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SOMMARIO FASCICOLO N. 2

EDITORIALE

- Mariachiara Tallacchini, *Preparati per l'incertezza. I cittadini e i cambiamenti climatici* 337

SAGGI

- Angela Musumeci, *Autonomia differenziata, acqua pubblica e sistema idrico integrato* 343

- Franco Peirone, *Revisiting the German Federal Constitutional Court's "Ultra-spective" Decision* 375

- Mauro Pennasilico, *Sostenibilità, economia circolare e giustizia contrattuale nella filiera agroalimentare* 411

ARTICOLI

- Alessandro Cardinali, *Divari territoriali e mobilità sostenibile: i trasporti marittimi* 451

- Giulia Formici - Marica Mileo, *Ripensare il ruolo del consumatore alimentare nell'era della sostenibilità e delle comunicazioni green: nuove traiettorie* 477

- Margherita Marotta, *La climate change litigation e le banche* 503

- Omar Makimov Pallotta, *Lo status quo della giustizia climatica in Italia* 523

NOTE A SENTENZA

Vittorio Fazio, *Il contributo della Corte costituzionale nel sistema multilivello di governo dell'energia* 553

Daniela Messina, *La sentenza della Corte EDU sul caso "Terra dei fuochi": una significativa tappa nel riconoscimento multilivello del diritto all'ambiente salubre* 573

Alice Quaranta, *Nuove e antiche incertezze sul diritto alla vita in casi di inquinamento ambientale: in margine a L.F e altri c. Italia* 603

Bettina Steible, *¿Hacia un constitucionalismo econcentrista? Sobre los derechos del Mar Menor* 629

Hanno scritto in questo numero 649

REVISITING THE GERMAN FEDERAL CONSTITUTIONAL COURT'S
“ULTRA-SPECTIVE” DECISION

SOMMARIO: 1. Introduction. – 2. The Temporal Architecture of The Law. – 2.1. The Ordinary Temporal Scope of the Law. – 2.2. Different Timespans for Different Laws. – 2.3. Ultra-active and Ultra-spective Laws. – 3. Ultra-Spectivity in Action: *Neubauer v. Germany*. – 3.1. Balancing Rights and Duties through Inter-Generational Proportionality. – 3.2. Time as a Benchmark for the Reasonableness of Mitigation and Precautionary Measures. – 3.3. Judicial Guardianship of Not-yet Visible Interests. – 4. Conclusions.

1. *Introduction*

Four years ago, on 24 March 2021, the German Federal Constitutional Court (‘the Court’) held that two provisions of the Federal Climate Change Act of 12 December 2019 that sets out national emissions reductions over the next decades, are unconstitutional¹.

Particularly, the Court declared the law unconstitutional because it disproportionately allocated the burden of making emission reductions to future generations. The Federal Climate Change Act had set an ambitious target in an effort to mitigate climate change: it expressly provided for slashing greenhouse emissions to net zero by 2050². To reach this long-term goal, it required reductions equal to 55 percent in greenhouse gas (GHG) emissions compared to the 1990 levels *by* 2030, as well as decreasing annual emissions budgets for certain sectors³. However, the law did not include climate targets post-

¹ German Federal Constitutional Court, Order of 24 March 2021 - 1 BvR 2656/18 and others. The provisions declared unconstitutional were in particular Section 3(1) and 4(1), sentence 3.

² § 3(2) 2nd sentence Federal Climate Change Act.

³ § 3(1) and §4 Federal Climate Change Act.

2030, merely a requirement for the Government to set annually decreasing emissions budgets post-2030. Several individuals and environmental associations considered the Act inadequate to mitigate climate change. According to them, the reduction of 55 percent before 2030 was insufficient, and the remaining reduction burden was unduly postponed until after 2030, which would jeopardize the rights of future generations. The Court agreed with this view, ruling that the law violated the complainants' rights since it postponed the largest share of emission reductions until after 2030 and did not contain any provisions on how emissions were to be reduced after 2030.

Time appears to play a crucial part in the Court's decision. The Court had to engage with the fact that the people of the present have the authority to rule over events of the present, but those events are, inevitably, the result of developments of the past and will significantly impact those of the future. Another fact is that, while future people's interests matter, especially when linked to matters of global interest like climate, in a democratic context, the first need and instinct is to uphold the rights and accommodate the wishes of the people of the present. In this very complex case, the Court made a commendable effort to fairly align democratic requirements with long-term goals. This article contends that the Court has placed a burden on the current people for the sake of a future interest by declaring part of the law unconstitutional.

This decision provides a specific dimension to the temporal projection of the law, which might be labelled as "ultra-spectivity": when dealing with goals that can only be achieved over time, the law's effects shall be spread out over different generations, deriving legal obligations for the present from the future.

The article is structured as follows: Section 2 analyzes the current understanding of the ordinary temporal scope of the law that operates in a fictitious timeframe, centered around an ever-lasting present (2.1). This default rule cannot adequately address the complexity of human events, especially environmental challenges, and therefore a more dynamic concept of law and time is needed (2.2). This could be achieved by adopting "ultra-spective laws" – laws bridging future and present obligations – when dealing with long-term goals such as fighting climate change (2.3). Section 3 argues that the Court decision

on the Federal Climate Change Act is an example of ultra-spective reasoning with respect to adjudicating over the (dis)proportionality of the Act (3.1), mandating mitigation of and precautionary measures to tackle climate change (3.2) and outlining its role in holding government accountable for these commitments over time (3.3). Section 4 concludes by addressing the outcomes of this decision through the lens of constitutional law and its temporal dimension.

2. The Temporal Architecture of The Law

2.1. The Ordinary Temporal Scope of the Law

The significance and breadth of the concept of time in law⁴ must be the starting point for the review of such a decision⁵. The law, and in

⁴ M. STRONKS, *Grasping Legal time. Temporality and European Migration Law*, Cambridge, 2022; L. CORRIAS and L. FRANCO (eds.), *Temporal Boundaries of Law and Politics: Time Out of Joint*, London, 2018; A. KOUROUTAKIS and S. RANCHORDÁS, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, in *Minnesota International Law Journal*, n. 25, 2016, pp. 29-76; L.A. KHAN, *Temporality of Law*, in *McGeorge Law Review*, n. 40, 2009, pp. 55-105; P. ROUBIER, *Le Droit Transitoire. Conflits des Lois dans le Temps*, Paris, 2008; R.R. FRENCH, *Time in the Law*, *University of Colorado Law Review*, n. 72, 2001, pp. 663-748; C. GREENHOUSE, *A Moment's Notice: Time Politics Across Culture*, Ithaca, 1996; B. ADAM, *Timewatch. The Social Analysis of Time*, Chichester, 1995; J.B. BENDER and D.E. WELLBERY (eds.), *Chronotypes: The Construction of Time*, Stanford, 1991; J. BJARUP and M. BLEGVAD (eds.), *Time, Law, and Society*, Stuttgart, 1995; C. GREENHOUSE, *Just in Time: Temporality and the Cultural Legitimation of Law*, in *Yale Law Journal*, n. 98, 1988-1989, pp. 1631-1651.

⁵ The substantial emission reduction goal addressed in the decision (environmental constitutionalism), the methods to achieve it (international law tools and national courts' openness to international law), and the legitimacy of certain institutions to operate in this field fall outside the scope of this article. On these, see, J. JAHN, *Domestic courts as guarantors of international climate cooperation: Insights from the German Constitutional Court's climate decision*, in *International Journal of Constitutional Law*, n. 3(21), 2023, pp. 1-25; P. MINNEROP, *The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court*, in *Journal of Environmental Law*, n. 34(1), 2022, pp. 135-162; G. WINTER, *The Intergenerational Effect of Fundamental Rights: A Contribution of the*

particular the legislative function⁶, in establishing itself as an order, always resorts to time as a key structural feature⁷. The law determines when one time ends and another begins in a legal sense and regulates what human behavior is permissible during each period⁸. Therefore, time informs the architecture of the law. This is a well-known issue when the period concerned is the past, with many studies having been conducted into retro-active laws, a concept that refers to laws that interact with and shape the past.

In relation to the Court's decision, the current article postulates that as much as we legal scholars carefully deal with backward-looking laws⁹, we should also study the forward-looking ones, meaning those legal acts that interact with and shape the future. Environmental constitutionalism studies have dealt with the issue, claiming that the law needs to integrate past, present, and future for dealing with environmental challenges¹⁰. However, there is not yet an explanation

German Federal Constitutional Court to Climate Protection, in *Journal of Environmental Law*, n. 34(1), 2022, pp. 209-221; R. KRÄMER-HOPPE, *The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide*, in *German Law Journal*, n. 22(8), 2021, pp. 1393-1408; L. KOTZÉ, *Neubauer et al. versus Germany: Planetary Climate Litigation for the Anthropocene?*, in *German Law Journal*, n. 22(8), 2021, pp. 1423-444.

⁶ S. RANCHORDÁS and Y. ROZNAI, *Introduction*, in S. RANCHORDÁS and Y. ROZNAI (eds.), *Time, Law, and Change: An Interdisciplinary Study*, London, 2020, p. 2.

