

THE MONITORING FUNCTION OF DEMOCRACY

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May I begin with a personal remark, the bearing of which on our issue will gradually unfold. Born to German-Saxon parents in Lübeck, Northern Germany, Hanseatic City of great mediaeval importance, which had accepted the Reformation almost four hundred years before my life began, I was brought up a Protestant or, to put it differently, on the Protestant interpretation of the Christian faith.¹

The religious wars of the seventeenth century which laid most of Germany in ruins had left Lübeck intact. During my youth Lübeck's skyline appeared to the approaching traveler exactly as it had looked to the contemporaries of Charles V and Luther. At the end of the Hitler regimen, however, the seven beautiful spires of the five main churches did no longer greet you from far or overawe you from near. Only two, lonely and distant, were left, merely to accentuate the dreadful gap between them and the lack of that architectural unity of the whole which had edified so many generations.

I well remember how as a boy of fifteen, standing at the foot of the massive towers of St. Mary's Church (Marienkirche) in the darkness of midnight on New Year's Eve, quite overtaken by romantic feelings, I listened to the sonorous bells that rang out the nineteenth century and rang the twentieth in. No one, so I pondered, who tonight sees the beginning of the new century will see its end, while these majestic spires unperturbed had seen many centuries come and go. They seemed eternal to me, designed to remind us of our transient nature. Yet half an hour in the year of 1942 sufficed to destroy them.

It would take no longer to destroy Monhattan's skyline in another world war. We all realize that this is so, although only imperfectly unless we have seen such destruction and had known and loved the place before it was razed. The spires in Lübeck have long been rebuilt, the old skyline has been restored, and we are not afraid of another religious war in the

¹ The ideas incorporated in this paper were among those I frequently discussed with Professor Luis Recaséns Siches one of the world's ablest and most consistent fighters for humanism and personalism—during the years of our partnership at the New School for Social Research in New York. They are printed here in his honor.

old sense. History has taught us that it is desirable, possible, and even necessary, for men and women who believe that they know the metaphysical truth, to live peacefully with others who as firmly believe in a different truth. But this lesson had been learned only as the result of complete exhaustion from thirty years of devastating wars when mutual tolerance finally emerged as the only viable alternative to annihilation — alternative far too long neglected.

It has become a trivial truism to refer to the religious wars to the seventeenth century as an historic analogy to the threat of another disastrous war today or tomorrow, or the day thereafter, between people given to antagonistic *secular* ideologies, such as democracy and totalitarianism. For the moment however, I wish to leave this parallel out of focus and concentrate a little longer on the religious antagonisms of old.

Three questions may be raised in this context. The first is whether Martin Luther, under present-day conditions, in view of the high moral standards and practical absence of corruption in the Catholic Church, would at all have taken the grave step of breaking up the unity of the western Christian Church, a breach that had not been his original purpose. This question is not for me to answer. I can but express my general feeling that the trend toward the manifold and toward individual research for truth would likely have led to splits in Christianity anyway even without Luther, Calvin and the other reformers.

The second question is whether the Catholic Church could have kept her gigantic organization morally intact and uncorrupted merely on the basis of its internal hierarchic system of supervision. I gladly testify to my admiring impression that today the supervision is being exercised with great conscientiousness and wisdom. But here is my point. Does not even a religious organization profit from that popular control which secular democracy through institutions of freedom of speech, freedom of the press, and independence of the judiciary, grants every organization, secular or divine, within its orbit?

This question I feel more competent to answer than the first. In analyzing governmental systems based on complete subordination, like absolute monarchy or modern totalitarianism, and in frequent debates with people who in good faith believed in the wisdom and goodness of their leader and wished to grant him absolute power, I have been struck by the importance of one of the few arguments the validity of which is scientifically certain. This irrefutable argument against absolute power is in fact fourfold. Not only, so it runs, is it impossible to guarantee that the man emerging as a dictator will be good and wise at the time when invested with absolute power, nor, secondly, that he will remain so and, thirdly, his successors likewise. In addition there is, fourth, the fact that no leader, however clever his mind and saintly his character, as a human being is able efficiently to protect hundreds of millions of people from arbitrary or corrupt practices by his

thousands of agents (down to concentration-camp guards) unless independent expression of opinion, an independent press and independent courts are able to check upon the honesty of the agents and to complain when any should start on the road to corrupt practices.²

This is what I mean by the "monitoring function" of democracy. I do not care to say that public monitoring *alone* suffices to guarantee the absence of abuse of power and of corruption. Quite obviously this is not so. Public monitoring alone cannot do the job. In the first place, there must be within the organization — national government, the civil service, party, labor union, church — the firm will and intention to keep clean. My point is that good intention alone is not enough either. Organizational good will and outside monitoring must work *together*.

There is no adequate alternative to freedom of opinion, expression and independent courts in the fight against corruption, abuse of power and arbitrary despotism. Nothing less will do, at least not in a country of many millions of inhabitants and over a long period of time.

