

The Cost of Taking Time

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[Bringing the federal capital to a standstill in order to get the federal government to move](#) – for this goal, dozens of climate activists are once again taking to the traffic-clogged streets of Berlin and are being dragged off them again by angry car drivers, sometimes with brutal force. The pressure is rising in the German boiler, to a degree that starts to look really dangerous for democracy and the rule of law. To flavour his worries about this escalation with the right amount of historical spice, Federal Minister of Justice Marco Buschmann of the FDP has now made a [risky comparison](#): „In the 1920s and 1930s, there were street battle-like conditions in Berlin because people on the left and right political fringes felt empowered to place themselves above the legal system and enforce their own ideas with their fists. That must not be allowed to happen again.“

Seriously? To draw a line between the Last Generation and, of all things, the battle-hardened communist militia of the Weimar Republic would indeed be a fabulously silly idea, and a parallel between those livid car drivers and the Nazi thugs of the SA even more so. Compared to this, even Alexander Dobrindt's talk of an emerging „climate RAF“ would appear downright lucid. If the minister can nevertheless hope for a certain resonance for his comparison, then for other reasons. What could these be?

What is remarkable about the current conflict over climate protection is that one of the conflict positions is the denial that it is a real conflict at all. Climate change, of course, they say, we ultimately are all on the same page on that, aren't we? Definitely a huge problem! We absolutely have to do something! What exactly, though, that is debatable, of course. One measure would be costlier for some, the other for others, and which mix should become collectively binding is ultimately a completely ordinary question of completely ordinary policy preferences co-existing in a diverse society, which has to be answered through completely ordinary democratic procedures of deliberation and majority decision-making. So what we have here is actually not so much a conflict but a joint problem that takes time to find a joint solution for. So let's take it slowly and patiently, and it will all work out fine in the end.

What this way of putting things makes invisible is the radical and existential inequality with which the ability to afford time is distributed in society. If the supposedly joint solution to the supposedly joint problem is constantly postponed, delayed, protracted and watered down, then by no means does everyone pay the same price. For a rich 50-year-old like me, postponing, delaying, remaining cautious and moderate amounts to paying radically and existentially less than a precarious 20-year-old. The costs of taking time are radically and existentially unequally distributed, and this inequality cannot easily be democratically processed, nor can it be dispatched to the future in a progressive and growth-oriented way, nor can it be excluded, marginalized and pushed to or over the edge of society. It is right there, in

our face, and the greater the efforts to make it invisible, the louder it will make itself heard.

That is the conflict.

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I'm no historian, and neither is Buschmann, as far as I know. But under that aspect, couldn't one actually find some merit even in that wild Weimar comparison of his? Didn't the first German democracy indeed fail (apart from the stupidity and perfidy of certain conservatives) not least because of its inability to get a grip on the radical and existential inequality, which became ever more radical and existential through the consequences of war, inflation and the world economic crisis? Wasn't democratic liberalism pulverised between communism and National Socialism, not so much because its liberal democratic legal and constitutional order suddenly had too many people walking all over it out of sheer exuberance and completely out of the blue,

but rather because it had [too little of relevance to say to too many people in too existential need?](#)

The legal and constitutional order is what makes it possible for a diverse society to process its differences of opinion and interest in a peaceful and effective way. The constitutional foundations of democratic decision-making, the institutions and procedures of ordinary law, the limits and empowerments for society and the state, the rejection of arbitrariness and violence enshrined in and guaranteed by the legal system as a whole. I am sure that the liberal democrat and jurist Marco Buschmann would subscribe to that any time.

Of course, as every critical mind knows, the legal order is not a neutral place, equidistant from all social interests, but a product and instrument of concrete social power relations. But precisely because this is so, those who are empowered to operate this instrument must be filled with an ethos of impartiality. Judges and administrators must truly and sincerely believe that they take their decisions from the law and not from the preferences and interests to which they are attached. The police must truly and sincerely believe that they are protecting the law, even if that law grants demonstrators the right to do and demand things that are personally and institutionally deeply repugnant to them. Neutrality is an „[indispensable fiction](#),,, as philosopher Kwame Anthony Appiah has just called this in a very commendable essay. It is indispensable because without it the instruments can't function properly. A judgement by a biased judge, a decision by a corrupt civil servant, a demonstration ban by a politically instrumentalised police chief gives those who are supposed to accept it as binding no reason to actually do so but fear of violence. Rule by violence is notoriously expensive, inefficient and unstable, which is why it is in the rulers' own interest not to allow it in the first place as long as they can help it, and to keep the fiction of neutrality as credible as possible. This is not cynical, this is democracy.

