Never Again - Ever Again

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“The monster is multifaceted, and nothing is more monstrous than man.” (Sophocles, Antigone)

The “Never Again” is the desperate evocation of something impossible. Nothing prevents people from expanding the arsenal of their crimes with ever newer, ever more artificial, more scientific methods and instruments, and from using them. Just as grass and flowers mercifully spread over the ruins of the ovens, the fields fertilized with ashes, all attempts to bear witness to the crimes, to keep memory alive as a warning, dissolve into the history of the victors, which has dominated everything else in all times of human history.

The victims, the survivors, their children and grandchildren bear the traumas inflicted on them alone. The victims are annoying, their suffering is suppressed and finally forgotten. Moreover, the longer the years go by, the more blame for the crimes they have suffered is attributed to them as “self-inflicted”. Old, new hatred is perpetuated in hostility and murderous attacks. This fact, the “again and again” is a constitutive part of civilization. It not only bears the face of Jew-hatred, it appears everywhere and again in a variety of narratives.

“Never again” has been elevated to the constitutional principle of democracy, puts democracy itself, depending on political preference, up for discussion

Since the American and French revolutions, human and constitutional rights based on natural law have been further developed into an international law, albeit one that is still toothless. However, the democracies of today’s liberal West, which emerged form these revolutions, are still looking for legally sound instruments to domesticate their innate, misanthropic, dark side of civilization without abolishing themselves.

They fail theoretically and practically again and again because of the liberal constitution of their democratic systems. To put it bluntly, if democracy wants to take its voluntary commitment to freedom seriously, it cannot be ruled out that it will be abolished with the use of these civil liberties with the consent of large majorities.

> *The free, secularized state lives on prerequisites that it cannot guarantee itself. On the one hand, it can only exist as a liberal state because the freedom it grants its citizens is regulated from within, from the moral substance of the individual and the homogeneity of society. On the other hand, it cannot seek to guarantee these regulatory forces on its own, i.e. by means of legal coercion and authoritative commandments, without giving up its freedom – and on a secularized level – falling back into the claim to totality from which it led in the confessional civil wars. (...) There is no way back over the threshold of 1789 without destroying the state as the order of freedom.Ernst Wolfgang BöckenfördeRecht, Staat, Freiheit, Frankfurt am Main, 1991*

Was the takeover of government by Hitler and the NSDAP in 1933 not a seizure of power by fascists and murderers determined to do anything allowed by the conservatives, but merely the legitimate, democratic norm? Is the rise of anti-democratic, right-wing radical parties in all Western democracies, e.g. in Italy, France, the USA, Slovakia, Hungary as well as in the Federal Republic of Germany – all enemies of the state who invoke civil liberties in order to abolish them in the event of success that cannot be ruled out – to be accepted as democratically wanted, according to Böckenförde?

This understanding of democracy strips democracy of any meaningful substance, it transforms it into a formal institutional theatre that is open to any staging.

Yet it can already be read in Aristotle that in the polis the government is supposed to be there to promote virtue in a way that leads to a good life for its citizens. "Life, liberty and the pursuit of happiness" is how this claim is revolutionarily summed up centuries later in the American Constitution.

Democracies have constitutionally sound instruments at their disposal to block the paths open in them into "again and again" without cancelling themselves

Contrary to what Böckenförde states, there is an objective system of values inherent in democracy, a binding standard that qualifies for equal participation in the democratic competition for political power and hegemony. Based on this value system, those who use it only to abolish it once in power can be excluded from participation in this competition in regulated procedures. This regulates the use and order of freedom, and even abolishes it for its enemies, but it itself is preserved. In the Basic Law of the Federal Republic of Germany, the constitutional fathers took this idea of rule-based protection of the order of freedom in the democratic process into account by defining the Federal Republic as a "defensive democracy" in three articles of the Basic Law.

Art.18 of the Basic Law: Deprivation of fundamental rights

No one may violate fundamental rights. Anyone who nevertheless violates fundamental rights may be fought by the state. It can deprive them of their fundamental rights. The Federal Constitutional Court must decide on this. Article 18 has not yet been successfully applied in the history of the Federal Republic of Germany.