⁷ B. RICHARDSON, *Time and Environmental Law: Telling Nature's Time*, Cambridge, 2017, p. 80.

⁸ G. SEIDMAN, *Night Laws: How Nightfall Shapes Regulation*, in S. RANCHORDÁS and Y. ROZNAI, note 6, p. 91.

⁹ P. SALEMBIER, *Understanding Retroactivity: When the Past Just Ain't what it Used to Be*, in *Hong Kong Law Journal*, n. 33, 2003, pp. 99-138; J.G. LAITOS, *Legislative Retroactivity*, in *Wash. U. Journal of Urban & Contemporary Law*, n. 52, 1997, pp. 81-160; C. SAMPFORD and A. PALMER, *Judicial Retrospectivity*, in *Griffith Law Review*, n. 4, 1995, pp. 170-213; J. TRAHAN, *Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, in *Louisiana Law Review*, n. 59, 1998-1999, pp. 661-766; S.R. MUNZER, *A Theory of Retroactive Legislation*, in *Texas Law Review*, n. 81, 1982, pp. 425-428.

¹⁰ M. MURCOTT, *Transformative Environmental Constitutionalism*, Leiden, 2023; L. KOTZÉ, *Global Environmental Constitutionalism in the Anthropocene*, London,

of which legal mechanisms can substantiate this cross-temporal character of the law.

In our understanding of the law – as shaped by rule of law considerations¹¹ and democratic principles¹² – almost nothing endures forever¹³. The law has no claim to be eternally valid for all people no matter when they are alive. In law, the past and the future are not dissimilar to distant, foreign provinces, inhabited by unknown people. We do not know the people of the past and the future in the same way that we do not know foreign populations, nor do we have authority to rule over them. Commitments undertaken today could always be reversed by the people who would otherwise have to respect them in the future¹⁴. This is the core of the principle of *lex posterior*, which is

2016; D.A. FABER, *From Here to Eternity: Environmental Law and Future Generations*, in *University of Illinois Law Review*, 2003, pp. 289-335.

¹¹ The impossibility of operating in an unlimited timespan is linked to rule of law principles. The principle of human agency militates against backward-looking laws: it would be impossible for people to follow the rules laid down in law if the rules are retroactive. Similarly, laws have to be knowable in advance to allow individuals to follow them and to make choices accordingly. Only if these time-related principles are followed, the legal system becomes intelligible and apt to address human lives, and thereby suitable to regulate human actions. See J. WALDRON, *The Appeal of Law - Efficacy, Freedom or Fidelity?*, in *Law & Philosophy*, n. 13, 1994, pp. 259-284; L. FULLER, *The Morality of Law*, New Haven, 1964, pp. 39 and 46.

¹² The idea of law operating indefinitely is generally at odds with the democratic values as it would entail current generations deciding for people who are not yet involved in the democratic decision-making process. C. INVERNIZZI ACCETTI, *The Temporality of Normativity: Hans Kelsen's Overcoming of the Problem of the Foundation for Legal Validity*, in *Philosophy and Social Criticism*, n. 42(1), 2016, pp. 25-43; J. EULE, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, in *American Bar Foundation Research Journal*, n. 12(2-3), 1987, pp. 379-459.

¹³ F. OST, *Le Temps du Droit*, Paris, 1999, pp. 14-15.

¹⁴ Constitutions are often characterized as perpetual documents which reflect society's aim to protect itself against the risk of preferring short-term passions over long-term interests. Constitutions are therefore an attempt to regulate the future on behalf of the past. As such, they allow the majority of the past to set rules that will restrict the wishes of future majorities. This 'temporal imperialism' is considered necessary to achieve some higher aspirations of the polity. R. DIXON and T. GINSBURG, *Deciding Not to Decide: Deferral in Constitutional Design*, in *International Journal of Constitutional Law*, n. 9, 2011, pp. 636-672. S. Calabresi, *Time and the Law: The US Constitu-*

twofold: what is provided now does not count for the past, and it can be reversed in the future. These features of the law are synthesized in the principles of non-retroactivity of the law (the law does not apply to events that occurred before its enactment) and of non-ultra-activity of the law (the law does not apply to events that occurred after the abrogation of the law). That is to say, the law does not rule the past and rules the future only insofar as it is not abolished. This set of principles is usually provided for at the legislative level. It is therefore possible that another law proclaims itself retro-active or ultra-active in the name of the principle of *lex posterior*, thereby derogating from those principles. This is of course impossible if such principles are set out in the constitution instead, since the other principle for solving conflict between sources of law, the *lex superior*, commands that laws may not contradict what is provided in the constitution itself.

International conventions¹⁵ and national constitutions¹⁶ for example

tional Experience, in S. RANCHORDÁS and Y. ROZNAI, note 6, p. 34; J. RUBENFELD, *Freedom and Time: A Theory of Constitutional Self-Government*, New Haven, 2001. Given the nature of constitutional provisions – which are typically distinguished from ordinary laws by the presence of more onerous amendment procedures – most modern constitutions could be considered entrenched. They require more demanding processes for amendment than ordinary legislation (e.g. parliamentary supermajorities, approval across two legislative terms, or national referendums) Some go even further by including special entrenchment clauses that either raise the threshold for certain changes or prohibit certain material amendments entirely. M. HEIN, *Constitutional Norms for All Time?: General Entrenchment Clauses in the History of European Constitutionalism*, in *European Journal of Law Reform*, n. 21(3), 2019, pp. 226-242; R. ALBERT, *Amending constitutional amendment rules*, in *International Journal of Constitutional Law*, n. 13(3), 2015, pp. 655-685.

¹⁵ Universal Declaration of Human Rights, Article 11(2); International Court of Justice Statute, Article 38(1)(c); Covenant on Civil and Political Rights, Article 15; EU Charter of Fundamental Rights, Article 49; ECHR, Article 7(1); American Convention on Human Rights, Article 9; African Charter on Human and Peoples' Rights, Article 6; Arab Charter of Human Rights, Article 15.

¹⁶ E.g. Brazilian Constitution, Article 5, Sect. XXXVI and XL; Canadian Charter of Rights and Freedom, Article 11(g); French Declaration of the Rights of the Man and of the Citizen, Article 8; German Constitution, Article 103; Indian Constitution, Article 20(1); Irish Constitution, Article 15.5.1; Italian Constitution, Article 25, c. 2; Japanese Constitution, Article 39; Mexican Constitution, Article 14; Norwegian Con-

provide the principle of non-retroactivity in criminal affairs to prohibit any legislation that seeks to impose criminal penalties on individuals for acts that were not considered criminal when committed. In doing so, international conventions and constitutions prevent retroactive (criminal) legislation¹⁷. Constitutional texts commonly make provision for retroactive legislation in the same matters by declaring that acts that were considered criminal by a law that has been repealed, will not be considered criminal anymore, thereby derogating from the principle of non-retroactivity of the law. Since the general principle of law governing the future is usually limited to the idea that a law remains valid until it is repealed, constitutions usually do not provide any further insight into the forward-looking character of the law. The temporal breadth of law is then limited by default: the law does not rule the past, it rules the present and, as a default rule without the aim or any promise of eternity, the future. It has therefore a kind of limited forward-looking effect. From the moment the law enters into force, the law will rule over an aspect of life, and it is presumed that it will keep doing so in the future as well.

This authority could cease only by means of another law and under the same *lex posterior* principle that gave binding effect to the now abrogated law. Still, despite being the most interesting timespan in the law, investigating the effects of the laws on the future seems a futile exercise as it is inherent in the concept of the law that it could and should be changed: the expectation that today's law will continue to be upheld cannot be relied upon. On the grounds of *lex posterior*, people in the future may change what is established today. This whole temporal architecture of rules works well in theory. The law rules the present and limitedly the future, and it has no bearings on the past except if otherwise provided in exceptional cases. This framework

stitution, Article 97; Pakistani Constitution, Article 12.1(a)(b); Philippines Constitution, Article III, Sect. 22; Romanian Constitution, Article 15(2); Spanish Constitution, Article 9(3); Turkish Constitution, Article 38, c. 1; United States Constitution, Article 1, Sect. IX.

¹⁷ B. JURATOVITCH, *Retroactive Criminal Liability and International Human Rights Law*, in *British Yearbook of International Law*, n. 75(1), 2005, pp. 337-362.

encapsulates clear categories of the past and future, with an abstract and eternal present in between¹⁸.

2.2. *Different Timespans for Different Laws*

This conception of law and time becomes somewhat strenuous when we immerse ourselves in the temporal fluidity of human endeavor. In reality, issues from the past may need a legal assessment in the present, and issues yet to come may also require such an assessment. Past, present, and future are all part of the intertemporality of human existence. They do not exist as such: they are simply postulated as a reaction to the limited timespan of human existence¹⁹.