Iris Spranger, Home Secretary of the German capital Berlin, has just done the exact opposite of this when she [revealed her regret](#) that those who mete out violence and vigilante justice against climate activists „unfortunately then also have to be held accountable“. To make sure that even the last person understands which side the head of Berlin's security apparatus is on in this current conflict, she responded to criticism of her choice of words by saying that she understands only too well the anger against the climate activists, but that vigilante justice was nevertheless the wrong answer. In doing so, she proved that the executive power in the federal capital sees itself as a party in this conflict, and thus caused much more damage to the liberal democratic constitution than all the climate activists together with their civil disobedience exceptions confirming the rule of law. But aren't we ourselves to blame, too? Every time we meekly allow the media to treat us to the commentary and demands of the unspeakable „*Gewerkschaft der Polizei*“ on all kinds of current security policy issues, as if the police force were just another political interest group and not the embodiment of executive power, we are basically doing the same thing.

Iris Spranger, unlike Marco Buschmann, is a Social Democrat. In the mid-20th century, it was the reservoir of ideas of social democracy – welfare state, public services, participation, progressive taxation – that helped democratic liberalism regain its strength after its deepest crisis. In this way, inequality was brought back

down to a level that was democratically processable (meanwhile creating new inequality, painstakingly made invisible). This effort gave rise to much of the liberal-democratic constitutional law we still operate with today.

Now it looks as if democratic liberalism is once again confronted with a situation of inequality of such radicality and existentiality that it may not be able to cope with it easily. Will it be able to? If liberals and social democrats were to finally start to ponder on the possibility of beginning to enter an early stage of drafting a process to approach the vision of developing an idea what to do about this, I might allow myself some hope that it will.

The week on Verfassungsblog

... summarised by PAULA SCHMIETA:

The EU Council intends to **digitalise the Visa procedure for the Schengen Area**. [MIRKO FORTI](#) opposes the Council's current proposal due to concerns that the fundamental rights of visa applicants could be subordinated to security and efficiency considerations.

Two Dutch investors recently turned to a US court to enforce a so-called **intra EU investor-State arbitral award** against Spain under the Energy Charter Treaty. The court however held that Spain lacked legal capacity to enter into an agreement to arbitrate in the first place. [STEFFEN HINDELANG, JULIA NASSL & ARGHA KUMAR JENA](#) explain how it came to be that a **US court enforces EU law**.

On 14 April, the **French Constitutional Council** upheld the government's pension reform as largely constitutional. [TIM WIHL](#) says this was to be expected, discusses the constitutional criticism voiced against the reform, and explains how it is linked to the 'legitimacy crisis of the Fifth Republic'.

At the end of last month, the **ECtHR** held a hearing in the **climate change** case of *KlimaSeniorinnen v. Switzerland*. What is special about the case is that the claimants argue that, as *older women*, they are disproportionately affected by the impacts of climate change. [PETRA SUßNER](#) explores to which extent this embodies an intersectional case and reflects on **intersectionality's** implications for climate litigation.

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If Germany is to be climate neutral by 2050, the federal states would have to borrow money to finance climate protection measures. [JOACHIM WIELAND](#) explains how the Länder can meet their constitutional obligations to **protect the climate despite the ‘debt brake’**.

[YANNIK BREUER & JANNIK KLEIN](#) report on the hearing on the ‘**small**’ **electoral law reform** of 2020, which took place this week before the BVerfG. Although the law in question has since been replaced by this year’s new ‘big’ electoral law reform, the decision could still have a major impact on the current electoral law.

Four German Länder have included so-called **anti–anti-Semitism** clauses in their constitutions since 2020. [ULRIKE LEMBKE & CHRISTOPH SCHUCH](#) find this explicit anchoring ‘certainly laudable’, but criticise that this raises thorny legal questions.

In **Mexico**, tensions between the Mexican supreme court and the Inter-American Court of Human Rights (IACHR) are rising around the question of judicial review of constitutional provisions and amendments. [JAIME OLAIZ-GONZALEZ, DANIEL](#)

[TORRES-CHECA & SEBASTIÁN INCHÁUSTEGUI](#) explain the IACHR's special role in the Mexican constitutional system and the implications of its latest 'unprecedented decision'.

[MING-SUNG KUO](#) responds to last week's article on **Taiwan's legal status**. Regarding the UN General Assembly's resolution in question, he contends that 'engaging with China in such a dogfight on the original meaning may not help free Taiwan of the Resolution's straightjacket very much' and suggests that the core problem is not so much the resolution's original meaning, but its continuing applicability.

Finally, our [blog debate 50 Years On: Ireland and the UK In and Out of the EU](#) concludes with a contribution by [IMELDA MAHER & JOELLE GROGAN](#).

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That's it for this week. All the best to you!

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Max Steinbeis

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