Vol. 2 No. 2 - 2023

Comparative Law and Language

Narratives in Flux

Legal Language, Digital Technologies, and the Climate Crisis

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Abstract: This article argues that legal language tells stories and presents a certain world view, and that the changing circumstances 'out there' in the real world require a corresponding change in the legal narrative/narratives contained in law. By changing circumstances I mean the so-called twin transitions of the ever-increasing importance of digital technologies in society, and the ever-increasing urgency of the climate change crisis. For jurists to be able to handle these challenges, we need to train our awareness of the narratives and normative qualities of our legal language, so that we are able to critically assess whether our vocabulary and regulatory toolkit is fit for the future.

Keywords: Narratives, Legal hermeneutics, Discourses; Digitalisation; Sustainability.

Summary: 1. Changing world, challenged narratives; 2. Law as narrative and legal hermeneutics to understand it; 3. The Power of Big Tech: discourses, narratives, paradigms; 4. Human/nature: suppressed voices, intergenerational justice and telling new economic stories; 5. Concluding remarks

1. Changing world, challenged narratives

In today's world there are two confluent, paramount phenomena, namely the ascendance of digital technologies and the escalating urgency of climate change, that bring forth unprecedented challenges for our societies. These twin forces challenge our conventional beliefs, our societal narratives, about progress, sustainability, and our relationship with the environment.

The law inevitably plays a role in dealing with these transnational phenomena. As digital technologies continually redefine the boundaries of, inter alia, privacy, intellectual property, and competition, traditional legal doctrines find themselves straining to adapt. Moreover, the ecological repercussions of unchecked production and consumption patterns necessitate the development of a novel legal framework to ensure climate justice, environmental stewardship and sustainability. These contemporary challenges therefore also necessitate a re-evaluation in terms of legal norms and narratives, and perhaps even educational paradigms.

Every action we take as legal professionals is intertwined with and reliant upon our interpretation and composition of written materials, of legal texts. The law, I therefore argue, can be seen as a creative process, and recognizing the artistic and imaginative nature of legal language invites us to consider critical perspectives drawn from literary theory and hermeneutic philosophy.[1] These perspectives offer us ways to critically assess whether the current legal narratives and norms are fit for the future, and whether and how new legal conceptualisations about technology and sustainability, as well as the responsibility of legal professionals, can be formed.

In this paper I shall, firstly, outline a way of thinking about the law and about our use of legal language that is based on contemporary insights in legal theory and Law & Humanities scholarship. I will then demonstrate how this way of thinking helps to critically assess the regulation of the effects of digitalization and Big Tech power, on the one hand, and the questions raised by sustainability concerns,

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[1] J. GAAKEER AND P. PHOA, *EU Law and Law and Humanities: a novel method inspired by Paul Ricoeur and James Boyd White*, IN R. DEPLANO, G. GENTILE, L. LONARDO, T. NOWAK (eds.), *Handbook on Interdisciplinary Research Methods in EU Law*, Cheltenham, 2024 (forthcoming).

on the other. This will result in an argument that we need this way of thinking in order for us jurists to play our part to adapt and adjust the system ethically and with integrity.

2. Law as narrative and legal hermeneutics to understand it

In legal theory, we can distinguish two contrasting views of law and of language. On the one hand, we have those who view law as merely a system of rules with a simple syllogistic application to a set of facts and language as a neutral vehicle for meaning. On the other hand, there are those who perceive the use of language and the application of law, as complex cultural practices.[2] This latter perspective aligns with what can be considered a late-Wittgensteinian view of language, and it is closely related to, and influenced by how we view the world.[3]

AG Stix-Hackl, in her Opinion on the *Intermodal transports* case, clearly adopts the second view of law. She observed that the legal interpretation process 'always involves a process of understanding which, as such, cannot be turned into a mathematical formula – this is particularly true of [Union] law, with its many variables of interpretation, which themselves include the dynamic evolution of that system of law'.[4] She emphasised that law is 'intrinsically bound by the possibilities of linguistic expression and is therefore as imprecise and imperfect as language itself'.[5] According to Stix-Hackl, a legal finding is never purely objective; it involves a degree of decision-making by the judges who have to *pronounce* this finding: as the traditional German and French judicial formula say 'hat für Recht erkannt'/'dit pour droit'.[6]

