

## MILITANT DEMOCRACY AND FUNDAMENTAL RIGHTS, II\*

KARL LOEWENSTEIN

*Amherst College*

### II

*Some Illustrations of Militant Democracy.* Before a more systematic account of anti-fascist legislation in Europe is undertaken, recent developments in several countries may be reviewed as illustrating what militant democracy can achieve against subversive extremism when the will to survive is coupled with appropriate measures for combatting fascist techniques.

1. *Finland:* From the start, the Finnish Republic was particularly exposed to radicalism both from left and right. The newly established state was wholly devoid of previous experience in self-government, shaken by violent nationalism, bordered by bolshevik Russia, yet within the orbit of German imperialism; no other country seemed more predestined to go fascist. Yet Finland staved off fascism as well as bolshevism. At first, the political situation was not unlike that of the Weimar Republic in the years of disintegration. The Communist party, declared illegal by the High Tribunal as early as 1925, reconstituted itself and, in 1929, obtained a large representation in the Riksdag, thereby blocking any constitutional reform. Under the decidedly extra-constitutional pressure of the nationalist and semi-fascist movement of the Lapuans, the Communists were so intimidated that nationalists, and progressives (bourgeois liberals), against the opposition of the social Democrats, were able to carry the constitutional reforms which not only strengthened the position of the government but also eventually barred subversive parties—meaning, at that time, the Communists—from national and communal representation. The Communist party finally disappeared from political life. Concomitantly, the fundamental rights of association, free speech and press, and freedom to combine were severely curtailed. In particular, the statute of November 28, 1930, proscribed the formation, activities, and support of all parties aiming at forceful change of the political and social order. When, however, after the elimination of

\* The present and concluding instalment of this article covers developments to May 1, 1937.

the Red danger, the Lapuan movement became increasingly overbearing, and also resorted to lawlessness and terrorism against the constitutional government, the acting cabinet, under the presidency of the "liberator" of Finland, Svinhufvud, invoked against the Lapuans the same laws by which Communism had been crushed. In December, 1931, the Lapuans, in the Mäntsillä uprising, tried to seize power by armed rebellion, but the movement collapsed immediately, when it encountered, in March, 1932, militant application of the extraordinary powers. The Finnish democracy was saved also from fascism. After that, President Svinhufvud was able to steer a middle course and to stabilize the country as a genuine democracy. The government passed the necessary legislation against the recurrence of fascist plots by the bills of 1933 forbidding the formation of private armies within political parties, and of 1934 prohibiting the ostentatious wearing of political uniforms and other symbols of political allegiance. Although a fascist party was permitted to participate in political life, enforcement of the anti-extremist legislation effectively crippled its aggressiveness, and, deprived of its military regalia, it became only one among other ordinary political parties of scant importance. Thus, Finland's political status was changed from that of a Baltic state of the authoritarian type to that of a member of the Scandinavian family of democracies. The result of this evolution was confirmed by the election, in February, 1937, of Mr. Kallio, the Agrarian leader, in succession to Mr. Svinhufvud as president of the Republic.

2. *Estonia*: Another striking illustration of militant democracy is offered by Estonia. Here again, a country of political and economic instability, located precariously between Red and Brown, successfully withstood both communism and fascism. After Hitler's seizure of power in Germany, the menacing pressure of fascist groups increased also in Estonia. The problem took once more the post-war turn of constitutional reform usually resorted to when it becomes necessary to strengthen the executive against parliamentary disintegration. By the reform of 1933-34, the president became nothing less than an authoritarian leader. The reform movement was sponsored and carried through by the "liberators," a true replica of the National Socialist party in Germany. When, in January, 1934, the new constitution came into force, the "liberators" hoped to utilize the increased powers of the executive

over the legislative for their own plans and prepared for a forceful overthrow of the government by a *coup d'état*, the so-called Larka plot of March, 1934. But President Päts used against fascism exactly the same extraordinary powers that the reform had conferred upon him. Not only the local fascist organizations which the former Baltic landowners of German extraction had built up were dissolved, but also the "liberators" were proscribed by martial law. Emergency powers were widely applied to maintain order and peace through the vigilance of the President, a second attempt of the fascists to seize power by force was nipped in the bud (the so-called Larka plot of December, 1935). It is true that since 1934 Estonia's political system more or less reflects the authoritarian type of government, with almost unlimited powers vested in the President on the basis of the one-party system, the government's Fatherland party. But the suspension of constitutional government was clearly meant to be of transitional character. In February, 1936, an honest plebiscite went in favor of a full restoration of democracy and of a constituent assembly. At the general elections for the constituent assembly, in December, 1936, both communists and fascists were excluded from the ticket, and a democratic constitution of the new authoritarian type may be expected. The Estonian example demonstrates the preservation of democracy by undemocratic methods and typifies the situation of democracy at war against fascism.

