Amendment for the first time. During the previous decade the Court had upheld convictions for speeches against the War, but after 1931 it steadily expanded its interpretation of the freedom of speech.⁶ Continuing this liberal line, the Court recently struck down a California law forbidding the display of the red flag and even upheld the right of protesters to burn the American flag as an expression of political opinion.

The following step in this liberal and progressive line, pursued by an intellectual elite in the Supreme Court, came with the controversial *Roe v. Wade* case, which turned the famous law court into a quasi-legislative body. Indeed, in 1973, the Supreme Court, with a 7 to 2 majority, declared the anti-abortion statutes of the State of Texas unconstitutional, thus legalizing the interruption of pregnancy within certain limits. The case came to Washington on appeal from a US District Court in Texas, Henry Wade being the District Attorney of Dallas County and Jane Roe an alias for the woman in question. The Supreme Court rested its conclusions on a constitutional right to privacy emanating from the Due Process Clause of the Fourteenth Amendment (1866), the relevant text reading as follows: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law'.

In this great contemporary debate and in a charged political climate the Court took sides with the more liberal approach prevailing in Western societies. It was a logical step considering the Court's defence of liberal values, but it was nevertheless a debatable step, since there is no article in the US Constitution or the Amendments dealing with abortion, so that the Court was pushing its logic to extremes. Not only is there not a word on abortion in the sacred Text of the United States, but it is obvious that it could not even have been the intention of the Founding Fathers to take this liberal stance, as at their time abortion was universally seen as an abominable sin and a crime. Yet, since the task of the Court is to check laws against the Constitution, the judges had to find a way of anchoring their decision on the Sacred Text. This they did by a reasoning that struck many lawyers as far fetched. The Court based its judgment on the concept

of the woman's privacy: having a child or not, being her private decision, and the right to privacy being implied in the notion of Due Process. But here again the Court came up against the fact that the Constitution says nothing about privacy, an unknown concept in the 18th century, and consequently hard words were used about 'judicial usurpation of American politics' and 'judicial imperialism'.⁷

The next logical step in this liberal judicial activism came with the almost successful attempt (a vote of 5 to 4) of the Court to outlaw capital punishment. Here the opinion of the four liberal judges was even more remarkable than in *Roe v. Wade* for, whereas there was nothing in the Fundamental Law about abortion, there was an unequivocal constitutional text accepting the death penalty after a fair trial. How then could capital punishment be against the Constitution, when the Constitution itself postulated it? Indeed, the Fifth Amendment (1791) stipulates that no person shall 'be deprived of life, liberty or property, without due process of law'. And yet the Supreme Court made a reasonable and almost successful attempt to rid the country of the death penalty, which to the progressive mind was a relic of the past and not in accordance with the evolving standards of decency of modern society.

The anti-death-penalty camp formally based its case on the prohibition of 'cruel and unusual punishments' in the Eighth Amendment (1791): if execution by the electric chair or some other means was a cruel and unusual punishment, then the death penalty was unconstitutional. The objection that this clearly was not the original intent of the authors of the Fundamental Law was overcome by the consideration that 20th-century America could not be ruled by the standards of the 18th. How binding the 'original intent' should be on later generations is a debate into which we cannot enter here.⁸

The fact remains that the Court almost declared the death penalty unconstitutional, although the Constitution expressly accepts it, but a liberal victory in this case would apparently have been a bridge too far, and verging on the absurd. However, can one seriously accuse of absurdity judges such as Mr Justice Brennan, who defended the liberal approach in his impressive and lucid 1986 Oliver Wendell Holmes Jr Lecture?⁹ In order to understand the controversy it is helpful to distinguish two different views of the role of the Supreme Court. One is that its task is to see whether a particular statute is in strictly legal terms compatible with the letter of the Constitution and the intent of its authors. If that is the case, the attempt to declare capital punishment unconstitutional may indeed seem absurd. But the other view sees the Court as the supreme guardian of the fundamental values of the American Republic in the widest sense and respecting the underlying message of the Great Text in accordance with contemporary values. In that light, the attempt of the minority was understandable and defensible.

One is, nevertheless, left with the feeling that leaving this decision on life and death to one judge was an unacceptable burden. Indeed, four judges were clearly in favour and four clearly against, so that one judge, Mr Justice Lewis Powell

after long hesitation, in October 1986 cast his deciding vote for maintaining capital punishment.