Taking a similar train of thought, though a step further, American legal theorist Robert Cover argued that 'we inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. […] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning'.[7]

In a similar vein, American legal theorist James Boyd White posited that 'the fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it.' [8] White also noted that we engage in an ongoing process of recounting and revising our life stories, seeking to make sense of our past experiences while anticipating the future, adapting our narratives as necessary. Moreover, these narratives extend beyond the individual; they constitute a collective experience and practice as we continually narrate the stories of our communities.[9]

European philosophers, such as Hans-Georg Gadamer and Paul Ricoeur, have also extensively explored the process of interpretation. Ricoeur's phenomenological focus was on the experience of language use at the level of discourse, beyond syntax and lexicon, and its consequences for human subjectivity, emphasising the conscious experience of life and agency[10]

Adopting the second view of language and law, which sees both as complex cultural practices involving storytelling and narratives, opens a theoretical and methodological window to employ

[2] J. WHITE, *Justice as Translation: An Essay in Cultural and Legal Criticism,* Chicago, 1990, ix–x; see J. GAAKEER, *Judging from experience: law, praxis, humanities*, Edinburgh, 2019, pp. 47-48; See also P. PHOA, *EU Law as a Creative Process: A hermeneutic approach for the EU internal market and fundamental rights protection*, Zutphen, 2021, pp. 28-31.

[3] See J. VAN DORP, AND P. PHOA, *How to Continue a Meaningful Judicial Dialogue About EU Law? From the Conditions in the CILFIT Judgment to the Creation of a New European Legal Culture* in *Utrecht Journal of International and European Law,* 34(1), 2018, p. 79.

4. Case C-495/03 *Intermodal transports* ECLI:EU:C:2005:215 [2005] ECR I-8151, Opinion of AG Stix-Hackl, para 101, reflecting on the CILFIT-doctrine.

[5] *Id.* at footnote 57.

[6] *Id.* at footnote 57.

[7] R. COVER, *The Supreme Court, 1982 Term – Foreword: Nomos and* Narrative, in *Harvard Law Review,* 97(1), 4.

[8] J. WHITE, *Telling stories in the law and in ordinary life: The Oresteia and "Noon Wine"* in J. WHITE, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*, Madison, 1985, p. 169.

[9] *Id.* at pp. 169-70.

[10] G. MADISON, *Ricoeur and the hermeneutics of the subject,* in L. HAHN (ed), *The Philosophy of Paul Ricoeur,* Chicago, 1995, p. 75.

disciplines, particularly from the humanities to study law's narrative content. This approach allows us to utilise methods like narratology, discourse analysis, or deconstruction to unpack the functions of legal language and what it communicates. These methods collectively form part of a 'hermeneutic philosophy', ie., a more or less coherent set of ideas about what texts are and how to *correctly* interpret them.[11] The term 'correctly' requires clarification here, as its use is qualified in this context. It is important to note that interpretative processes, when viewed in this way, lead to 'phronesis' or practical wisdom rather than 'episteme' or universal truths. [12] This does not negate the presence of a methodology to guide and stabilize the reading process. However, it underscores the significance of human subjectivity and contextual factors, including cultural and historical contexts, in the interpretative process. As Robin West expressed it,

> "To the extent that legal theory is narrative, however, it is also art. Therefore, we must decide not whether the worlds we envision are true or false, right or wrong. Rather we must decide whether they are attractive or repulsive, beautiful or ugly. Our acceptance or rejection of these aesthetic visions will in turn influence the historical choices we must make. (...)".[13]