3. *Austria*: For a short while, between March, 1933, and February, 1934, the Austrian Republic seemed to take a similar course. The government of Dollfuss was at first intent on avoiding fascism as well as communism, and in May, 1933, it outlawed subversive movements of all kinds impartially. In February, 1934, however, Dollfuss ruthlessly crushed the Socialist party, which was intensely loyal to constitutional government, and established a one-party state, thus openly flouting the rule of law and turning Austria into a fascist country without even the pretext of constitutional government. The attempt of the dominating minority group to keep out national socialism by a pitiful imitation of its emotional propaganda seems doomed to failure. After the conclusion of the German-Austrian agreement of July, 1936, the transformation of Austria into a National Socialist vassal state is only a matter of time and tactics, which even successful monarchical restoration may temporarily delay yet not ultimately prevent.

4. *Czechoslovakia*: No doubt the most conspicuous example of a democratic country maintaining its fundamental structure against overwhelming odds is Czechoslovakia. Here, on this solitary island in the surrounding sea of dictatorial and authoritarian states, the internal situation is distressingly complicated by the existence of a strong minority of Sudetic Germans, who, once the dominating class, could never quite reconcile themselves to coöperation with the Czech majority controlling the government. Among the Sudetic Germans, whose masses live close to the German border, more and more a dangerous spirit of irredentism grew up, duly fostered by the rising power of National Socialist Germany. In addition, the parliamentary administration, otherwise admirably handled, proved, as everywhere, too slow and cumbersome for the exigencies of the economic crisis which weighed heavily on the highly industrialized country. That the democratic structure and the national integrity were none the less maintained is due to two causes. In the first place, the successive coalition governments, acting under sweeping enabling laws, ruled more and more by decrees under the ultimate control of the parliament. Thus Czechoslovakia bowed to the new version of parliamentary democracy after 1929. Although this course was certainly open to grave constitutional objections, the highest courts and the parliamentary bodies, which alone can raise the issue of the constitutionality of these far-reaching measures before the Supreme Constitutional Tribunal, wisely refrained from being over-legalistic. Slowly, the Czechoslovakian political system was transformed into the authoritarian, or "disciplined," democracy which the emergency situation in the national and international sphere demanded. On the other hand, the government reacted vigorously against the fascist technique of undermining the constitutional system and the democratic spirit of the institutions. In the report of the committee of the House of Representatives on constitutional and legal questions, introducing the law of October, 1933, concerning the suspension and dissolution of subversive parties, we read the following sentences, which aptly describe the existing emergency situation: "It is evident that all constructive and politically responsible factors are confronted by the necessity of making provisions for the defense of the most cherished possessions of the Republic and of the citizens, in order to check the activities inimical to the state

*. . . In politics also the defense is shaped according to the fighting methods of the assailant."*

In accordance with these policies, the Czechoslovakian Republic enacted the most comprehensive and intelligent legislation against fascism now in existence in any modern state, and, what is more, the authorities used the powers conferred upon them with undaunted energy. As early as 1923, an act for the "protection of the Republic" shielded the integrity of the Republic and of republican-democratic institutions. In view of the more subtle methods of the fascists, who shrank back from open defiance of the law and pursued their aims under cover of the exercise of fundamental constitutional rights, more appropriate measures had to be devised. In October, 1933, shortly after the avowedly National Socialist German parties had been prohibited by a mere administrative order, a statute was passed which empowered the government to suspend and dissolve any subversive party, group, movement, or association whose activity, in the opinion of the government, was "apt to endanger the constitutional unity, the integrity, the republican-democratic form of the state or the safety of the Czechoslovakian Republic." Membership in an association with subversive aims was deemed sufficient evidence of guilt. Reconstitution of a dissolved party under another name or form (*tarnung*) is unlawful; members of the outlawed party are ineligible for parliamentary or public office; active members forfeit their parliamentary or official functions; property of an outlawed association is to be confiscated; uniforms and all symbols indicating sympathy for the proscribed movement are prohibited; freedom of speech, press, assembly, and movement within the state for all involved in or suspected of subversive activities is heavily curtailed. In addition, members of and sympathizers with such parties may be subjected to close surveillance and control by the police. In conformity with the rule-of-law principle, the final decision on the legality of an order suspending or dissolving an allegedly subversive party lies with the Supreme Administrative Tribunal. Thereafter, no subversive extremist or revolutionary movement could raise its head, although a Czech fascist party was permitted to continue as an ordinary political party. Communism had previously adjusted its program and tactics to the democratic environment.