This argument is valid also in appraising attempts to base the purity of a religious organization completely on its own hierarchic structure. Whenever a religious organization operates in a country that is constitutionally endowed with a bill of rights it too profits from the existence of free secular institutions for the preservation of its own integrity.

Catholic theologians may be inclined to object that this analogy forgets Almighty God. He would lead His Church safely through the danger of corruption even with no democratic monitors acting from the outside. To this I would reply in religious terms that we cannot expect God to do for us what with the gifts of reason which He bestowed upon us we can well do ourselves.

The third question touches directly on the secular ideological conflicts of our time. Should man not be able and willing to do what he has achieved with regard to differences of opinion about metaphysical truth also for controversies about economic systems? Just as we no longer wage wars to force our religious opinions on others, could we not likewise abandon any appeal to force for the purpose of preventing other countries from pursuing different economic ideas? I see only one reason why we could rightly withhold tolerance in this area, namely, if it were true that socialism *necessarily* entails abolition of basic freedoms, including *habeas corpus*, freedom of speech and juridical independence. But there is no proof for the validity of so sweeping a warning. True, there is no single case known yet in which a socialist system has been actually established and maintained under preservation of freedom of opinion and of the press and of independent courts. But neither has it been established that it is *impossible* to achieve socialism in this manner or at

² For details I refer to my articles "The Impossible in Political and Legal Philosophy", in *California Law Review*, vol. 29, March 1941, pp. 312-31, and "Democracy - Challenge to Theory", in *Social Research*, vol. 13, June 1946, pp. 195-224, and to my book *Political Theory*, chapter XII.

least after a short period of transition to reestablish free institutions for wide areas of political and social life.³

This analysis leads up to a major problem that has not yet been sufficiently examined. Can freedom be divided? Can freedom be severely limited in one sector — for example in a country's economic system by mandatory socialist planning and abolition of private ownership of the means of production — and yet be preserved in other areas, for example in religious affairs, in science and art, in speech and association, in the choice of residence, of work and recreation, in the use of media of communication, questions of foreign policy, and appeal to independent courts?

The answer is not easy. The execution of socialist plans in economics may require interference with civil freedoms in other areas, for instance by limiting the free choice of residence and of jobs, restrictions which even democracies impose on their citizens in military service. While that much must be conceded to socialist planners as well as to antisocialist vigilants, they on their side of the debate ought to concede that socialist planning in economic affairs does not necessitate interference —totalitarian interference— with *all* other freedoms.

The same problem may arise in situations in which less is at stake than transition from market economy to socialism. Pollutions of air and water may reach such magnitudes that they cannot be checked by regular democratic procedures but where effectively to master them requires dictatorial powers of some board, commission or individual agent over a considerable period of time.

Similar needs may evolve in democratic countries to enable the government to control the scramble for the available sources of energy and to accelerate the flow of new sources.

This particular problem may lead up to what I would call the *need of a fourth branch of government for the survival of democracy*, that is the need of regulating certain areas of life by transferring quasi-dictatorial powers to competent agencies. Should this need materialize, as I am afraid it soon will, then it will be imperative on one hand to give the agency which is to be entrusted with this particular task (the task force, so to speak) the necessary extraordinary powers in its special area, and yet, on the other hand, to protect civil liberties and democratic procedures in all other sectors.

There seems to be far-spread inclination to take continuance of basic rights in western countries for granted. This, I fear, is a dangerous illusion. In a grave emergency basic rights may vanish over night. In some countries this can happen by constitutionally irreproachable means, either in the absence of any constitutional protection of basic rights or under a variety of clauses which make it possible to ignore them in emergencies.

³ See on this problem my *Political Theory*, chapter XII, section 6d, discussing Lenin Khrushchev, and Hayek.

It is desirable, therefore, that individual national constitutions, as some of the most recent ones have already done,⁴ include clauses that outlaw at least the rudest sorts of injustices even in great emergencies. To achieve this the usual bills of rights do not suffice because they generally admit exceptions in emergencies to be made by executive agencies or by statutes. *Emergency-proof minimum standards* must be constitutionalized. They should outlaw cruelties and torture under any circumstances. They should provide maximum periods for non-criminal internment, minimum standards for the treatment of interned persons, the right of access to counsel and witnesses, appeal to boards that are to review the observation of these principles, regular examination of places of detention and the like.⁵ These emergency-proof minimum standards should be epitomized by clauses which say that they are not abrogable even through amendment processes.

This refinement of constitutional law can be voluntarily enacted in each individual country. But other countries cannot be forced to do the same. The final aim should be international conventions that establish minimum standards of respect for human dignity in all participating countries not only in criminal procedures but also in the event of so-called protective custody or internment in concentration camps. If this cannot yet be achieved on a global basis it should be done regionally wherever the opportunity arises.