It can, however, be pointed out that in political assemblies it also happens that a single vote is decisive. One remembers the condemnation of Louis XVI in 1793 and the one decisive vote in the Bundestag that, in 1948, made Konrad Adenauer chancellor of the German Federal Republic. It is also appropriate to remember that the Supreme Court enjoys a solid democratic legitimacy, as the judges are appointed by an elected President and confirmed by elected Senators. Nevertheless there is a real difference between politicians elected for a limited period and judges appointed for life.

From the preceding it should be clear that power moves from the politicians to the judges when the latter have the final word on such sensitive political issues as abortion and capital punishment. If this is the consequence of having a written Constitution and Constitutional Courts, as is nowadays the case in numerous countries, one wonders if a written Constitution is as desirable as is generally assumed. Or is an unwritten Fundamental Law without a constitutional court – as in the United Kingdom of Great Britain – preferable? It is ironic that a few months before I was writing this article the then British Prime Minister, Gordon Brown, on 10 June 2009 told the House of Commons: ‘It is for many people extraordinary that Britain still has a largely unwritten constitution. I personally favour a written constitution’. He seems to have been the first British Prime Minister ever to express such a sentiment.¹⁰

5. Papal supremacy

In our final example, the initial impetus again was reasonable and justified, i.e. the call in the second half of the 11th century for the *libertas ecclesiae*. This vast movement, known as the Gregorian Reform or as the Papal Revolution, was forcefully led by Pope Gregory VII (1073–85). In his day, the Latin Church was dominated by kings and feudal magnates, who owned abbeys and churches (Eigenkirchen) and appointed bishops and parish priests. The German king – Roman emperor appointed the bishops of Rome, some of whom were German, and the kings openly sold bishoprics to the highest bidder. The Church wanted to extricate itself from this servitude and establish its freedom of action in its own spiritual sphere, deemed to be superior to the secular order. To achieve this aim and overcome the weight of custom and vested interests, concerted action was necessary, centrally led and co-ordinated by a charismatic leader. The obvious choice was the bishop of the Church of Rome, with its great prestige and its unique position in the Latin world. Indeed, of all the ancient eminent Christian churches, only Rome belonged to the Western world, as the others – in Africa, Greece and the Near-East – were in Arab or Byzantine hands.

The Freedom of the Church meant that popes would no longer be appointed by the German monarch but elected by a college of cardinals. Also, bishops would no longer be invested by secular rulers (Investiture Struggle), but elected by a college of canons and/or appointed by the pope, who assumed spiritual leadership over the whole of Latin Christendom: the Church not only became free and autonomous but established clerical supremacy over the kingdoms and the laity. However, as the Church obtained its autonomy in the spiritual sphere, so the kingdoms became separate and autonomous within their secular ambit: it implied the separation of state and Church and in the course of time the modern state would free itself from its ties with Church and religion. Meanwhile the pope proceeded to impose a centralised government, based on his *plenitudo potestatis*. He assumed administrative control over the bishops, became the highest lawgiver for the whole Latin Church and its highest judge with appeals to the Roman curia from the simplest local courts, via the rural deans, the archdeacons, bishops and archbishops, following a strict hierarchical chain of command. The papacy also built a fiscal organisation, which drew money from far away places to Rome and became a model for the kingdoms.

The medieval apotheosis of this imposing endeavour came in the Holy Year of 1300, when Pope Boniface VIII was acclaimed as a universal leader by pilgrims coming from as far away as Scotland, Poland and Portugal. The great movement was supported by theologians and jurists: ecclesiastical law was highly developed and taught in the Faculties. The underlying idea of universal dominion and disciplined hierarchy owed much to the example of the ancient Roman Empire and its law, which was ‘discovered’ in the West around the time of Gregory VII. It became an indispensable tool for the study of canon law and great papal lawgivers were learned jurists.

Papal absolutism was, in Modern Times, exacerbated by two events. The Protestant Reformation launched virulent attacks on the papacy, with the logical consequence that the Catholic Counter-Reformation at the Council of Trent (1545–63) reacted by stressing the preponderance of Rome even more: the Church was confirmed as a papal Church, and there were no more ecumenical councils until Vatican I (1869–70), which marked another extreme step – this time as a reaction to the Enlightenment and modern liberalism – by proclaiming papal infallibility in theological questions. This idea had been mooted ever since medieval times and was now taken a step further by declaring it a dogma. To some leading Catholics this was so extreme as to be unacceptable and a schism ensued, inspired by the priest and professor of Church history J.J.I. von Döllinger († 1890), who in 1871 was excommunicated by the archbishop of Munich. Yet it could be argued that declaring a leader with absolute power infallible was a logical option: why give complete control to someone who is apt to make mistakes? The late medieval conciliar movement had agreed with the *Zeitgeist*,

for parliaments and assemblies of estates flourished all over Europe and the papalism of the Council of Trent was also in unison with the European trend towards absolutism. Vatican I on the contrary went against the democratic and liberal grain of modern Europe.