In view of the determination of the government to defend de-

mocracy, the parties fundamentally opposed to the present form of the state had to conform to the laws. Avoiding any open defiance, and also refraining from unlawful or militaristic propaganda, the formerly subversive forces of the German opposition organized themselves into a normal political party. At the general elections of May, 1935, the "Sudetendeutsche Heimatpartei" of Herr Konrad Henlein emerged suddenly as the second strongest party in Parliament, rallying almost seventy per cent of the German population under its banner. It was evident that even the most foresighted legislation could not prevent the forces of the opposition from organizing themselves efficiently. But under threat of the act of 1933 and the determination of the government to enforce it, the Henlein party acted scrupulously in accordance with the law, the constitution, and the rules of the parliamentary game. In addition, the act had proved an effective device for preventing the opposition from becoming a military organization. Yet the government anticipated the potential danger arising from an inimical population strongly organized in political cadres and bordering on an unfriendly neighbor. A new and far more drastic statute was passed in May, 1936, styled an "Act for the Defense of the State." Again no heed was paid to well-substantiated objections which constitutional legalism did not fail to raise. In normal times, this piece of legislation—which in fact is a new constitution—would have been legally impossible unless passed as a constitutional amendment. But it was justified by the emergency situation. The statute moulds the entire state, and particularly the border districts, into a fighting unit in preparation for the impending war by abolishing, to a large extent, under wide discretionary powers of the government, constitutional guarantees and constitutional rights. It provides, should need arise, for martial law in peace-time, and it anticipates the totalitarian war by the totalitarian peace. At present, only an open rebellion, presumably supported by intervention from abroad, could overturn the existing system of government. In Czechoslovakia, the postulate of democracy at war is fulfilled to the letter.

In weighing the anti-fascist legislation of Czechoslovakia, it may safely be argued that, against all expectation, it has preserved the internal peace of the state, the stability of the Republic, and, with due reservations, also the rule of law, even though it could not inspire loyalty in the hearts of those sections of the popula-

tion which are still averse to the state. Within the limits of the possible, it immunized the state against fascist techniques and prepared the country for defense if and when a final clash of doctrines can no longer be avoided. Manifestly, this anti-fascist legislation has rendered an invaluable service to the peace of Europe.

### III

*Summary of Anti-Fascist Legislation.* The following survey tries to summarize the contents and purposes of anti-fascist legislation in Europe. The principal democratic countries included are France, Belgium, the Netherlands, England, the Irish Free State, Sweden, Norway, Denmark, Finland, Switzerland, and Czechoslovakia. Reference is made occasionally also to Lithuania, notwithstanding that this state clearly belongs to the new type of "authoritarian," or "disciplined," democracy of the Baltic pattern. Space forbids any detailed or exhaustive description, and no juridical evaluation is intended. Although the comprehensiveness of the measures adopted varies from country to country, it will be seen that, without exception, all democracies have resorted to statutory precautions and legislative defense of one kind or another.

As to the political effect of the measures for keeping incipient fascism under control, it may be said that although local conditions are widely different, behind national diversities considerable uniformity is clearly visible, corresponding to the uniformity of the fascist technique in undermining the democratic state. Naturally, the chances of ultimate success in holding the various local fascist movements at bay are proportional to the time of the enactment of restraining measures (whether early or late), the elaborateness of the measures and the skill with which they have been drafted, the prevailing legal traditions and techniques, and, above all, the zeal and determination in enforcement displayed by the administrative and judicial authorities. The appropriate time for enactment was certainly shortly after Germany went National Socialist. Countries which unduly delayed legislation found it increasingly difficult to quell movements that had already cast their spell and taken root in the public attention.

Legislation is usually directed also against subversive movements or groups other than fascist or National Socialist if they are considered detrimental to the democratic state. In the main, however, the laws are drafted in order to match the particular kind of

technique applied by fascism. It should be noted that in democratic countries, with the exception of France, there is, on the whole, no conspicuous permeation of the people by communism. This is true not only because the comparatively high standard of living in democratic countries and the social environment do not encourage it, but also because where radicalism exists it is more or less merged with and absorbed by official moderate socialism, and thus neutralized.

The various legislative measures may be grouped along the following lines:

(1) To deal with open rebellion, insurrection, armed uprising, sedition, extended riots, conspiracy against the state—in short, with every overt act bordering on or falling in the category of high treason—the ordinary criminal codes of all countries are adequately equipped. Unless a state has reached the stage of actual political disintegration, the regular forces of the police or the army are amply sufficient to suppress high treason of individuals or rebellion undertaken by larger groups. As fascism and communism had ample opportunity to learn from experience, a determined government backed by a loyal army is invariably capable of quelling a *putsch* or *coup d'état*, or even an extended insurrection from left or right—for example, the Kapp *putsch* (1920) and the Hitler *putsch* (1923) in Germany; the Gayda *putsch* in Czechoslovakia (1926); the Larka uprising in Estonia (1935); the Mäntsillä uprising in Finland (1931–32); rebellions in Austria (1934), Spain (1934), Greece (1935), Ireland (1935); the military revolt on board the *De Zeven Provincien* in the Dutch East Indies (1933). Hence, the fascist strategists have grown particularly careful not to commit any overt act of rebellion until the subtler and studiously lawful methods of undermining the state and establishing the atmosphere of double legality warrant the ultimate seizure of power by *coup d'état*. Nevertheless, several democracies have deemed it advisable to strengthen their criminal codes or to introduce special legislation against high treason (Czechoslovakia in 1923 and after, Belgium in 1934). Similar provisions were proposed in Switzerland (1934 and 1936). In addition, most states are prepared to make full use of martial law, and of extraordinary powers for state of siege, in case of a rebellion spreading over their territories.