White, West and Ricoeur all advocate a structured method of close reading, guided by specific questions that can be repeatedly applied. For instance, Robin West drew from Northrop Frye's classical work in structuralist literary criticism, *Anatomy of Criticism*,[14] while Ricoeur also drew from various strands of (French) structuralist narratology. Both pay attention to the levels of 'story' (chronological events as they occurred), 'narrative' (how events are portrayed and structured within the text, including temporal arrangement, character portrayal, and relationships), and 'narration' (how the story is conveyed, including voice, writing style, and point of view).[15]

While the narratological questions seem to offer some analytical rigour, West, White and Ricoeur also encourage a more profound and intuitive contemplation of the themes, characters, relational structures, and symbolism these questions reveal within the text. They assert that the meaning of a text is not found solely on its surface or within the historical context of the author's intentions. Instead, it resides within the entirety of the reader's experience with the text. As White puts it: 'the meaning of a text is thus not simply to be found within it, to be dug out like a kind of mineral treasure, nor does it come from the reader, as if he were a kind of movie projector. It resides in the life of reading itself, to which both text and reader contribute'.[16]

From this perspective, the process of legal interpretation, reading, and writing, becomes an ethical undertaking. Since readers interpret in a participatory manner, they must actively contemplate their actions and recognise their involvement in the reading and writing processes. A text can be seen as alluding to a particular reality and shaping societal roles and connections for individuals within that context, including both the reader and the author. By interpreting depictions of a world and its

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[11] See for an overview of hermeneutic theories: For instance, L. SCHMIDT, *Understanding Hermeneutics,* New York and London, 2014. See also for a Law&Humanities view on hermeneutic philosophy: J. GAAKEER, *supra* note 2, at 5.

[12] This is my take on the so-called 'Ërklaren-Verstehen' controversy in hermeneutic philosophy. For a fuller discussion see P. Phoa, *supra* note 2*,* 26-62, referring to, inter alia, P. RICOEUR, *The Task of Hermeneutics*, in *Philosophy Today*, 17(1), 1973, p. 112; P. RICOEUR, *Interpretation Theory: discourse and the surplus of meaning*, essays reprinted in Texas Christian University Press, 1976, pp. 71-80; see generally L. SCHMIDT, *supra* note 11, at chapter 7; see also J. GAAKEER, *supra* note 2, at pp. 51-53 and 78-79. For a more profound discussion of phronesis versus episteme, see J. GAAKEER, *supra* note 2, at pp. 55-56 and 107-113.

[13] R. WEST, *Narrative, Authority and Law*, Ann Arbor, 1993, p. 418.

[14] *Id.*, referring to N. FRYE, *Anatomy of Criticism: Four Essays,* 1957.

[15] P. RICOEUR, *What is a text? Explanation and* understanding, in P. RICŒUR, J. THOMPSON (ed.) *Hermeneutics and the Human Sciences: Essays on Language, Action, and Interpretation*, Cambridge, 2016, pp. 117-119. See also P. RICOEUR, *The Narrative Function,* in *id*. pp. 244-247. See for a more detailed overview of the various approaches to narrative analysis and narratology L. HERMAN AND B. VERVAECK, *Handbook of Narrative Analysis,* Lincoln, 2005, pp. 41-101; See also H. PORTER ABBOTT, *The Cambridge Introduction to Narrative,* Cambridge, 2008, pp. 57–58.

16. J. WHITE, *When Words Lose Their Meaning*, Chicago, 1984, p. 19.

characters, individuals gain a deeper understanding of themselves and their communities. Consequently, each act of interpretation should be inherently self-reflective, and each act of writing is necessarily so.[17]

Through this lens, we will examine the 'twin' digital and green transitions that our society is currently undergoing. The ensuing discussion highlights several key issues through a research agenda, without claiming to provide an exhaustive analysis.