Already in the Middle Ages voices were raised against papal absolutism. Kings refused to tolerate Roman interference in their national politics, ordinary Christian people minded that they took no part in the decision making in their own Church, and intellectuals such as Marsilius of Padua († 1343) and John Wycliff († 1384) voiced outspoken criticism of the Roman curia. The discontent came to a head in the 16th century when the Protestant Churches on the Continent and in England seceded from Rome.

In the previous century, an important attempt had been made to reform the Church from within. The Conciliar Movement saw the Christian people, represented in ecumenical councils, as the true universal Church, the Roman curia being one of its organs, not its master. A series of general councils met, where hundreds of clerics and laymen from every country gathered, and discussed and issued legal decrees and statements on doctrine. They asserted their supremacy and even deposed popes. These councils, where voting took place by nations (*per capita nationum*), were an experiment in representative democracy and may rightly be called the first European Parliament. They were milestones not only in ecclesiastical but also in European history. The council of Pisa was held in 1409. Konstanz sat from 1414 to 1418. On 19 May 1415 the council condemned Pope John XXIII, forced him to resign and took the government of the Church into its own hand. The council of Basel (1431–1437–1449) continued the work of Konstanz and proclaimed as binding doctrine the superiority of the general council over the pope (denial of which constituted heresy). In 1439 it dismissed Pope Eugene IV (who nevertheless continued in office till 1449) and elected an ‘anti-pope’, Felix V (who abdicated in 1449). These events marked both the culmination and the demise of the Conciliar Movement, and the papacy, particularly under Pius II (1458–64), recovered its previous supremacy.

It was not until the Second Vatican Council (1962–65) that a revival of the conciliar idea took place, when the bishops’ synod was instituted, a body for periodic consultation between the pope and delegates from the bishops’ conferences: henceforth the bishops were considered the pope’s ‘colleagues’ and ‘brethren’, not his underlings.

In recent years, however, the curia has followed a conservative course, moving away from the endeavour of Vatican II. So much so that, at the time of writing (April 2010), a leading Catholic theology-professor, Dr Hans Küng, wrote an open letter to the bishops urging them to convene a Council in order to counter papal ‘absolutism’ and ‘autocracy’. Clearly, the ancient conflict between pope and council has not been laid to rest. It is, however, obvious that Professor Küng

faces a legal problem because the *Codex Iuris Canonici*, promulgated in 1983 by Pope John Paul II, makes it clear that only the pope can convene an ecumenical council and that he presides over it, controls its deliberations and dictates its agenda, its decrees being subject to his approval (canon 338). And canon 1372 adds, for good measure, that ‘whoever appeals to an oecumenical council or to the college of bishops against an act of the Roman pontiff shall be censored and punished (*censura puniatur*)’. The *Codex* leaves no doubt, more generally speaking, about the pope’s absolute control of the Church. Canon 331 states that he is the head of the College of Bishops and that on the strength of his office he enjoys ‘the highest, full, immediate and universal ordinary power (*potestas*), which he can always fully wield’. Canon 332 speaks of his *plena et suprema in Ecclesia potestas*, and canon 333 § 3 adds that ‘there is no appeal or recourse against a sentence or decree of the Roman Pontiff’. It comes therefore as no surprise to read in canons 1404 and 1405 that the papal see can be judged by nobody, whilst it is the Roman Pontiff’s right to judge the secular rulers in spiritual and ecclesiastical matters. As to the Synod of Bishops (canons 342–48), it is conceived as a means of contact between the bishops and the pope, whom they are ‘to help with their advice’. It is moreover made clear that the Synod ‘is directly subjected to the authority of the Roman Pontiff, who convenes it whenever he finds it opportune, determines its agenda and presides over it’ (canon 344).¹¹ A global corporation led by a single autocratic chief executive officer, elected for life and officially declared infallible, would strike most observers as going against every rule of good governance and bordering on the absurd. The extreme and logical outcome in the 21st century of a movement that started in the 11th? The Church is, however, no business enterprise but a numinous community of the faithful, and religions have their own ways and finality, which should perhaps not be judged by secular standards. *Adhuc sub iudice lis est*, the debate is still going on.

I hope that the reader who seeks a better understanding of the present-day constitutions of Church and State will find my historical reflections helpful and will agree with Professor Sabino Cassese, a judge in the Corte Costituzionale in Rome, that ‘history is an indispensable companion of the law’.¹²

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