Article 21 of the Basic Law: Prohibition of anti-constitutional parties

On the basis of this, the SRP, a successor organization to the NSDAP, and the KPD in 1956 were banned by the Federal Constitutional Court in the Federal Republic of Germany. Currently, there is a public discussion about a motion to ban the right-wing radical AfD, which consistently achieves up to 20% approval in the electorate in polls nationwide. The Bundestag, Bundesrat or Federal Government can file such an application for a ban. The application must be substantiated. At the moment, the parties are reluctant to make such a motion, which is well justifiable on the basis of the facts, because they themselves represent populist positions in many respects, especially in asylum policy, which are similar to those of the AfD. They fear for their support among many citizens at the ballot box. Incidentally, such a ban on political parties, as laid down in the Basic Law, does not exist in any other constitution of Western democracies.

Article 37 of the Basic Law: federal coercion

If a federal state does not fulfil "its federal obligations under the Basic Law or another federal law", the federal government can force this state to fulfil its obligations with the consent of the Bundesrat. This federal coercion can be enforced against all authorities of the Land concerned by means of a commissioner appointed by the Federal Government who is vested with a direct right to issue instructions.

With federal coercion, the federal government can prevent the government work of an openly anti-constitutional prime minister (Ministerpräsident) if the AfD should win the majority in the Thuringian state parliament in the fall of this year – which is not ruled out. Such federal coercion has not yet been applied in the history of the Federal Republic.

Safeguarding the Federal Constitutional Court

In addition, the democratic parties in government and opposition in the Federal Republic are currently discussing how the position of the Federal Constitutional Court and the appointment of its judges, which have so far only been regulated in a federal law, can be incorporated into the Basic Law. In this way, unlike in the USA and recently in Poland, a politicization of the Federal Constitutional Court and thus its independence from the political process as a constitutional body that ensures democracy is to be secured.

Furthermore, the reintroduction of the Radical Decree is discussed. The Radical Decree was introduced in 1972 by Willy Brandt, SPD and all Prime

Ministers (Ministerpräsidenten) of the Länder for the political examination of all applicants for the civil service on their loyalty to the constitution to keep out left radical applicants coming out of the student movement and the DKP. A few years later, it was tacitly repealed. Now the trials of infiltration for an abuse of the public service of the republic is to be prevented, this time from the right.

The denial of the Holocaust is prosecuted as a crime of opinion in the Federal Republic of Germany. A fine or imprisonment of up to five years can be imposed on "anyone who approves, denies or trivialises an act committed under the rule of National Socialism", meaning genocide, "in a way that is likely to disturb the public peace, in public or in an assembly". Section 130 of the German Criminal Code, paragraph 3.

"Again and again" has found and continues to find its place worldwide since 1945

The Russians' war to destroy Ukraine, Hamas' hatred and terror war against the Jews are only the latest examples, they have not been defeated. "Never again" remains an irredeemable, rather moral, unfulfilled claim of the liberal democracies. The defensive measures against the anti-democratic challenges laid down in the Basic Law and in the laws of the Federal Republic of Germany, which if used would de facto mean a restriction of democratic freedoms, are formulated in the interest of a legally sound "Never Again".

For the Federal Republic of Germany, it should be noted, that there is no practical political consensus supported by all parties to actively ward off enemies of the constitution, a publicly secured "never again" beyond many moral speeches. On the contrary. In the Federal Republic of Germany, politicians are rather hesitant, even helpless, in using the instruments of the rule of law at their disposal in view of the aggressive hatred of Jews openly expressed on the streets, at universities and in cultural institutions, despite the crimes of HAMAS on 7 October 2023. For a long time now, the focus of criticism has not been on the crimes of Hamas, but on Israel's war of self-defence, which is justified by international law. In supporting Ukraine's struggle for freedom, Western democracies are also reluctant to use their opportunities instead of intervening on Ukraine's side with a promise of victory.

How a "never again" beyond its moral content could be constitutionally and internationally binding for all Western democratic governments, translated into joint action, "without destroying the state as the order of freedom" is an open question. A question that calls up many philosophical and international legal ideas about the one world society, the realisation of which seems rather utopian at the moment.

Thus, Böckenförde's reference to the barricades of 1789 can also be understood as an indication that the deepening and future of the liberal democracies of the West must rather be defended on the barricades, i.e. in civil wars, if at all. If citizens are willing to fight militantly and with their lives for the preservation of civil liberties, which, realistically speaking, does not speak for very much.

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