But the same human condition obliges us to acknowledge that past, present, and future are not separate elements, but rather like communicating vessels. Time flows from one vessel to another, but it is always the same substance and the same quantity²⁰. Spread out over that quantity of time, legal commitments might be established, even if they can only be accomplished at some moment in the future. Once we accept that time is a legal product, we might seize opportunities and have discretion in shaping the temporal scope of the law. Time is socially constructed in law: it is given meaning and form according to human needs²¹, which makes time highly context dependent²². The

¹⁸ L. BARSHACK, *Interpretation and the Legal Fabrication of Time*, in S. RANCHORDÁS and Y. ROZNAI, note 6, p. 16.

¹⁹ R.R. FRENCH, note 4, p. 677.

²⁰ T. CHOWDHURY, *Time, Temporality and Legal Judgment*, London, 2020, p. 36 and 83; A. GRAPON, *Judging the Past: Three ways of understanding time*, in L. CORRIAS and L. FRANCOT, note 4, p. 31.

²¹ L. MUMFORD, *Technics and Civilization*, London, 1934, p. 269.

²² The view of temporality as a legal construct runs up against Natural law and Marxist perspectives on time. Following the former perspective, time is not legally constructed, but dictated by nature or a divine entity, and discovered by mankind. According to Marxist accounts, instead, time is indeed legally instituted but, as such, it is a repressive institution merely representing and enacting the hegemonic group *desiderata*, L. BARSHACK, *Time and the Constitution*, in *International Journal of Constitutional Law*, n. 7(4), 2009, pp. 553-576.

decision to adopt either broad or narrow temporal periods, to produce unity or divisions in the timeline, is a human choice, and connected to the politics of law²³.

By recognizing the connection between past, present, and future, it is possible to tackle the continuity of legal events, such as acts with long-lasting consequences, the ramifications of legal decisions, and cross-generational legal issues. The law can establish links between temporally distant events and demonstrate legally significant relationships between different periods. Regarding the past, for example, it may be convenient to change the legal status of an action that occurred in the past on account of its consequences for the past and the present. Under more limited circumstances, it might be wise to create a new legal framework in which the acts committed, or the entitlements acquired in the past gain a different meaning or have no relevance anymore. Regarding the future, it might be useful to bind future generations and commit them to a goal established today that will shape the present as much as the future. Furthermore, lawmakers could simply seek to ensure that the law regulating behaviors of the present must consider any potential far-reaching consequences that will materialize in the future²⁴. This raises questions of how far into the future decision-makers should look, what value should be assigned to future interests, and how to reconcile competition between present and future interests. These interests do not concern only the future people but present people too because of the continuity of actions and the unity of time²⁵. Goals may be realized in the future, whose benefits will mostly or exclusively be reaped by the people of the future, but

²³ R. MAWANI, *The Times of Law*, in *Law & Social Inquiry*, n. 40(1), 1995, pp. 255-279; J.E. GERSEN and E.A. POSNER, *Timing Rules and Legal Institutions*, in *Harvard Law Review*, n. 121(2), 2007, pp. 543-589.

²⁴ L. HEINZERLING, *Environmental Law and the Present Future*, in *Georgetown Law Journal*, n. 87(6), 1999, pp. 2025-2059.

²⁵ M. VALVERDE, *The Chronotypes of Law: Jurisdiction, Scale and Governance*, London, 2015, p. 75; B.M. STEWART, *Chronolawgy: A Study of Law and Temporal Perception*, in *University of Miami Law Review*, n. 67(1), 2012, pp. 304-322; J. GIBSON, *Political Timing. A Theory of Politicians' Timing of Events*, in *Journal of Theoretical Politics*, n. 11(4), 1999, pp. 471-496.

which require an assessment in the present with all the related legal consequences.

The problem is thus that the law as a tool with a temporal scope that extends, if only irresolutely, from the present to the future, is potentially not well suited to tackling future-oriented goals. It might nevertheless be possible to address such a problem by resorting to some higher law, like constitutional law. However, if we make use of constitutional law too much, leading to over-regulating issues over time, we might face a legal legitimacy crisis. This is because an increasing amount of legislation will have been made by past lawmakers whose laws have less and less democratic authority over the now future, but then people of the present. So, to resolve this impasse, we have to reframe our understanding of the temporal scope of the law, conjoining the following necessities of the law and the development of its authority over time: (i) the legitimate choice of policies and the law by the people of the present; (ii) the length of time needed for the law to be effective, especially for certain goals; (iii) the sphere of autonomy of people of the past and the future; (iv) and the inherent changes in circumstances, technology and balancing of values over time.

When dealing with environmental goals, like halting climate change, the complexity of the components appears evident. In deciding about policy priorities (i) people generally address environmental challenges depending upon circumstances of temporal proximity. They are more willing to face imminent threats that can be remedied in the short term – such as the clearance of a forest that suddenly diminishes a natural habitat – than environmental changes – such as climate change – that have a long term perspective in terms of both comprehension of consequences and effectiveness of mitigation measures²⁶. Moreover, the beneficial effects of laws and policies that address issues like climate change can only be fully quantified and appreciated in the long term. Therefore, when dealing with environmental challenges like climate change that span multiple generations, the law must quantify and distribute costs and benefits,

²⁶ B. RICHARDSON, note 7, pp. 47, 116, 285 and J. JAHN, note 5, p. 2.

considering future people's interests too (ii). As human systems cross over indefinite time horizons, future conditions must be factored in. This future impulse evidently extends to the protection of natural resources that renders the future itself possible. Forward-looking laws are therefore needed to rule and constrain the present with a sufficient degree of foresight and forward-looking action to safeguard future people's autonomy (iii). Legislation that deals with the distant future and handles complex issues such as environmental protection must be flexible enough to permit re-assessment through timely checking whether and how it is achieving its goals (iv). Accordingly, the law should be capable of adjustment in light of performance failures, new environmental circumstances, changing scientific knowledge, or evolving social values²⁷. This requires that its legal rules shall not be static once established, but shall be dynamic and open to revision²⁸. Several international and national courts have adopted a similar stance in climate change litigations, deriving legal obligations for the present counting back from a future deadline²⁹.

²⁷ This is the 2015 Paris Agreement approach that includes quinquennial performance reviews enabling adjustment of the Agreement in light of new information about global warming trends and parties' emission-reduction efforts, Conference of the Parties, United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement, 21st sess, UN Doc. FCCC/CP/2015/L.9 (12 December 2015).

²⁸ B. RICHARDSON, note 7, p. 185.

²⁹ Australia, Federal Court, 27 May 2021, n. 607/2020, where the court assessed that the existence of a foreseeable and future harm with potential catastrophic effects (at paras. 257; 458; 506) triggers a duty of care up to institutions in the present (at paras. 397; 491; 510-513); Canada, Supreme Court, 25 March 2021, n. 38663: an existential threat to human life like climate change should be addressed in time (at para. 66) and with progressive stringency (at para. 67). An instrument like the increasing of price of gas over time is an appropriate way to incentive a climate-friendly behavioral change (at para. 336), and its constitutional legitimate also because of its 'temporary' nature (at para. 402); Ireland, Supreme Court, 31 July 2020, n. 205/19: the court determined that the national plan to tackle global warming falls short of specificity on how to achieve the climate goals (at paras. 6.21; 6.43-6.48) and ordered that details should be provided now and not left to sometime in the future (at para. 6.45); Netherlands, Hoge Raad, 20 December 2019, n. 19/00135: since future generations will have to deal with the adverse effects of climate change with a greater intensity – therefore jeopardizing their human rights – greenhouse gas emissions have to be adequately re-

To understand how the law should work in relation to these four conflicting necessities, four different alternatives exist to the ordinary temporal scope of the law, that is, for dealing with laws as they relate to time sensitive issues³⁰. When we are confronted with laws that have a particular timespan differing from the ordinary one, we might enlist four types of law: a) retroactive law and b) retrospective law when the law has backward-looking effect; c) ultra-active law and d) ultra-spective law, when the law has a forward-looking effect.

Looking at the first two, the laws concerning the past, we have two alternatives: a) retroactive law and b) retrospective law³¹. Despite both looking backward, they are very different in their relationship with past events. A retroactive law applies to the past as though the current

duced since now (at para. 4.7); Colombia, Corte Suprema de Justicia, 5 April 2018, STC4360-2018: being the current environmental legislation inadequate in terms of equity between generations (at para. 11.2), the court mandated to adopt an intergenerational pact to halt the deforestation and reduce gas emissions (at para. 14); New Zealand, High Court, 2 November 2017, CIV 2015-485-919, where the court ascertained that the climate legislation purpose and the scientific evidence limited the government's discretion in setting emissions reduction target for 2050 (at para. 162); Belgium, Court of Appeal of Brussels, 30 November 2023, *VZW Klimaatzaak v. Kingdom of Belgium & Others*, wherein it has been stated that Belgian authorities have to seriously revise upwards their GHG emission targets, not only for 2020 but also the future deadlines such as 2030 and 2050 (at paras. 239-244); European Court of Human Rights, 9 April 2024, n. 53600/20, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, in which the Court noted that in the context of climate change, intergenerational burden-sharing is especially important—both among current generations and for those yet to come (at para. 420). The outcome of legal proceedings in this context extends beyond individual interests and is inherently forward-looking, shaping the measures needed for effective climate change mitigation and adaptation (at para. 479). For a general overviews of climate law litigation, see L. PARKER, J. MESTRE, S. JODOIN, and M. WEWERINKE-SINGH, *When the kids put climate change on trial: youth-focused rights-based climate litigation around the world*, in *Journal of Human Rights and the Environment*, n. 13(1), 2022, pp. 64-89.