(2) The most comprehensive and effective measure against fascism consists in proscribing subversive movements altogether.

Only in isolated instances is legislation drafted so as to prohibit specifically named parties. This was the case when, in 1933, Austria proscribed both National Socialism and communism, together with their affiliated organizations. As a rule, however, such legislation is formulated very carefully in order to avoid open discrimination against any particular political movement, thereby maintaining, at least nominally, the democratic principles of equality before the law and due process under the rule of law. Thus not even the anti-communist statutes in Finland, Latvia, and Lithuania singled out left extremism for prohibition, although the communists were the obvious target. To have sinned glaringly against the fundamental democratic tenet of political equality is the doubtful distinction of the oldest and most venerable democracy, i.e., Switzerland. The federal Public Order Bill, proposed by the Federal Council in December, 1936, tried to outlaw the Communist party alone by naming it explicitly as dangerous to the state—a wholly unjustified discrimination which so stirred public opinion that the bill had to be changed, during the parliamentary debates in the *Ständerat*, into a general ban of all subversive movements. While public resentment against such crude violations of democratic traditions had not yet subsided, the cantons of Neuchâtel and Geneva outlawed, by cantonal acts of 1937, the Communist party within their borders. Although in an ultra-bourgeois country like Switzerland communism has perhaps less chance than in any other European democracy, the anti-communist law was accepted by referendum by a large majority in [Neuchâtel, and a similar result may be expected in Geneva. A statute which openly discriminated against communism was passed in March, 1937, in the Canadian province of Quebec (the so-called "Padlock Bill"), and also one in Luxemburg in April, 1937.

With these exceptions, anti-extremist legislation in all democratic states applies the ban indiscriminately to all political groupings which fall under the general category of a subversive party, an unlawful association, or an organization inimical to the state. Specific legal definitions of what constitutes a subversive party or organization are usually avoided. The fact, however, that a group, by its organization or aims, intends or is prepared unlawfully to usurp functions ordinarily belonging to the regular state authorities is as a rule sufficiently indicative of its subversive character. The decision as to whether a group is to be declared

illegal lies with the discretionary power of the government, subject, in some countries, to an appeal to a court of the last instance. "Guilt by association" is generally deemed sufficient, even if malicious intent or knowledge of the subversive aims of the association cannot be proved against the individual member. *Groupements de fait* are treated as regularly constituted political parties or organizations—a provision which strikes a blow at the ominous notion of the "movement" as distinguished from an ordinary political party. Reconstituting a proscribed party under any pretense whatsoever is a crime. This measure has not proved sufficient, however, to prevent outlawed parties from experiencing rebirth as officially constituted, and therefore legally recognized, parties. Illustrations are furnished by the reappearance in Czechoslovakia of the German National Socialists as "Sudetendeutsche Partei," of the French *Croix de Feu* as the French Social party (at present under judicial investigation), and of the Iron Guard in Rumania as an "All-For-The-Country party." At any rate, if the prohibition of a party is coupled with the outlawing of military party activities, the actual danger of creating a double legality is alleviated to a considerable extent. Consequences of the dissolution of a party are eventually confiscation and liquidation of its property (Czechoslovakia (1933), France (1936), Great Britain (1936)).

In this connection, the situation in Switzerland again deserves attention. In March, 1934, a federal Public Order Bill—on the whole moderate and dealing only with actual gaps in existing federal legislation—was rejected by referendum. The proposal was aimed at subversive associations only in so far as they frustrated or impeded measures of the authorities by unlawful means or arrogated to themselves official powers, and it did not interfere with political parties proper. A similarly restricted cantonal measure failed in 1934 in Zürich, while in the canton of Ticino, obviously more exposed to fascist propaganda from neighboring Italy, an appropriate statute was carried in the same year. In December, 1936, the Federal Council submitted to the federal parliament a new and far more sweeping draft of a resolution styled "For the Protection of Public Order and Safety," which, if adopted, will provide Switzerland with an elaborate and comprehensive system of legislative and administrative defense against subversive activities, second in Europe only to the armory of defense existing in Czechoslovakia. The proposal was characterized as "urgent,"