3. The Power of Big Tech: discourses, narratives, paradigms

The creation of the Internet for public use in the 1990s, and particularly the mainstreaming of smartphone technology in the early 2000s, has profoundly changed the way we communicate, interact socially, shop, travel, and access information. Can we still recall a time when online search engines like Google, direct messaging, or video calling did not exist? One only needs to stroll through the center of a medium-to-small-sized city to witness the challenges faced by brick-and-mortar shop owners as they struggle to compete with giant e-commerce platforms like Amazon. Additionally, the emergence of entirely new professional occupations, exemplified by the somewhat perplexing 'influencers' on social media, further contributes to this evolving landscape. The digitalization of society, coupled with the ascent of Big Tech conglomerates like Google, Apple, Facebook (Meta), Amazon, and Microsoft, has fundamentally reshaped our society. While these changes have ushered in technological advancements and benefits, they have also presented challenges to established narratives and paradigms across various domains, including privacy, capitalism, and power dynamics.[18] However, the current legal framework and the language employed to interpret and utilize it do not consistently align with these transformations.

One of the most conspicuous challenges posed by digitalization and Big Tech pertains to the erosion of privacy as we know it. Shoshana Zuboff's seminal work, "The Age of Surveillance Capitalism", elucidates how tech companies have commodified personal data, fundamentally reshaping the narrative around privacy. In this new paradigm, personal information becomes a valuable resource, feeding the surveillance capitalism machinery.[19] Think about the way in which social media platforms offer services that are 'free' in the sense that they do not charge a fee for their use, but they do collect wide-ranging data about their users and their behaviour. This data is, in turn, used to raise the value of targeted advertising on these platforms.[20] This is but an example of the way in which the very concept of privacy is being reframed, with individuals grappling with the consequences of pervasive surveillance and the dilution of personal agency.[21] However, regulatory instruments such as the GDPR are still largely based on traditional notions of privacy which are predicated on autonomy and control over personal information.[22] Therefore, they are increasingly incongruent with the reality of constant data collection, profiling, and monetization.[23] The safeguards that the GDPR offers, are hardly sufficient to protect users and provide a counterweight to these tech giants.

Furthermore, the digitalization of society calls into question economic models and discourse, which are currently largely dominated by capitalism and free-market thinking. Traditional narratives of capitalism have been based on ideas of competition between a plurality of market actors, the influence of (free) market forces, and the importance of consumer choice. Examining the wording of Articles 101 and 102 TFEU, as well as the corresponding EU Commission's guidelines and CJEU case law, reveals

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[17] See P. PHOA, *supra* note 2, at 26-62, see also J. WHITE, *supra* note 2, at ix, xiv.

[18] See generally J. VAN DIJCK, T. POELL AND M. DE WAAL, *The Platform Society*, Oxford, 2018.

[19] S. ZUBOFF, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, London, 2019.

[20] See for a comprehensive discussion V. MOROZOVAITE, *Hypernudging in the changing European regulatory landscape for digital markets,* Policy & Internet, 15, 2023, pp. 78-99.

[21] See N. COULDRY AND U. MEJIAS, *Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject. Television & New Media*, 20(4), 2019, pp. 336-349.

[22] I. VAN OOIJEN, AND H. VRABEC, *Does the GDPR enhance consumers' control over personal data? An analysis from a behavioural perspective,* in *Journal of Consumer Policy*, 42(1), 2019, pp. 91–107.

[23] See for a comprehensive discussion of the GDPR, *inter alia*, B. VAN ALSENOY, *Data Protection Law in the EU: Roles, Responsibilities and Liability*, Antwerp, 2019, and L. FEILER, N. FORGÓ AND M. WEIGL, *The EU General Data Protection Regulation (GDPT): A Commentary*, Woking, 2018.