³⁰ Y. ROZNAI, *Legal Schizophrenia: Rethinking the Dichotomy in Distinguishing between Retroactive Criminal and Civil Legislation*, in S. RANCHORDÁS and Y. ROZNAI, note 6, p. 269.

³¹ C. SAMPFORD, *Retrospectivity and the Rule of Law*, Oxford, 2006; J. WALDRON, *Retroactive Law: How Dodgy was Duynhoven?*, in *Otago Law Review*, n. 10, 2004, pp. 631-654.

law were in force when a past action took place, substituting yesterday's legal framework for that of today. By doing so, a retroactive law alters the legal status of a past action: an action that was legally permissible at the time it occurred, could be made illegal before the applicable date of the new law. A retrospective law instead affects the legality of past action but after the applicable date of the law: while it also affects pre-enactment actions, it does so only in the post-enactment future. The retrospective law disciplines past events only for the sake of the present, thus leaving events that have no impact on the present to the former discipline. Therefore, it does not modify the past but rather shapes the value of past human actions for the present and the future. For backward-looking law to be retroactive, it must change the legal status of past human actions; when it merely has an effect that eventually adversely affects past human actions, it is retrospective. The difference between retroactive law and retrospective law is thus evident. Even if they both concern past actions, the differentiating factor is the moment at which the enactment enjoys the force of law³². A retroactive law explicitly states that its effects will take place before the day of its enactment; a retrospective law modifies the legal consequences of what happened in the past exclusively from the day of its enactment instead. Therefore, while retroactive legislation considers the past-present as a uniform whole shaped by the same (retroactive) rule – that is, the past does not exist, there is only a perpetual present –, retrospective legislation breaks that temporal unity.

³² R.A. CASS, *Judging: Norms and Incentives of Retrospective Decision-making*, in *Boston University Law Review*, n. 75, 1995, pp. 954-990; E. DRIEDGER, *Statutes: Retroactive Retrospective Reflections*, in *Canadian Bar Review*, n. 23, 1978, pp. 264-276; M. FRIEDLAND, *Prospective and Retrospective Judicial Lawmaking*, in *The University of Toronto Law Journal*, n. 24(2), 1974, pp. 170-190; D. SLAWSON, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, in *California Law Review*, 1969, pp. 216-251; W. FRIEDMANN, *Limits of judicial lawmaking and prospective overruling*, in *Modern Law Review*, n. 29, 1966, pp. 593-607; B. SMITH, *Laws and Vested Rights II*, in *Texas Law Review*, n. 6, 1927-1928, pp. 409-431.

2.3. *Ultra-active and Ultra-spective Laws*

The proposal set out in the current article is to apply this theoretical binary division of backward-looking laws (retroactivity/retrospectivity) to forward-looking laws, labelling them as c) ultra-active law and d) ultra-spective law. Now, the systematization could not be identical, since the law always has a prospective or forward-looking effect, even if tenuous, while generally, it does not have a backward-looking one. The law always has the aim of being respected for an indefinite period, which starts in the present and projects itself into the future.

The temporal unity between present and future is already accomplished: the more the present lapses, the future is postponed and becomes the present for the sake of the law and its authority. It is of course a legal fiction, or even an illusion, but apparently, there is no distinction between how the law deals with the present and the future: the law simply rules the future, even if conditionally, but such uncertainty manifests itself only on the day that the law is repealed. Such unity of time, which is exceptional in backward-looking laws and only manifests in expressly retroactive laws, is instead the default rule for the law in general and all forward-looking laws. Still, it is possible to distinguish between forward-looking laws according to the subject they rule on and based on that, appreciate how their capacity to rule might change.

That is, the law's objective is to rule on a topic (e.g., freedom of religion), and when it aims to provide how future laws will interact with that topic, no matter the circumstances, we should talk about ultra-active law. This works as follows: in the present, the lawmaker decides how lawmakers to come will deal with the content of freedom of religion in the future. For example, a lawmaker might provide that no (future) laws may discriminate between people based on their (future) religion. Such a law has more than a forward-looking commitment: it concerns future decisions on such a topic, but its mandate aims to be indefinite. The present lawmaker assumes that circumstances may change in the future, but that the legal rule must be maintained as such. The temporal unity of present-future is reinforced here, with the dominance of the present being more evident: the future

will not ever come into existence for said laws. It postulates an eternal present, where the voice of the law will always remain the same. As much as retroactive law consumes the past by retro-extending the present, ultra-active law extinguishes the future by making it part of the present. All these forms crystalize the lapse of time in a single moment, situating the command of the law in an ever-lasting present. For this reason, retroactive (a) and ultra-active (c) laws are not usually viable options when we are confronted with past or future events because we have to respect the legitimate sphere of autonomy of the people of the past and the future (iii)³³.

³³ Retroactive law and ultra-active law respond to the same exigencies of constitutional laws, and for this very reason, they usually have constitutional rank to ensure their effect. Constitutional law, on the one hand, and retroactive/ultra-active law, on the other hand, are rather similar from a structural and teleological point of view. Constitutional laws exist because of a certain mistrust regarding democracy, or better still, past, or future majorities. Therefore, they may be only exceptionally enacted, such as during a constituent moment or in extraordinary times to redress blatant injustices. Similarly, retroactive laws imply that the people of the present can and should redress past legal mistakes, and ultra-active laws are adopted because future legislation shall not contradict what has been established today. However, while constitutional laws even operate along the lines of *lex superior*, retroactive and ultra-active law operate on the ones of *lex posterior*. It is indeed possible, for example, to have retroactive or ultra-active legislation of sub-constitutional rank; and when such a legislation conflicts with the prohibition (or obligation) of retroactive law is unlawful under the principle of *lex superior*. Vis-à-vis sub-constitutional sources of law, such a legislation will instead operate under the principle of *lex posterior*. Thus, there cannot be any confusion between ultra-active law and eternity clauses too. Ultra-active law might be of constitutional level, while eternity clauses must be. R. ALBERT (ed.) *The Architecture of Constitutional Amendments*, London, 2023; S. SUTEU, *Eternity Clauses in Democratic Constitutionalism*, Oxford, 2021; M. HEIN, *Do Constitutional Entrenchment Clauses Matter? Constitutional Review of Constitutional Amendments in Europe*, in *International Journal of Constitutional Law*, n. 18(1), 2020, pp. 78-110; Y. ROZNAI, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford, 2017; M. POLZIN, *Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law*, in *International Journal of Constitutional Law*, n. 14(2), 2016, pp. 411-438; X. CONTIADES (ed.), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA*, London, 2012; U.K. PREUSS, *The Implications of "Eternity Clauses": The German Experience*, in *Israeli Law Review*, n. 44(3),

By contrast, where the subject of the law is a concern of the present that on account of its nature, length, and time of transition has an impact on, and a needed continuity in the future, we should talk about a different type of law. Here, the aim of the lawmaker is to ensure a certain continuity between the present and a certain future to ensure that the commitment undertaken today will achieve its goal. The desired effects are situated in a necessary continuity between the present and the future: they are the same effects but spread out over a given period.

Such a commitment to the goal, however, evidently has an end. It is a mutable, future objective, not written in stone. The term ultra-spective law was chosen because this law is strictly speaking neither purely prospective nor purely ultra-active. The deadline for the law is not an unspecified eventuality, albeit decisive for its scope of ruling, as in prospective law. It is not even a legal enactment that does not interfere with the law's application, as in ultra-active law. Rather, it is a well-defined moment in the future on the basis of which the effects are calculated and distributed over the timespan leading up to it. In ultra-spective law, time's finiteness is not just a possibility, it is the constitutive element of the rule that has to be exactly established in advance to calculate the amount and the distribution of the legal effects. The subjects of the legal effects of the ultra-spective law are not the unlimited generations to come, they are instead a predetermined number of generations, in a similar vein to backward-looking laws, where it is possible to calculate the legal entitlements that the law will impact upon. The ultra-spective law still leaves the possibility, and even postulates, that new legislation will be adopted once the goal of the law in question has been achieved³⁴. It is the

2011, pp. 429-448; D. OLIVER and C. FUSARO (eds.), *How Constitutions Change: A Comparative Study*, Oxford, 2011; M. SCHWARTZBERG, *Democracy and Legal Change*, Cambridge, 2009.