which, according to the Swiss constitution, implies that the bill, after acceptance by both houses of the federal parliament, should not be submitted to the referendum otherwise prescribed for federal bills. Conspicuous features of the draft proposal are the outspoken and admitted discrimination against the Communist party which has been mentioned, and, in addition, the fact that it couples sound legislative devices for the protection of democracy against subversive movements with far-reaching provisions intended to prevent incitement to disaffection among the armed forces. Even reasoned criticism of the army can be punished severely. Public opinion, including large sections of the Right bourgeoisie, is strongly opposed to the measure, which manifestly goes far beyond the scope of protecting the legally constituted government against subversive methods and cuts deeply into Swiss liberal traditions. In view of this widespread resentment, the fate of the proposal is at the time of writing doubtful. The National Council shelved discussion until the spring session of 1937, thereby denying the "urgent" character of the bill which the government, evidently shying from a popular vote, seems unwilling to waive. Although even during the debates in the Ständerat drastic modifications were adopted, separating partisan intentions from general protective measures, the bill might scarcely fare better than its predecessors if submitted to the people. In the meantime, it is evident that the Swiss democracy is not protected adequately against infiltration by the fascist technique of propaganda. It may be added to the record here that the present Federal Council is itself by no means beyond suspicion of pro-fascist leanings, and that the "Red-menace" scare has driven large sections of the Swiss bourgeoisie into an almost hysterical blindness toward the danger from fascism.

(3) All democratic states have enacted legislation against the formation of private para-military armies of political parties and against the wearing of political uniforms or parts thereof (badges, armlets) and the bearing of any other symbols (flags, banners, emblems, streamers, and pennants) which serve to denote the political opinion of the person in public. These provisions—too light-heartedly and facetiously called "bills against indoctrinary haberdashery"—strike at the roots of the fascist technique of propaganda, namely, self-advertisement and intimidation of others. The military garb symbolizes and crystallizes the mystical

comradeship of arms so essential to the emotional needs of fascism. More or less identical "blouse-laws" were passed in Sweden (1933), Norway (1933), Denmark (1933), Finland (1934), the Netherlands (1934), Czechoslovakia (1933 and 1936), Switzerland (1933), Austria (1933), Belgium (1934), and, very belatedly and only under the provocation of deliberate disturbances of the peace caused by Mosley's Blackshirts, in England (1936). For the sake of comparison, it may be mentioned that prior to 1933 no stronghanded action was taken in Germany against political uniforms and the formation of private armies, partly because of political weakness and actual connivance of the authorities of the Reich, unwilling to discriminate against a "national" movement, partly because of constitutional jealousies arising from the police power of the states. A federal ordinance of the Reich-president, finally enacted in the spring of 1932, was repealed after less than two months. No action at all was taken in Spain; and in the Irish Free State, an anti-uniform bill was rejected by the Senate (1934), which led ultimately to the abolition of that body.

(4) While uniforms are usually the manifest sign of an organization operating on military lines, it is even more important for democratic states to forestall the formation of military bands or private party militias. Created originally as "stewards" for the protection of party rallies from undesirable interruptions and as bodyguards for the "leaders," they have a tendency to grow into private armies for offensive purposes and to prepare for the ultimate seizure of power. Thus they constitute intolerable competitors of the state's own armed forces. Many states, therefore, have prohibited the formation of private armies, party militias, and bands for any purpose whatsoever, as stewards or as assault troops or as bodyguards, as in Sweden (1934), Denmark (1934), Belgium (1934), the Irish Free State (1934), the canton of Zürich (1934), France (1936), Holland (1936)—proposed also in Switzerland (1936). Equally detrimental to public authority are military exercises and military training not controlled and supervised by the state, even when practised by men without uniforms. Consequently, the prohibition of party uniforms should generally be accompanied and supplemented by making military training by unauthorized persons illegal. Such statutes were passed in Belgium (1934), the canton of Zürich (1934), Great Britain (1936), and France (1936).

(5) All democracies have taken legislative precaution against illicit manufacture, transport, wearing, possession, and use of firearms or of other offensive weapons of any kind, or they have strengthened already existing prohibitions (Czechoslovakia [1923], Belgium [1934], France [1936], Great Britain [1937]). In Switzerland, after provisions included in a federal statute had been rejected by the referendum of 1935, some of the cantons, e.g., Zürich, Fribourg, St. Gall, and Basle City, stepped into the gap. The ultimate efficacy of such measures, however, continues rather dubious, even if police and army remain loyal to the state, because during these turbulent years of political strife in Europe large quantities of arms have changed hands in countries through smuggling, hiding, and secret storage. Complete internal and private disarmament is at best difficult when a general and official armament race is on; but a vigilant police force should be in a position to prevent at least any large-scale accumulation of arms in private hands.

(6) A series of new statutes deal with the abuse of parliamentary institutions by political extremism. Taken together, these measures constitute the first and, as yet, rather timid effort for safeguarding the parliamentary technique from being utilized for purposes of subversive propaganda and extremist action. When the Rexist "leader," Léon Degrelle, in March, 1937, forced the resignation not only of the acting member of the Rexist party for the arrondissement of Brussels, but also of the substitute nominees on the Rexist party ticket, solely for the purpose of causing a by-election in which he could advertise as a legitimate party candidate the aims of the fascist party, the Belgian Parliament passed a law by which such frivolous by-elections are prohibited in the future. A constitutional amendment in the Netherlands, adopted in April, 1937, by overwhelming majorities in both chambers, permits the exclusion from representation in political bodies (national, provincial, and communal) of adherents of subversive parties who advocate alteration of the existing form of government by unlawful means. Extremist groups may thus be deprived of their official spokesmen, the edge thereby being taken off subversive propaganda, particularly since another constitutional amendment, enacted simultaneously, restricts also the parliamentary immunity, which no longer can be used for treasonable activities. Although these amendments are still subject to acceptance by two-thirds of