the prominence of these themes (or tropes, in literary terms) in the application and enforcement of EU competition law rules. However, while paying lip service to the narrative of consumer choice, innovation and competition, the rise of Big Tech actually disrupts corrective market mechanisms (including competition law) by consolidating power in the hands of a few tech giants, engendering monopolistic tendencies.[24] These corporations not only possess the capacity to manipulate markets based on their respective size and economic weight, but they also have a unique advantage in leveraging the data they accumulate to shape consumer behaviour and exert influence over governments and political processes.[25] Consequently, the narrative of a free and open market, once emblematic of capitalism, now contends with the reality of tech-driven monopolies that curtail competition and concentrate wealth. The challenge for current and future jurists is to adequately design and interpret regulatory frameworks in a way that addresses these contemporary market power imbalances. This includes rethinking the currently inadequate legal vocabularies and taxonomies to accurately describe and problematize the complex forms of power wielded by Big Tech companies. If our legal language remains inadequate, the result will be an equally inadequate range of instruments for addressing the power of tech giants.[26] For instance, a legal narrative analysis may help to assess if, and in what way, the Digital Markets Act (DMA) is conservative in the sense of preserving and confirming the position of large online platforms as so-called gatekeepers, and what needs to change in order make legislation that is less 'conservative' in this sense.[27] Moreover, an unforeseen consequence of the GDPR is that large platforms can now restrict their rivals' access to data, hampering their ability to compete effectively. Jurists will need to consider what this implies for the interpretation and potential future re-design of the GDPR.[28]

The developments described above are even more concerning given the profound transformation of power dynamics between citizens, governments, and Big Tech. The traditional narrative of governance and accountability is being redefined in the digital age as tech companies, with their global reach and immense resources, wield considerable influence over political processes, discourse, and policy formulation.[29] This necessitates a reassessment of democratic narratives that historically presumed governments as the primary custodians of power. As tech companies shape public opinion and policy outcomes, and increasingly provide services that could be considered as essential as public services,[30] the traditional paradigms of checks and balances are strained. Furthermore, the narrative of citizens' agency in a democracy requires critical examination in light of the outsized influence of tech platforms on political narratives and outcomes. Jurists need to be equipped with the narratological tools to design appropriate and effective countermeasures.[31] The recent development and proliferation of generative

[24] A. GERBRANDY AND P. PHOA, *The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-power*, in M. BENNETT, H. BROUWER AND R. CLAASSEN (Eds.), *Wealth and Power: Philosophical Perspectives*, London and New York, 2022, 166-176. See also for a careful discussion of the competitive constraint of innovation, versus the tipping point of dominant designs: L. HUMMEL, *Dominant positions or dominant designs? Market power and innovation in European competition law*, in V. ŠMEJKAL (Ed.), *EU ANTITRUST: HOT TOPICS & NEXT STEPS: Proceedings of the International Conference held in Prague on January 24–25*, 2022, 65-82, https://cld.bz/ExPAaRt.

[25] A. GERBRANDY AND P. PHOA, *supra* note 24, at pp. 166-185.

[26] *Id*., at pp. 166-185.

[27] T. SCHREPEL, *Digital Markets Act: a conservative piece of legislation*, Concurrentialiste (20 May 2021) https://www.networklawreview.org/digital-markets-act-is-conservative/.

[28] D. GERADIN, T. KARANIKIOTI AND D. KATSIFIS, *GDPR Myopia: how a well-intended regulation ended up favouring large online platforms - the case of ad tech*, in *European Competition Journal*, 17(1), 2021, pp. 47-92

[29] U. KLINGER, D. KREISS AND B. MUTSVAIRO, *Platforms, Power, and Politics: Global Political Communication for the 21st Century,* Cambridge, 2023. See also A. GERBRANDY AND P. PHOA, *supra* note 24, at pp. 166-185.

[30] L. LALIKOVA, *Google Search as a Public Service*, in J. VAN DE GRONDEN ET AL. (eds.), *Services of General (Economic) Interest: State of Play and Current Challenges* (forthcoming 2024, chapter on file with author).

[31] See for a start of this reconsideration as regards antitrust enforcement J. POLAŃSKI, *Antitrust shrugged? Boycotts, content moderation, and free speech cartels*, in *European Competition Journal*, 19(2), 2023, pp. 334-358. Moreover, as argued elsewhere, there is a need for a refined legal vocabulary to accurately 'see' and describe, as well as regulate, Big Tech's complex market power. This power is not just instrumental market power, but is also structural, political and discursive power. See A. GERBRANDY AND P. PHOA, *supra* note 24 at pp. 166-185.