³⁴ From this perspective, an ultra-spective law resembles sunset legislation. Sunset legislation refers to statutory provisions enacted for a limited time and sets to expire unless their validity is extended. Therefore, like ultra-spective law, sunset legislation reverses the default rules of prospectivity: whereas the traditional default rule in legislation is that law's validity continues in perpetuity, sunset legislation's legal validity

natural timespan of the goal that requires such a projection into the future time, rather than an ambition for eternity. The temporal unity present-future is fragmented here: the future will be different from the present and a new law will be needed once the deadline expires. Not the whole future is conquered by the present, but only the part of the future that is needed to make the choice made in the present possible. In such cases, the future is only involved as the playing field where the goal of the present has its effect.

Since all laws are generally prospective, all laws could be argued to be ultra-active, or at least ultra-spective. However, this is not necessarily the case. Some laws achieve their aims by having an instantaneous effect: goals always lie in the future, but some of them can be achieved immediately. For example, by prohibiting an activity, giving access to information, stating the election of an individual,

terminates at the sunset date. This feature makes sunset legislation an attractive regulatory-legislative tool for various situations in which the nature of the law, policy, or circumstances requires a time sensitive norm. In the literature it is observed that sunset laws are employed in different areas, such as 1) controversial laws (e.g., liberalizing abortion in a religious society); 2) experimental legislation (e.g., regulating cloning); 3) legislation responding to a short-term need and of authorization of emergency powers (e.g., legislation offering aid after an earthquake disaster or temporary suspension of civil and political rights in the fight against terrorism). While the structure and purpose of sunset legislation and ultra-spective law might look similar, sunset legislation serves the purpose of limiting the time of a legal framework, an ultra-spective law has as its object the achievement of a long-lasting goal that can be met only *in* time. While sunset legislations relate to the technical aspect of time in legislation, ultra-spective law relates to the substantive aspect of time in law. I. BAR-SIMAN-TOV and G. HARARI-HEIT, *The Legisprudential and Political Functions of Temporary Legislation*, in S. RANCHORDÁS and Y. ROZNAI, note 6, p. 227; H. XANTHAKI, *Sunset Clauses: A Contribution to Legislative Quality*, in S. RANCHORDÁS and Y. ROZNAI, note 6, p. 209; I. BAR-SIMAN-TOV, *Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study*, in *Regulation & Governance*, n. 12, 2018, pp. 192-219; S. RANCHORDÁS, *Constitutional Sunsets and Experimental Legislation: A Comparative Perspective*, Cheltenham, 2014, p. 74; F. FAGAN, *After the Sunset: The Residual Effect of Temporary Legislation*, in *European Journal of Law and Economics*, n. 36, 2013, pp. 209-226; J. IP, *Sunset clauses and counterterrorism legislation*, in *Public Law*, n. 1, 2013, pp. 74-100; S. VEIT-JANTZ, *Sunset Legislation: Theoretical Reflections and International Experiences*, in A. ALEMANN (ed.), *Better Business Regulation in a Risk Society*, 2012, p. 54.

declaring the provision of State aid unlawful, repealing another law, or granting amnesty, laws have an immediate effect³⁵. Such acts do not need a projection into the future. If the world were to end tomorrow, such laws would still be effective; they still would have reached their goals.

In contrast to such ordinary laws, ultra-spective laws are inherently projected into the future to the extent that they only have meaning when linked to a deadline, which marks the expected achievement of the goal, as much as retrospective laws rely on their date of enactment for regulating affairs of the past that have not yet ended. Here, the balancing of values is not only done in the present but in the continuity present-future as marked by the deadline of the event. The future deadline for forward-looking laws is therefore what the moment of the enactment of the law is for backward-looking laws: it helps distinguish ultra-active from ultra-spective laws. Both forward-looking laws need a certain timespan because they are framed around such a timespan. However, in the case of ultra-spective laws, that timespan is expected (and it must come) to end. The section of the future marked by the deadline indeed falls under the purview of the present and is unified under the rule of the present law. This section, however, is limited and does not cover the entire future, as is the case for ultra-active laws. Ultra-active laws are an exception to the rule of *lex posterior*. It means that the law keeps on applying to certain facts no matter the enactment of new legislation. Therefore, such laws have the purpose of regulating the issue in the future even when they are then no longer in force. An ultra-active law has no claim of superiority over conflicting future laws: it merely postulates that another, conflicting law rules.

Simply put, the new law will only be applicable to facts that happened after its enactment, while facts that happened before but are judged in the future will still be decided according to the ultra-active law. Ultra-spective law does not even have this latter claim: the facts that happened before the enactment of the new law will be judged

³⁵ M. D. KELLY, *Applying Laws Across Time: Disentangling the 'Always Speaking' Principles*, in *Oxford Journal of Legal Studies*, n. 44(3), 2024, pp. 1-28.

according to the law ruling at that (future) time. It does not have a claim to survive in regulating cases after its expiration date. Similar to retro-spective law in reverse, future events taken into account by ultra-spective laws are considered to be subject to the rules of the present even if it might not be so in future – as much as retrospective laws do not change the legal status of events of the past –, and future events provide legal consequences for the present. Thus, whereas in retrospective law, the law rules the present considering the past, in ultra-spective law, the law rules the present considering the future. Continuing with the analogy, in retrospective law, it is the enactment date that determines that past events, from that moment onwards and not before, will be affected by the law of the present. In ultra-spective law, it is the deadline date that provides that future events, until that moment and not after, will be affected by the law of the present. Here, the temporal line is inverted, because of the law's prospectivity that makes the temporal unity present-future accomplished by default, even if being contingent on no further changes.

The Court's decision on the constitutional commitment to tackle climate change can be interpreted as ultra-spective law. Indeed, in the decision, the present is legitimately being governed by policy and law of present people (i). However, this is with the *caveat* that the climate targets now decided, as is common with environmental goals (ii), cannot be met immediately and are projected into the future. Therefore, present legal assessments impact on future people's lives (iii), and, as such, they shall take in account future interests and obligations, and be subject to further changes and periodic review (iv).

3. Ultra-Spectivity in Action: *Neubauer v. Germany*

3.1. *Balancing Rights and Duties through Inter-Generational Proportionality*

Preliminarily, to understand the complexity of a decision that addresses the future-present timespan, it is important to clarify that the Court did *not* declare the law unconstitutional for what it provides for the current period. The Court has stated that there had been no

violation of the State duty to actively protect fundamental rights regarding the present – or more specifically, with regard to the present-future timespan of 2020-2030.

In their complaints, the plaintiffs relied on the fundamental rights to human dignity³⁶, and an ecological minimum standard of living³⁷. The main climate goal they relied on as a yardstick was the achievement of a 1.5-to-well-below-2°C long-term temperature stabilization goal by 2050, as established in the Paris Agreement³⁸, and pursued as such by German legislation³⁹. The Federal Climate Change Act is connected to this international climate goal: specifically, it provided the basis for the greenhouse gas neutrality by 2050-target⁴⁰. The specified reduction quota of at least 55 percent by 2030 was an interim goal on the path toward climate neutrality⁴¹. The German Constitution endorses this commitment: Article 20(a) proclaims that the State must protect the natural foundations of life and animals, also mindful of its responsibility towards future generations. Article 20(a) was enacted in 1994 to introduce environmental protection into the Constitution: it encompasses protection against pollution regardless of the source of the pollution, as well as against climate-related extreme weather. Therefore, the Federal Climate Change Act provisions on GHG emissions must be compatible with the obligation to take climate action as enshrined in Article 20(a) German Constitution. Article 20(a) is here used as a benchmark for constitutionally required climate protection.

The constitutional obligation with regard to climate protection triggers a State duty consisting of safeguarding fundamental rights over time and fairly dividing the possibilities for fulfillment of these rights among present and future generations. As such, it sets down

³⁶ Art. 2(1) in conjunction with Art. 20(a) German Constitution.

³⁷ Art. 2(1) in conjunction with Art. 1(1) first sentence German Constitution.

³⁸ Art. 2 § 1(a) of the 2015 Paris Agreement. On this H. JEPSEN, M. LUNDGREN, K. MONHEIM, and H. WALKER (eds.), *Negotiating the Paris Agreement: The Insider Stories*, Cambridge, 2021.

³⁹ § 1 3rd sentence Federal Climate Change Act.

⁴⁰ § 3(2) 2nd sentence Federal Climate Change Act.

⁴¹ § 3(1) 2nd sentence Federal Climate Change Act.

that future generations will not be forced to radically change their lives to accommodate for the lack of natural resources. Therefore, for the Federal Climate Change Act to be constitutional, the effect arising from its provisions on GHG emissions should not compromise the rights of future generations, neither *de facto*, inevitable as present actions shape future outcomes, nor *de jure*, meaning that those rights have to be taken into account in the *present* legal assessment. However, the Court declared that the Federal Climate Change Act stayed within the margin of discretion by pursuing the goal of the Paris Agreement of limiting climate change to well below 2°C and, if possible, to 1.5°C. The constitutional mandate of Art. 20(a) German Constitution has therefore not been violated, at least with regard to the present.