the new chamber, there is no doubt that this sound reform will reach the statute-book in due course. Similarly, the new French press law, at present under consideration in the Senate, makes it impossible for legally responsible editors to escape prosecution for seditious propaganda or other unlawful activities under cover of parliamentary immunity. As in the Netherlands, the Czechoslovakian statute of 1933 declares the mandates of representatives of subversive parties forfeited, and in both countries such vacancies are not filled until the next election, in which, in Czechoslovakia, parties dissolved because of their subversive aims cannot participate.

(7) Other recently passed measures of democratic states aim at curbing excesses of political strife. The ordinary criminal codes or the common law of most countries (Sweden, Norway, Finland, the Netherlands, Great Britain, also Germany before 1933) contain provisions dealing with incitement to violence or hatred against other sections of the population. In addition, it became necessary to alleviate political acrimony when it was directed against persons or classes of persons or institutions usually singled out for attack by fascism. Many states have provided remedies by forbidding incitement and agitation against and baiting of particular sections of the people because of their race, political attitude, or religious creed—in particular, because of their allegiance to the existing republican and democratic form of government (Czechoslovakia [1933], the Netherlands [1934], also the Canadian province of Manitoba [1934]). While statutory protection was thus given, in the main, to religions exposed to the anti-religious propaganda of communists, such measures are intended also to prevent or mitigate the violent campaigning against Jews and Marxists. In this connection, it should be remembered that under the Weimar Republic, owing to the ill-advised yet inveterate attitude of the courts in interpreting the criminal code, Jews and Marxists as members of a group were left entirely without protection if they could not prove that the attack was directed personally against the complainant.

(8) Political strife carried by the fascists to the extreme of organized hooliganism made the fundamental right of assembly more or less a sham. Creating disturbances in or wrecking meetings of opposing or constitutional parties not only proved a favorite test of the fighting spirit of militarized parties ("meeting-hall-battles"

—“*Saalschlacht*”), but also deterred peaceable citizens from attending meetings of their own selection. The task of the police to keep peace and order at meetings and public processions became increasingly difficult. The ordinary criminal codes being wholly insufficient to curb the deliberate tactics of extremist parties, more stringent legislation was introduced in Czechoslovakia (1923), Great Britain (1936), and proposed in Switzerland (1936). Many democratic countries, however, are still lagging behind.

A different problem arose when it became obvious that fascist demonstrations, processions, and meetings were held in districts where they could be considered only as a deliberate provocation because of the hostility of the bulk of the people living in these quarters. If, in such cases, disturbances occurred, they were actually created by the opponents. Exploiting this situation was one of the favorite methods of rising fascist movements whereby they could stand on the constitutional right of free processions and assembly. It was only reasonable that new legislation should, in various states, as in Great Britain (1936), and as proposed in Switzerland (1936), subject freedom of assembly to severe restrictions by the police or, as the case might be, by the political authority, in order to avoid provocation and subsequent clash between political opponents.

(9) Perhaps the thorniest problem of democratic states still upholding fundamental rights is that of curbing the freedom of public opinion, speech, and press in order to check the unlawful use thereof by revolutionary and subversive propaganda, when attack presents itself in the guise of lawful political criticism of existing institutions. Overt acts of incitement to armed sedition can easily be squashed, but the vast armory of fascist technique includes the more subtle weapons of vilifying, defaming, slandering, and last but not least, ridiculing, the democratic state itself, its political institutions and leading personalities. For a long time, in the Action Française, the finesse of noted authors like Daudet and Maurras developed political invective into both an art and a science. Democratic fundamentalism acquiesced, because freedom of public opinion evidently included also freedom of political abuse, and even malignant criticism was sheltered. Redress had to be sought by the person affected through the ordinary procedure of libel, thereby affording a welcome opportunity for advertising the political intentions of the offender. Democracies which have gone fascist

have gravely sinned by their leniency, or by too legalistic concepts of the freedom of public opinion. Slowly, the remaining democracies are remedying the defect. In some instances, the criminal codes are reformed in order to cope with the misuse of the press and of free speech to foster subversive propaganda or recriminations which affect the dignity of the republican and democratic institutions. New statutes were enacted in Finland (1931) and in the Netherlands (1934). Some countries went so far as to enact laws forbidding the circulation of false rumors; illustrations are Czechoslovakia (1923), Finland (1934), Switzerland (1936), and the new French press law which at the time of writing is under consideration in the Senate. It was made an offense to disparage the existing political institutions, and to offend the dignity of the acting authorities and public organs, in Czechoslovakia (1923), Finland (1930 and 1934), Spain (1932), the Netherlands (1934); also proposed in Switzerland (1936). Especially the republican-democratic institutions and symbols were shielded against defamatory denunciation. All such restrictions on the use of free speech and free press were greeted by fascists with the outcry that the democratic state was violating the very essence of its principles of freedom. But the measures proved effective in curbing the public propaganda of subversive movements and in maintaining the prestige of democratic institutions.