AI and large language models (LLMs) such as ChatGPT and Bard will be particularly interesting to study from the perspective of discourses, narratives, authorship and agency.

The digitalization of society and the ascendancy of Big Tech have disrupted established narratives and paradigms across various domains. Understanding and grappling with these evolving narratives is essential for shaping a more equitable and resilient future. Equipping jurists with hermeneutical and narratological tools empowers them to make law that fulfills its potential.[32]

4. Human/nature: suppressed voices, intergenerational justice and telling new economic stories

The second transition, i.e., the advance of climate change and the urgent need for sustainability, has equally triggered a seismic shift in both societal and legal narratives and paradigms.[33] A careful reading of the law, along with the criticisms levelled against it, can lead to a growing awareness of the role of law both as part of the problem – i.e., creating or defending certain unsustainable practices and institutions and posing obstacles to innovative, sustainable alternatives – and as a potential driving force towards a solution. However, as Adelman aptly points out: "This requires more than effective legislation and enforcement; it requires a paradigm shift in ways we think about, teach and practice law".[34]

There are several problematic elements within the law and legal discourse surrounding sustainability and climate change that can be uncovered and addressed through a narrative analysis. For instance, the reality of climate change disrupts conventional narratives about the relationship between humankind and our natural environment. This traditional narrative revolves around human dominion over nature, which asserts that humans can extract natural resources without limits, without bearing responsibility for environmental damage and degradation. In this narrative, nature itself lacks agency and humans are portrayed as masters over, but not interconnected with, their natural environment.[35] Consider how nature is notably absent from the preamble of the EU Treaty, which merely mentions 'taking into account the principle of sustainable development' and 'environmental protection' but only in relation to promoting 'economic and social progress of the European people. Article 3(3) TEU goes a bit further by considering that the EU '…shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.' Art. 3(5) TEU states that the EU shall contribute to '…the sustainable development of the Earth'. The preamble of the TFEU does not even mention nature or sustainability, although Art. 11 TFEU mandates that '(e)nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. Article 13 TFEU states that, 'since animals are sentient beings [the Union and its Member States shall] pay full regard to the welfare requirements of animals'. It does add a qualification, mentioning that this shall be done 'while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage'. Viewed through the narratological lens, these recitals and provisions maintain a distance between humankind and the natural environment, subordinating the relationship between the European people and nature, if any, to the ultimate goal of economic and social progress.

Examining texts such as the EU Treaties for the presence or conspicuous absence of narratological elements involving nature can expose deep structures of legal and political reasoning that resonate in the interpretations of these texts and related legislation. Furthermore, a comparison to alternative narratives presented in critical scholarly works from a different perspective, such as Anna Tsing's *The Mushroom at the End of the World*, or in works of fiction, including Sarah Hall's short story *Mrs Fox*, Elif Shafak's *The Island of Missing Trees*, or Jeff VanderMeer's *Southern Reach Trilogy*, can broaden

[32] D. CARPI, *Have We Ever Been/Will We Still Be Human? Law and Literature Faced with the Shifting Boundaries of Humanity and Technology*, in *Pólemos*, 17(1), 2023, pp. 1-5.
[33] F. EKARDT, *Sustainability: transformation, governance, ethics, law,* New York, 2019.
[34] S. ADELMAN, *A legal paradigm shift towards climate justice in the Anthropocene,* in *Oñati Socio-Legal Series*, 11(1), 2021, 44-68, 49. See also: P. SERRAND, P. SZWEDO, W. ZAGORSKI AND L. HELIŃSKA, *La durabilité saisie par le droit,* in *Ser. Droit & science politique*, 2023; E. BOULOT J. STERLIN, *Steps Towards a Legal Ontological Turn: Proposals for Law's Place beyond the Human,* in *Transnational Environmental Law*, 11(1), 2022, pp. 13-38.
[35] E. BOULOT AND J. STERLIN, *supra* note 34, at pp. 13-38.

the horizons of jurists' imaginations. This expansion is necessary if a different worldview is to be expressed in legal discourse.[36]