Furthermore, the Court did *not* declare that the law is unconstitutional because it infringes the rights of future generations as such. The duty to protect the climate has a solely objective dimension as future generations do not yet have any fundamental rights⁴². Indeed, although the State is *generally* obliged to protect future generations according to Article 20(a), the Constitution does not provide them with a justiciable fundamental right and legal standing to enforce it⁴³. In addition, the legislature has a wide margin of discretion to discharge its duty to protect: this duty is breached only if the State remains inactive or its measures are completely inadequate to the objective. Again, this is not the case here⁴⁴.

On the merits, however, the Court has commented that the complainants are adolescents and young adults. It means that they presumably have a long life ahead in which to enjoy their fundamental rights that are likely to be disproportionately affected compared to older people because the reduction of GHG emissions – and thereby the limitation of their fundamental rights – will have to increase decade after decade. Indeed, the complainants have invoked their fundamental rights that are threatened by the fact that they will endure

⁴² German Federal Constitutional Court, Order of 24 March 2021 - 1 BvR 2656/18 and others, at para. 146.

⁴³ *Id.* para. 112.

⁴⁴ *Id.* para.152.

the measures necessary to reduce GHG emissions *after* 2030⁴⁵. Therefore, the protection at stake is not about the fundamental rights of future generations, but of those *presently* alive who will experience a downgrade of fundamental rights in the future⁴⁶. The Court has made a major statement on the legal significance of Article 20(a) German Constitution *vis-à-vis* the future. The duty to protect the climate does not take precedence over other constitutional rights and principles but must be balanced against them. However, climate change is almost entirely irreversible. As things currently stand, the more climate change progresses, the more onerous the duty to protect the climate will become⁴⁷.

While the Federal Climate Change Act fulfills the State's duty to protect fundamental rights from the consequences of climate change for the present, the Court has crucially found it unconstitutional for failing to protect persons against the risk of curtailment of their rights in the future. It is precisely the design of the Federal Climate Change Act that causes this risk: since GHG emissions irreversibly drive global warming, each generation has only a limited number of emissions at its disposal to prevent further temperature rise. The Court describes climate change as "irreversible"⁴⁸, meaning that what has been done, cannot be undone. Building on this retrospect, the Court creates a prospect for the future and establishes an inseparable link between present actions and future outcomes⁴⁹. The more emissions are permitted until 2030, the greater the risk that from 2031 the State will have to infringe on fundamental rights, and with greater severity⁵⁰. The State would also be increasingly entitled to do so, because the legal weight of fundamental rights, when balanced against climate protection, decreases more and more as climate change intensifies⁵¹. So, it is neither the actual protection of people nor the protection of

⁴⁵ *Id.* paras. 60, 131.

⁴⁶ *Id.* para. 108.

⁴⁷ *Id.* para. 198.

⁴⁸ *Id.* paras. 108, 118, 119, 130, 133, 185, 186, 187, 198, 218, 229, 262.

⁴⁹ *Id.* paras. 122, 185-186.

⁵⁰ *Id.* para. 199.

⁵¹ *Id.* paras. 118-120.

future people that the Court has found lacking, but rather the future protection of people as enacted by the contested law. This omission jeopardizes the protection mandate of Article 20(a) German Constitution – not in the present, but when looking at the future. Therefore, it is imperative to prevent a distribution of freedom and reduction of burdens slanted to the detriment of the future.

Every amount of CO₂ allowed today narrows the remaining options for reducing emissions in compliance with Article 20(a) German Constitution. This requires that the limited remaining CO₂ budget be used in a sufficiently prudent manner, to gain the critical time needed to initiate the transformations that mitigate the future losses of freedom resulting from emission reduction. The challenged provisions are thus unconstitutional because they allow such large share of the remaining budget to be consumed that future freedom restrictions would, from today's perspective, assume unreasonable proportions from today's perspective. Indeed, the Constitution affords protection against comprehensive threats to freedom from being unilaterally offloaded onto the future. The Court calls this protection an 'inter-temporal safeguarding of liberties'⁵². Provisions that allow for considerable GHG emissions in the present time⁵³ constitute an irreversible legal threat to future freedom because every amount of CO₂ that is allowed to be emitted today substantially narrows the remaining options for reducing emissions after the deadline, thereby jeopardizing practically every activity protected by fundamental rights in the times following. Any exercise of freedom involving CO₂ emissions will therefore be subject to increasingly stringent, and constitutionally required restrictions.

At some point, even serious losses of freedom may be deemed justified under constitutional law to prevent climate change. However, since the current provisions on allowable emissions have already established a path to future burdens on freedom, the impact on future freedom must be proportional to today's standards. Climate action

⁵² *Id.* paras. 122, 183.

⁵³ § 3(1) 2nd sentence and § 4(1) 3rd sentence Federal Climate Change Act in conjunction with Annex 2.

measures that are presently being avoided out of respect for current freedoms will have to be taken in the future and would curtail the same freedoms with greater severity. To avoid the need for a future drastic constitutional assessments in the future, today's assessment must have a greater temporal breath. The severity of the restrictions on freedom depends on how much time remains to transition to CO₂-free alternatives and how early this process begins⁵⁴.

The Court's purview is then an ultra-spective one, that is, evaluating a phenomenon that will happen in the future according to today's principles and calculating and distributing the legal effects – under the principle of proportionality – in such a timespan that must encompass present and future generations – under the principle of equality⁵⁵. In the ultra-spective reasoning adopted by the Court, it is the standpoint of today that counts, in terms of the objective, burden, and rules to be consequently adopted. By doing so the Court ensures that the climate legislation of today will grant a proportional – and thereby constitutionally adequate – balance between climate protection and fundamental rights in the future as well. This balance could however not have been justified by the current Federal Climate Change Act since it did not grant an equal distribution of the chances and rights until the achievement of climate neutrality by 2050⁵⁶.

The ultra-spective reasoning shapes the constitutional balancing of rights: the *future* risk regarding the *future* exercise of fundamental rights has to be tackled *now* and possibly justified by the legislature *at present* and according to the *present circumstances* by taking sufficient precautions to ensure that fundamental rights will be protected later with the same intensity as today⁵⁷. It is the principle of proportionality that demands a prospective and rights-friendly distribution of the remaining carbon budget. The proportionality test concerns the equality of the distributions of rights (of making use of emissions) and duties (of reducing emissions) between generations. Here, the Court introduces the principle of intergenerational equity into the

⁵⁴ *Id.* paras. 120-122.

⁵⁵ J. JAHN, note 5, p. 13.

⁵⁶ *Id.* paras. 183, 243.

⁵⁷ B. RICHARDSON, note 7, p. 7.

proportionality test⁵⁸. One generation must not be allowed to consume large portions of the CO₂ budget while bearing a relatively minor share of the reduction burden if this would involve leaving subsequent generations with the burden of having to drastically reduce their rights.

3.2. *Time as a Benchmark for the Reasonableness of Mitigation and Precautionary Measures*

When Article 20(a) German Constitution obliges the State to protect the natural foundations of life, it is aimed first and foremost at future generations, and therefore relates to how environmental burdens are spread out over different generations. It requires progressive steps to be taken toward climate neutrality so that the associated losses of freedom remain reasonable and are distributed evenly between generations. The risk of a serious burden on future generations is significant, and can only be reconciled with the potentially affected fundamental rights if the measures needed to achieve climate neutrality ('mitigation measures') are taken in ways that respect such rights, and if correlated actions ('precautionary measures') are correspondingly adopted to make mitigation measures reasonable over time⁵⁹.

The Court is particularly concerned about the fact that further mitigation measures to tackle climate change might be necessary at extremely short notice, placing citizens under enormous additional strain, and thereby severely jeopardizing their fundamental rights⁶⁰. Fighting climate change might need re-adjustment from time to time and will probably take the form of further downgrades in living standards. It is true that no reduction deemed constitutionally unreasonable may be imposed on the complainants even in the future: the Constitution will continue to protect their fundamental rights

⁵⁸ D. BERTRAM, *For You Will (Still) Be Here Tomorrow': The Many Lives of Intergenerational Equity*, in *Transnational Environmental Law*, n. 12(1), 2023, pp. 121-149.

⁵⁹ K. PITTEL, *The Intertemporal Distribution of Climate Policy Burdens and the Decision of the German Constitutional Court*, in *CESifo Forum*, n. 5, 2021, pp. 15-19.

⁶⁰ *Id.* para. 117.

against unreasonable infringements of freedom. However, the definition of ‘reasonable’⁶¹ will necessarily be determined in light of the constitutional obligation to take climate action.

Reasonable might signify something less in the future, meaning that constitutional rights would be reasonably limited but also more harshly than today, depending on how much climate action is taken in the present. It is not enough that future generations will be shielded by the same constitutional law against unreasonable reductions in living standards. Future generations are affected by the present evaluation, legal effects, and concrete burdens that are arranged right now. While operating from an ultra-spective perspective, no distinction in degree of constitutional protection should be enacted between people alive today and futures ones, and the worst part of the deal should not be offloaded on the latter. On issues affecting the realm of the people of the future, they should be treated equally to the people of today. Given the uncertainty regarding how large the CO₂ budget will be in the future, it is impossible to ascertain the concrete content of the mitigation measures that will be needed in the future, and whether losses of freedom considered unreasonable from today’s perspective are going to occur.