When after President Franklin D. Roosevelt's death Mrs. Eleanor Roosevelt became a member of the U.S. delegation to the United Nations I used the opportunity offered by a conference on human rights to urge her that she press for the incorporation of minimum standards of respect for human dignity in international conventions. Her answer, which appeared quite naive to me, was that it would be offensive to the democratically governed countries represented in the United Nations to insinuate that their governments could ever do such nasty things. "Not the present governments," I replied, "but their possible totalitarian successors." Only *before* dictatorial changes in governments occur it is possible to conclude international conventions of this type.⁶

⁴ On the Basic Law of the Federal Republic of Germany of 1949, see my article "The New German Constitution", *Social Research*, vol. 16, 1949, pp. 425 ff., especially 457 ff.

⁵ See "Democracy-Challenge to Theory", *op. cit.*, pp. 217 ff., "European Federation - the Democratic Alternative", *Harvard Law Review*, vol. 55, 1942, p. 561, and "The Concentration Camp", *Columbia Law Review*, vol. 50, 1950, pp. 761, esp. 777 ff.

⁶ Discussed more elaborately in my article "Limited-Purpose Federations", *Social Research*, vol. 10, 1943, p. 135, "Distribution of Powers between International Government and the Governments of National States", in *American Political Science Review*, vol. 37, 1943, p. 862, and "The Concentration Camp", *Columbia Law Review*, *op. cit.*

The existing global conventions fail to close the gaps. The Universal Declaration of Human Rights of 1948 has no legally binding force at all, and the International Covenant on Civil and Political Rights of 1966 has so far been ratified by only 27 states while 35 ratifications are needed before it comes into force. Furthermore, both instruments allow the individual government to take all measures it considers necessary

It may be easier for smaller regions to attain such agreements in the mutual interest of contiguous states than it is for entire continents or the globe as a whole.

Sure, totalitarian regimes emerging in any of the constituent states will tend to ignore constitutional clauses or international conventions on minimum standards. It is being made much harder for usurpers of totalitarian power, however, successfully to order disregard of minimum standards when all public employees, judges, and attorneys know they are under constitutional or international obligation to disobey such orders. The mere existence of an international convention and of a supernational court authorized to review the action of national courts is likely to influence public employees.⁷

In this manner the monitoring function of democracy may be gradually raised to the international level by conventions mutually agreed upon. However that may be, it was my primary purpose here to point to the monitoring function of democracy *within* those countries that live under democratic principles.

After all that so far has been said monitoring is a healthy and even necessary function of democracy, and for a citizen to engage in performing this function is a good and useful thing. There can be too much of a good thing, however, so that the good thing turns bad. This borderline is crossed whenever other good and necessary functions in a democratic country are overly hampered by an immoderate exercise of monitoring activities, for example to the effect of betraying diplomatic or military secrets to the enemy. We have had graphic illustrations of such a conflict in the U.S. in the antagonistic interpretations given monitoring exposures of military plans and activities and their effects during the final stages of the Vietnam war, for example when and advocate of U.S. withdrawal from Vietnam published secret documents from the files of the U. S. war department (the "Pentagon papers"), or another while visiting in North Vietnam during the fighting publicly denounced continued bombing from U.S. planes.

These monitoring actions constituted treason in the views of many Americans but responsible vigilance to others. There have been similar conflicts throughout the world's political history. I'll mention here only the warning transmitted to the Netherlands by the German Colonel Oster on the eve of Hitler's invasion⁸ and the various attempts at clandestine negotiations with the enemy by German anti-Nazi patriots.⁹

for the maintenance "of public order". No emergency-proof minimum standards have been incorporated in the Covenant. See "The Concentration Camp", *op. cit.*

⁷ See my *Prelude to Silence - The End of the German Republic*. New York, Oxford University Press, 1944; reprint edition H. Fertig, 1968, pp. 76 ff., 105 ff.

⁸ See Joachim C. Fest, *Hitler*, Ullstein, Frankfurt, Berlin, 1973, p. 857.

⁹ *Ibid.*, pp. 957-961.

Or, to give still another illustration: At the end of Brüning's chancellorship in Germany, Brüning saw treason in the actions of Germans who told foreign ambassadors not to heed the Chancellor's statements of policy because he would be overthrown within a few weeks.¹⁰

It cannot be the aim of this article to draw a definitive line to the usefulness of monitoring activities in democratic countries. To find that line must be left in old Aristotelian fashion¹¹ to the never ending need of using practical judgment in specific historical situations.

¹⁰ Heinrich Brüning, *Memoiren 1918-1934*, Deutsche Verlags-Anstalt, Stuttgart, 1970, pp. 564-600.

¹¹ On the relevance of a recourse to Aristotle in the search for solutions of modern political problems see Kurt von Fritz, *The Relevance of Ancient Social and Political Thought for our Times*, de Gruyter, Berlin, New York, 1974.