Connected to the challenge of the worldview, centered on humankind's mastery over nature, is the issue of property rights and resource exploitation on the one hand, and the division or lack of responsibilities on the other. American law professor Mary Christina Wood's pioneering work on the 'public trust doctrine' underscores the need for a paradigm shift in environmental law towards a fiduciary duty of governments to protect the atmosphere as a public trust resource for future generations. This alternative perspective challenges existing legal paradigms and invites a re-evaluation of the narratives that underpin environmental jurisprudence.[37] In certain countries, climate litigation is already prompting judges to reflect on these issues. The Dutch Urgenda foundation, for instance, is a pioneer in climate litigation and successfully established the Dutch government's legal duty to prevent dangerous climate change.[38] Many similar cases have followed the Urgenda ruling, with several cases currently pending before the European Court of Human Rights (ECtHR) in which various groups of claimants allege violations of the ECHR due to states' inadequate efforts to reduce greenhouse gas emissions.[39] Judges are starting to acknowledge the need to uphold sustainability commitments, and lawmakers and governments are scrambling to align (or justify) their policies. It is noteworthy that private citizens and activists need to resort to litigation to enforce climate goals that policymakers have formally agreed upon. This highlights the necessity for judges and litigators to possess critical skills for legal interpretation and argumentation to provide persuasive substance to these concerns. It also underscores the need to critically reflect on the implications for appropriate levels of judicial scrutiny, procedural rights, and the *trias politica* more generally.[40]

Moreover, the need for sustainability clashes with established economic narratives, which often form the foundation of legal rules, focussing on unbridled growth and consumption.[41] For instance, the EU's Common Agricultural Policy (CAP) has historically incentivised production and growth. Consider Article 39 TFEU, which states that the CAP aims to increase productivity, ensure a fair standard of living for farmers, stabilise markets, secure the availability of supplies and provide consumers with food at reasonable prices. Or examine recital number 1 of the most recent CAP financing Regulation (EU) 2021/2116, which holds that,

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[36] See for instance S. ADELMAN, *supra* note 34, at p. 50. See also J. WHITE, *supra* note 2, at pp. 47-75, who spent an entire chapter examining neoclassical microeconomic thought, pointing out that this worldview sees the natural world as something external to the human actors, merely affording 'resources' for wealth. He contrasts this with an example of Buddhist economic thought as theorized by E. SCHUMACKER in his seminal *Small is Beautiful – A Study of Economics as if People Mattered,* London, 1973.

[37] M. BLUMM, AND M. WOOD, *The Public Trust Doctrine in Environmental and Natural Resources Law,* Durham, 2021.

[38] https://www.urgenda.nl/en/home-en/; Dutch Supreme Court ruling confirming the lower courts: ECLI:NL: HR:2019:2007 (English translation), Hoge Raad (20 December 2019) 19/00135, available at: https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2019:2007

[39] At the time of writing the following cases are still pending before the ECtHR: Duarte Agostinho and Others v Portugal and Others App no 39371/20; Verein Klimaseniorinnen Schweiz and Others v Switzerland App no 53600/20; Carême v. France (application no. 7189/21); Müllner v. Austria (no. 18859/21); and Greenpeace Nordic and Others v Norway App no 34068/21 (ECHR, Communicated Case, 16 December 2021). Uricchio v. Italy and 31 other States (application no. 14615/21) and De Conto v. Italy and 32 other States (no. 14620/21); Soubeste and 4 other applications v. Austria and 11 other States (nos. 31925/22, 31932/22, 31938/22, 31943/22, and 31947/22); Engels v. Germany (no. 46906/22).

[40] H. KELLER AND C. HERI, *The Future is Now: Climate Cases Before the ECtHR*, in *Nordic Journal of Human Rights*, 40(1), 2022, pp. 153-174.

[41] J. CAILLOSSE, A. BAILLEUX, *Le droit en transition*, in C. VÉRONIQUE, H. DEVILLERS AND M. CHAMBON (eds.) *Le paradigme de la croissance en droit public,* New York, 2022. See also L. KOTZÉ AND S. ADELMAN, *Environmental law and the unsustainability of sustainable development: a tale of disenchantment and of hope,* in *Law and critique*, 34(2), 2023, pp. 227-248.