The Court nonetheless presumes that a serious burden on future generations will materialize, and therefore precautionary measures are required to at least minimize the risk⁶². To this end, a mere governmental obligation to update the climate targets by 2025 and onwards via ordinances, as foreseen in the Federal Climate Change Act, was deemed insufficient. The legislature must at the very least set annual emission targets for after 2030 or impose more detailed requirements for their definition on the authority responsible for issuing the ordinance. Accordingly, the lawmaker is obliged to act in a forward-looking manner by taking precautionary measures to manage the mitigation measures after 2030 in ways that respect fundamental rights⁶³. It is for the legislature to decide how environmental risks

⁶¹ *Id.* paras. 117, 194, 246.

⁶² *Id.* paras. 192-194.

⁶³ *Id.* paras. 244-246.

should be tackled, to draw up protection strategies, and to implement them through legislation. However, this does not mean that the question as to the effectiveness of precautionary measures is beyond the scope of review by the Court where, as in this case, a duty of protection exists. It is also true that every exercise of freedom involving CO₂ emissions would essentially have to be prohibited at some point in any case because global warming can only be prevented if concentrations of CO₂ in the earth's atmosphere do not rise any further. Nonetheless, if the CO₂ budget were to have already been largely depleted by 2030, there would be an increased risk of serious losses of freedom because there would then be a shorter timeframe for the technological and social developments needed to enable today's CO₂-oriented lifestyle to make the transition to climate-neutral behavior in a way that respects freedom⁶⁴. The smaller the remaining budget and the higher the emission levels, the less time will be left for the necessary developments. Yet, the later these innovations are accessible, the more profoundly citizens will be affected by restrictions on CO₂-relevant behavior, restrictions that will become increasingly urgent under constitutional law as the CO₂ budget dwindles⁶⁵.

Constitutional protection against these restrictions on future fundamental rights is then already required because, as things currently stand, the allowed emissions have a largely irreversible impact once they have been released into the Earth's atmosphere⁶⁶. The overall constitutional balancing made with respect to a future-present timespan, therefore decides not only over how much burden is allocated to each generation but also how early this process is initiated with reference to the deadline, thus determining how many generations will be involved and which measures each generation shall endure. There is indeed a constitutional obligation of a transition to climate neutrality in good time⁶⁷. An overly short-sighted transition would increase a slanted distribution of burdens. It does indeed take time to achieve far-reaching implementation of the innovations

⁶⁴ *Id.* para. 121.

⁶⁵ *Id.* para. 186.

⁶⁶ *Id.* paras. 118, 130, 186.

⁶⁷ *Id.* para. 248.

required in almost all sectors of the economy. All fundamental rights could be jeopardized if society-wide reductions will have to be achieved within a very short timeframe. Since the risk of serious burdens is significant, and due to the obligation to contain such risks, the emission amounts specified in the Federal Climate Change Act can ultimately only adequately protect rights of people in the future if precautionary measures are now taken to manage the reduction burdens in ways that respect fundamental rights after 2030⁶⁸.

In all areas of life – production, services, infrastructure, administration, consumption, basically all activities that are currently still GHG emissions-intensive –, developments need to be set in motion to ensure that in the future, meaningful use can still be made of freedom protected by fundamental rights, but based on CO₂-free alternatives. The Court does not specify exactly what needs to be set down to create preconditions and incentives for the development of climate-neutral alternatives. However, it would be neither responsible nor realistic to initially allow GHG emissions-intensive behavior to continue unabated, and then to suddenly demand climate neutrality once the remaining budget of available GHG emission has been exhausted. One fundamental prerequisite for such development is that the legislator provides guidance on the earliest possible initiation of the required implementation processes. The legislature has discretion in setting the measures for protecting the climate, but this does not exempt it from setting out the course to achieve a climate-friendly economy in good time⁶⁹. It is therefore imperative that further reduction targets beyond 2030 are specified in good time, extending sufficiently far into the future to establish a horizon capable of generating incentives and pressure to initiate the developments on a large scale. In conclusion, the required reductions *until* 2030 determine what needs to be done *after* 2030, bearing in mind that in that period all remaining emissions must be curbed⁷⁰.

⁶⁸ *Id.* para. 244.

⁶⁹ *Id.* paras. 247-249.

⁷⁰ *Id.* paras. 117-118.

3.3. Judicial Guardianship of Not-yet Visible Interests

Considering the constitutional obligation to take climate action, the future objective to be accomplished, and the timespan in which GHG emissions will be produced, the decision of today must take into account the full breadth of time itself and the people who will live at any point in time (as well as their rights). Emission reduction measures for the period after 2030 have to be defined promptly⁷¹, and consequently the manner in which the Federal Climate Change Act determines the path beyond 2030 has not been held sufficient by the Court⁷². Therefore, the Court ordered the legislature to specify this no later than 31 December 2022.

The update to the legislation was ultimately passed in June 2021, and has settled targets beyond 2030 and provided for procedures to adapt the various rules⁷³. The amended legislation increased the minimum reduction target for 2030 to 65 percent, for 2040 to 88 percent, and net zero to be achieved in 2045, with negative emissions after 2050⁷⁴. The fate of the Federal Climate Change Act has proven that, despite the Constitution giving the legislature a role in specifying the content of the measure to halt climate change, it does so only in part to provide a counterweight to the political process. The Constitution sets limits on the leeway enjoyed in the decision-making process to determine whether environmental protection measures should be taken or not. The democratic political process is indeed organized along short-term lines based on election cycles, placing it at a structural risk of being less responsive to tackling the ecological issues that need to be pursued over the long term⁷⁵. Particularly, the

⁷¹ *Id.* paras. 252-253.

⁷² *Id.* paras. 256-258.

⁷³ Revised Federal Climate Change Act, 18 August 2021, Bundesgesetzblatt 2021, I, nr. 59, p. 3905.

⁷⁴ Revised Art. 3(1) Federal Climate Change Act.

⁷⁵ This does not mean denying that the growing influence of green political parties and social support for government leadership enabled many reforms in environmental sphere. See R. MACRORY (ed.), *Reflections on 30 years of EU Environmental Law – A High Level of Protection?*, Groeningen, 2005.

short-termism and limited constituency focus of politics do not lend themselves well to representing the interests of today's young people and future generations⁷⁶, who are also those who will feel the consequence of climate change most strongly⁷⁷. Election-focused thinking and the unwillingness to take unpopular measures are also structural flaws of politics that jeopardize the achievement of the constitutional goal of halting climate change⁷⁸. This binding of the political process to pursue climate neutrality, as envisaged by the Constitution, would be in danger of being disregarded if the content of climate law were fully determined by the day-to-day political process with its short-term approach and its orientation towards directly expressible interests⁷⁹. In this light, the Court sets constraints on democratic decision-making: the ultra-spective considerations adopted by the Court operate over a longer period and give protection to not-yet visible interests⁸⁰. Long-term commitments require costly actions in the present to reap benefits for the future: as such, they are more difficult to address than when the costs and benefits temporally align. A distant future goal might be invisible, remote, and beyond the here-and-now people's knowledge and experience. The ultra-spective judicial practice aims at remedying this, adjudicating in a manner that bridges the present and the future and identifying commitments to be upheld over time⁸¹.

⁷⁶ R.S. ABATE, *Climate Change and the Voiceless*, Cambridge, 2019, p.121; K. SHRADER-FRECHETTE, *Environmental Justice: Creating Equality, Reclaiming Democracy*, Oxford, 2002, p. 49.

⁷⁷ C. ECKES, *Tackling the Climate Crisis with Counter-majoritarian Instruments: Judges Between Political Paralysis, Science, and International Law*, in *European Papers*, n. 6(3), 2021, pp. 1307-1324.

⁷⁸ In the whole decision and particularly in this part, one might read a specific critique to the legislator, for not having adopted legal instruments to accomplish the climate change goals after 2030. Such instruments were provided in the law bill but have been scrapped during the legislative process.

⁷⁹ *Id.* para. 206.

⁸⁰ K. KUH, *The Legitimacy of Judicial Climate Engagement*, in *Ecology Law Quarterly*, n. 46, 2019, pp. 731-764.

⁸¹ M. PAYANDEH, *The Role of Courts in Climate Protection and the Separation of Powers*, in W. KAHL and M-P. WELLER (eds.), *Climate Change Litigation*, Oxford, 2021, p. 62.

Concerning their future-oriented vision, the Court has also pointed out that if alternative low-GHG forms of behavior were available, and sufficiently established in society so that any emissions-producing action could be partially replaced –, the prohibition of climate-harming behavior would entail less intrusive restrictions on fundamental rights. However, the Court does not live in such a utopia, clarifying that it will take some time before technological progress and other developments enable emissions-intensive processes and products to be largely replaced or avoided, especially considering that such innovations will have to be introduced on a massive scale in nearly all areas of economic production and in practically every aspect of people's lives.