Furthermore, vilifying campaigns against leading personalities of the existing régime had to be checked. In several states, it was made unlawful to indulge in defamatory utterances concerning the president of the republic (Czechoslovakia, 1923) or to detract from the dignity of the republican-democratic symbols (Czechoslovakia [1923 and 1936], Lithuania [1936]). In France, after the shameless campaign against M. Salengro had resulted in the suicide of the victim, the new press law, under parliamentary consideration in 1937, protects leading figures in public life—not only of the existing régime—against slander and libel. Evidence of truth is admitted, but even if a statement is proved, its malignant character makes the author liable to damages. If Belgium had a more stringent political libel law, M. Degrelle could scarcely have boasted that at one time more than two hundred libel suits were pending against him. As happens frequently in anti-fascist legislation, the border-line between unlawful slander and justified criticism as lawful exercise of political rights is exceedingly dim,

and the courts of democratic states are called upon to decide on legal grounds what in fact is a political problem for which a new *ratio decidendi* is yet to be discovered.

(10) More patently subversive is fascism's habit of publicly exalting political criminals and offenders against the existing laws—a practice which serves the twofold purpose of building up the revolutionary symbolism of martyrs and heroes and of defying, with impunity, the existing order. It is still remembered that Herr Hitler, in August, 1933, when the rowdies of his party murdered, under particularly revolting circumstances, a political adversary in Potempa and were sentenced to death by the court, proclaimed his "spiritual unity" with them. Only Czechoslovakia (1923) and Finland (1934) have provided against this practice of morally aiding and abetting the political criminal.

(11) Experience offers ample proof that even a well prepared armed rebellion of extremists from right or left is hopeless if the regular forces of the police and the army remain loyal to the legally constituted government. Therefore, one of the most important tasks of any self-respecting state is that of protecting its armed forces against infiltration by subversive propaganda. In many countries, political activity is altogether prohibited to members of the armed forces. The officers are usually less accessible to communist influence than the rank and file, while they are more inclined to sympathize with fascism because of its attendant nationalism. Thus, fascism is, on the whole, not unfavorably received by the officers of the armed forces. Although most countries possess criminal and military codes designed to curb incitement to disaffection among the armed forces, or have introduced new legislation of this kind (e.g., Czechoslovakia [1923], Belgium [1934], Great Britain [1934], Holland after the revolt on the *De Zeven Provincien* [1933-34]), such enactments aim manifestly at communism alone, and very little has been done to restrain penetration of the military system by fascist indoctrination.

(12) The best preventive statutes are ineffective if the public officials in general, who, by controlling the key-positions in the administration and by guiding the execution of the laws, are responsible for law enforcement, are not thoroughly loyal to the state from which they draw their livelihood. Whether public officials should be allowed the same freedom of political association and activity as other citizens (as provided for in Article 130 of

the constitution of the deceased Weimar Republic), is a debatable problem. To permit public officials, however, to endorse anti-democratic parties, or actively to support them, would be an undue demand on the generosity of democratic fundamentalism. In a number of states, precautions have been taken against the participation of public officials and employees in any political party, as in Denmark (1932) and Finland (1926 and 1934), or in particular parties considered inconsistent with the democratic and constitutional structure of the state (Switzerland, federal statute [1932] and proposal of 1936, canton of Basle [1936], Lithuania [1934], Holland [1934]). The most drastic provisions designed to curb anti-constitutional activities of public officials of all kinds—including university and school teachers and persons drawing pensions from the state—are again found in Czechoslovakia (1933), where even the compulsory transfer of a judge to another service-position, if not dismissal, is permissible if he is convicted of participating in anti-democratic activities. From this viewpoint, the much debated American statutes prescribing the teacher's oath may win some favor among those who are duly alarmed by their possible anti-democratic implications.

(13) Finally, a specially selected and trained political police for the discovery, repression, supervision, and control of anti-democratic and anti-constitutional activities and movements should be established in any democratic state at war against fascism. By setting up special departments of the police, the Scandinavian countries and Switzerland, possibly also other states, herein followed the example of the dictatorial and authoritarian states. Moreover, in several states, collaboration of all citizens with the authorities in maintaining public order and safety is enjoined by making it an offense not to report to the competent authorities information concerning unlawful or subversive activities.