It is neither possible nor the business of the Court, despite its deep engagement with scientific knowledge in the decision⁸², to make predictions regarding the adoption of new climate-friendly technologies. The latter will take an unforeseeable amount of time, during which freedoms will be disproportionately limited in comparison to today's situation. Therefore, decisions on GHG emissions must be made now, in line with the present circumstances. In the most optimistic scenario, involving new technologies or a natural miracle, global warming may be limited to +1.5°C, rendering the outer limit of the Paris temperature goal (well below +2°C) obsolete, and making the burdens and restrictions posed on present and future generations unnecessary. In such (positive) future developments, new adjustments could be made. It may be that developments with negative emission technologies enlarge the national emissions budget. The Court emphasizes that technological developments and new scientific insights must have to weigh in heavily.

The uncertainties involved in determining the remaining global budget and its distribution to individual States go in both directions. That means that the rules governing climate change are not and should

⁸² F. SCHRAMM, *Judges as Narrators of the Climate Crisis? An Illustrative Analysis of the Decision of the German Constitutional Court from 24 March 2021*, in *European Papers*, n. 7(1), 2021, pp. 361-378.

not be cast in stone. Indeed, ultra-spective law has no indefinite mandate: it allows for readjustment in light of new circumstances or re-balancing of values. If the legislature wanted to move climate change law into a fundamentally new direction, this fact would need to be recognized as such, and therefore open for political discussion. This would lead to a new legal framework that would address the issue differently. Eventual tensions would be reconciled in a democratically accountable manner, and legislation would provide the appropriate framework to do this. That is to say, there is always room for new adjustments in the future, and always through the law.

However, faith in new technologies should not lead to the conclusion that the remaining emissions budget will be larger than thought. It remains all pure speculation. While it cannot be ruled out that Germany's remaining budget might be larger than calculated, overall, it seems at least equally possible, and actually more probable, that the remaining budget might be smaller⁸³. Since the future is uncertain, the Court must assess how things stand right now, exactly as requested by a decision that makes projections into the future. Being faced with irreversible changes, greater caution is advised than in typical prospective decision. This caution requires the present generation to bear a fair amount of the environmental burden. This burden takes the form of a duty to take into account even mere indications pointing to future impairments of rights, and so to act with an active pessimistic attitude. In the face of serious and irreversible environmental damage, mitigation measures must not be delayed due to a lack of absolute scientific certainty⁸⁴. Precisely because of the uncertainties mentioned by the Court, it is impossible to assess now whether future adaptations will be an adequate alternative for emission reductions. Therefore, the legislature is under a permanent constitutional obligation to continuously adapt the law in light of the latest scientific developments and findings, to ensure that climate legislation is designed, interpreted, and applied following the dynamic state-of-the-art of climate science.

⁸³ *Id.* para. 262.

⁸⁴ *Id.* para. 229.

4. Conclusion

In *Neubauer*, the Court found the Federal Climate Change Act to be unconstitutional insofar as it gives rise to risks of future impairments of fundamental rights that are not sufficiently contained and balanced at present⁸⁵. This led the Court to conclude that the legislature had violated its duty to ensure that GHG emission reductions as per Article 20(a) German Constitution – this means reductions to the point of climate neutrality – are spread out over time in a forward-looking manner that respects fundamental rights⁸⁶. Based on the goals of the Federal Climate Change Act, efforts required to reduce GHG emissions after 2030 would have to be considerable. From today's perspective, it would be impossible to determine with certainty whether these efforts would be so drastic as to inevitably entail unacceptable impairments of fundamental rights, even if this seems highly likely. However, the mere possibility to contain this emergency today triggers a constitutional duty to pursue climate neutrality, and moreover to pursue it at a proportionate inter-generational pace. Even though it would be impossible to address all circumstances related to a future event, a legislator must make a good faith effort to try to minimize the damage that may result from it, nonetheless. Such actions take the form of ultra-spective laws, here in the shape of a judicial decision, that have the particular characteristic of being bound to a future date that creates obligations for the present.

They invert the present-future timeline, deriving legal obligations for the present from the future. By following this line of reasoning, the Court has not created new rights for future generations but has established a duty to support the rights of future as well as current generations. The inter-generational bond is created on the grounds of the proportionality principle, which follows an ultra-spective course as well. This decision added a temporal dimension to constitutional law, going from an a-temporal present into the fluidity of generations.

⁸⁵ *Id.* paras. 120, 177, 187, 198.

⁸⁶ *Id.* para. 266.

Bearing in mind this temporal fluidity, the Court has taken a big step in relation to redistribution and equality. Yet, this change was neither horizontal nor contextual, but rather vertical and inter-generational, and in line with the notions of sustainable development and inter-generational equity⁸⁷. These principles require that decision-makers should look into the future, valuing future costs and benefits, and reconciling competition between present and future interests. Only by recognizing that the future is not a faraway land, but the coming days that the present people will live, it is possible to improve the timing – and thereby the quality – of environmental decisions⁸⁸. In *Neubauer*, the Court's decision has effectively linked today's acts with their effects in the future. The unanimity about climate change and the urgency of counter-measures has made the Federal Climate Change Act the perfect candidate for such type of reasoning, as the strict legal division of past, present, and future is not applicable to the environmental protection task⁸⁹. The ultra-spective reasoning instead succeeds in capturing the multi-stranded time in law that climate legislation must grapple with. Climate acts and emissions today, the Court has argued, have repercussions for the ability to enjoy fundamental freedoms in the future.

⁸⁷ S. BOGOJEVIĆ, *Human Rights of Minors and Future Generations: Global Trends and EU Environmental Law Particularities*, in *Review of European, Comparative & International Environmental Law*, n. 29(2), 2020, pp. 191-200; L. SLOBODIAN, *Defending the Future: Intergenerational Equity in Climate Litigation*, in *Georgetown Environmental Law Review*, n. 32(3), 2019, pp. 569-589; B. Richardson, *Doing Time – The Temporalities of Environmental Law*, in L. KOTZÉ (ed.), *Environmental Law and Governance for the Anthropocene*, Oxford, 2017, pp. 55-74; I. GONZÁLEZ-RICOY and A. GOSSERIES, *Institutions for Future Generations*, Oxford, 2016; L. COLLINS, *Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance*, in *Dalhousie Law Journal*, 2007, pp. 79-140.

⁸⁸ B. RICHARDSON, note 7, pp. 134 and 353.

⁸⁹ It remains to be seen if the argumentation adopted by the Court could be used in other areas. However, nothing prevents the application of the ultra-spective line of reasoning to other fields of law that project into the future, like pensions schemes, austerity programs, prohibition of dangerous products like tobacco, and preparation for recurring emergencies like pandemics. R. KRÄMER-HOPPE, note 5, p. 1400.

Abstract^{*}

Ita

La Corte costituzionale federale tedesca ha dichiarato (parzialmente) incostituzionale la legge federale sul cambiamento climatico del 2019, poiché essa attribuiva in modo sproporzionato l'onere della riduzione delle emissioni di CO₂ in capo alle generazioni future, mettendo così a repentaglio i loro diritti. Questo articolo propone un inquadramento teorico della sentenza basato sul concetto di tempo. Nella sua decisione, la Corte ha preso in considerazione un arco temporale considerevole, che include il futuro, e ha ritenuto che le attività odierne siano la premessa di quelle future. Dinanzi a obiettivi a lungo termine, come ad esempio la cessazione del cambiamento climatico, il diritto può assumere un carattere ultra-spettivo: per garantire che gli impegni odierni raggiungano effettivamente il loro obiettivo, gli effetti degli atti normativi devono essere distribuiti su diverse generazioni. Il futuro non è (più) una terra lontana: il quadro normativo odierno impone il dovere di perseguire la neutralità climatica a tempo debito e di perseguirla secondo una proiezione intergenerazionale proporzionata che preservi i diritti futuri.

Parole chiave: Cambiamento climatico, intergenerazionalità, Stato di diritto, tempo, retroattività e retrospettività, ultrattività e ultraspettività

En

The German Federal Constitutional Court has (partially) declared the 2019 Federal Climate Change Act unconstitutional, because it disproportionately allocated the burden of making CO₂ emission reductions to future generations, then jeopardizing their rights. This article offers a theoretical understanding of the judgment based on the concept of time. In the decision, the Court has taken into account a considerable timespan, which includes the future, and considered that today's activities are the premise of future ones.

^{*} Articolo sottoposto a referaggio fra pari a doppio cieco (*double-blind peer review*).

When dealing with long-lasting goals, like arresting climate change, the law might assume an ultra-spective character: to ensure that today's commitment will effectively achieve its goal, the law's effects shall be spread over different generations. The future is not (anymore) a faraway land: today's framework triggers the duty to pursue climate neutrality in due time and to pursue it according to a proportioned inter-generational pace that preserves future rights.

Keywords: Climate change, intergenerationality, rule of law, time, retroactivity and retrospectivity, ultractivity and ultraspectivity