(14) In recent years of tension between the different doctrines, wide experience has been accumulated to the effect that fascist propaganda is pouring into democratic states from foreign countries with the deliberate purpose of undermining existing constitutional systems. International comity never was more flagrantly violated than by the missionary efforts of the fascist International in carrying political propaganda into other nations. Parrying of subversive activities directed against the state from outside is one of the fundamental, and at the same time most subtle, functions

of the democratic states. It demands both delicacy and determination in order to avoid political and economic retaliation. Apparently, nothing can be done against radio propaganda from foreign transmitters which, in dictatorial countries, are of course agencies of the government. More available to the jurisdiction of the state under fire are police and administrative regulations prohibiting the political activities of foreigners or alien emissaries on the national territory (e.g., as speakers at meetings), the importation or circulation of foreign newspapers of anti-democratic character, the wearing of fascist symbols by foreign visitors or residents, and the prohibition of foreign party organizations within the borders. Neglect of such precautions led to the assassination of the National Socialist Swiss *Landesführer* in Davos in 1936. Appropriate provisions have been enacted in Switzerland, Czechoslovakia, Lithuania, in South West Africa (against Nazi propaganda), and in Cyprus and Malta (against Italian fascism). Switzerland, in 1935, after the kidnapping of the journalist Jacob by agents of the German *Gestapo*, passed a federal statute by which foreign officials are forbidden to arrogate to themselves, on Swiss territory, activities which are reserved to the national or cantonal authorities. In some instances, anti-espionage laws were passed (Czechoslovakia, 1923 and 1936, and Switzerland, 1935). In this connection, mention should be made of the financial support which, to all appearances, flows freely from the headquarters of the fascist International to fascist movements in democratic countries. Even if an effective control of anti-constitutional movements should be found possible, it seems beyond the power of the state to cut off the secret sources of financial contributions through the mediation of private individuals. In continental Europe, public accounting of political parties is completely unknown.

## IV

*Conclusion.* As shown by this survey, democracy in self-defense against extremism has by no means remained inactive. At last, the terrifying spell of fascism's basilisk glance has been broken; European democracy has overstepped democratic fundamentalism and risen to militancy. The fascist technique has been discerned and is being met by effective counteraction. Fire is fought with fire. Much has been done; still more remains to be done. Not even the maximum of defense measures in democracies is equal to the mini-

mum of self-protection which the most lenient authoritarian state deems indispensable. Furthermore, democracy should be on its guard against too much optimism. To over-estimate the ultimate efficiency of legislative provisions against fascist emotional technique would be a dangerous self-deception. The statute-book is only a subsidiary expedient of the militant will for self-preservation. The most perfectly drafted and devised statutes are not worth the paper on which they are written unless supported by indomitable will to survive. Whether successful defense is ultimately possible depends on too many factors to be discussed here. National traditions, economic considerations, the social stratification, the sociological pattern, and the specific juridical technique of each individual country, as well as the trend of world politics, come into play. In order definitely to overcome the danger of Europe's going wholly fascist, it would be necessary to remove the causes, that is, to change the mental structure of this age of the masses and of rationalized emotion. No human effort can force such a course upon history. Emotional government in one form or another must have its way until mastered by new psycho-technical methods which regularize the fluctuations between rationalism and mysticism.

Perhaps the time has come when it is no longer wise to close one's eyes to the fact that liberal democracy, suitable, in the last analysis, only for the political aristocrats among the nations, is beginning to lose the day to the awakened masses. Salvation of the absolute values of democracy is not to be expected from abdication in favor of emotionalism, utilized for wanton or selfish purposes by self-appointed leaders, but by deliberate transformation of obsolete forms and rigid concepts into the new instrumentalities of "disciplined," or even—let us not shy from the word—"authoritarian," democracy. Whether this goal is reached by transubstantiation of the traditional parliamentary techniques, as in Belgium, Czechoslovakia, and, last but not least, Great Britain, or by the straightforward devices of constitutional reform, as in the Irish Free State or in Estonia, is perhaps of secondary importance when compared with the immediate end, namely, that those who control the emotionalism of the masses should be made, by constitutional processes, ultimately and irrevocably responsible to the people.

In this sense, democracy has to be redefined. It should be—at

least for the transitional stage until a better social adjustment to the conditions of the technological age has been accomplished—the application of disciplined authority, by liberal-minded men, for the ultimate ends of liberal government: human dignity and freedom.

In the meantime, since a majority of the people in all democracies under observation is still averse to the fascist mentality, the least that ought to be expected is that the governments in charge of the constitutional processes should be willing to meet and defeat the fascist technique on its own battle-ground. The first step toward the much-needed democratic International is awareness of the common danger, coupled with recognition of what has been done in the way of defense by other nations in similar predicaments. To neglect the experience of democracies deceased would be tantamount to surrender for democracies living.

Obviously, no country whatever is immunized from fascism as a world movement. Once this incontrovertible fact is recognized, the question suggests itself as to whether legislative measures against incipient fascism are perhaps required in the United States. To investigate possibilities in this direction would be beyond the limits of the present study. If, however, the question be answered in the affirmative, a second problem becomes that of devising federal or state anti-extremist legislation in conformity with the elaborate fundamentalism of constitutional rights enshrined in the American constitution.