> "The Common Agricultural Policy (CAP) should continue to step up its response to future challenges and opportunities by boosting employment, growth and investment, by fighting and adapting to climate change and by bringing research and innovation out of the laboratories and onto fields and markets. The CAP should furthermore address citizens' concerns regarding sustainable agricultural production."[42]

Viewing this recital through a narratological lens, paying particular attention to the significance of the ordering of the goals of the CAP, one may notice the emphasis placed on 'boosting employment, growth and investment' over 'fighting and adapting to climate change', and that the CAP's task to 'address citizens' concerns regarding sustainable agricultural production' is textually downplayed even further. Consider also that sustainability is subtly referred to as a 'citizens' concern' rather than a shared concern of the entire community.[43]

For a different example, consider Art. 101(3) TFEU, and reflect on the emphasis EU competition rules place on consumers' welfare, which regards limitations on choice or production as problematic. The interpretation of these rules has slowly been changing in response to the growing disparity between the rules and the growing importance of non-market values.[44] However, these recent efforts are largely based on ideas of 'green growth', which, at its core, remains a strategy for growth, an approach that remains problematic given the planetary boundaries and the ultimate need for true sustainability.[45] Moreover, the weak entrenchment of sustainability at an EU constitutional legal level, makes it particularly susceptible to political (and populist) whims and bargaining. It is quite telling that the most 'green' EU Commission to date has significantly scaled back its green ambitions in its 2023 State of the Union, likely in preparation for the 2024 elections for the European Parliament.[46]

This reframing of economic narratives is integral to addressing the sustainability imperative. Economists have proposed alternatives, such as Kate Raworth, who, in her book *Doughnut Economics* posits a narrative of an economy situated within ecological boundaries and social foundations. Raworth challenges the conventional narrative of economic growth as an unmitigated good and instead advocates for narratives that prioritise human well-being and ecological sustainability. Another example is the so-called degrowth movement, which has emerged as a thought-provoking and increasingly influential counterpoint to the prevailing economic paradigm fixated on growth. Degrowth proposes a shift towards economic systems that prioritise well-being, sustainability, and social equity over the pursuit of GDP growth. Advocates, such as Jason Hickel, argue that this alternative approach encourages a re-evaluation of our consumption patterns, prompting us to reduce waste, prioritise environmental stewardship, foster local, community-oriented economies, and reimagine success in terms of human flourishing rather than sheer material accumulation.[47] It is important for jurists to recognise the

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[42] Regulation (EU) 2021/2116 of the European Parliament and of the Council of 2 December 2021 on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013

[43] See for a similarly critical analysis of the CAP's green ambitions: A. LANGLAIS, *The new Common Agricultural Policy: reflecting an agro-ecological transition. The legal perspective,* in *Review of Agricultural, Food and Environmental Studies*, 104(1), 2023, pp. 51-66.

[44] A. GERBRANDY, *Solving a Sustainability-Deficit in European Competition Law*, in *World Competition*, 40(4), 2017, 539-562. See also on the most recent 'sustainable turn' in the EU Commission's guidelines: M. GASSLER, *The New Sustainability Chapter in the Horizontal Guidelines: Changes in the Final Version Compared to the Draft Version of March 2022*, 2023, available at: https://competitionlawblog.kluwercompetitionlaw.com/2023/06/07/the-new-sustainability-chapter-in-the-horizontal-guidelines-changes-in-the-final-version-compared-to-the-draft-version-of-march-2022/

[45] M. OSSEWAARDE AND R OSSEWAARDE-LOWTOO, *The EU's green deal: a third alternative to green growth and degrowth?* in *Sustainability*, 12(23), 2020, 9825, pp. 2-11.

[46] U. VON DER LEYEN, *State of the Union address 2023*: https://ec.europa.eu/commission/presscorner/detail/ov/speech_23_4426

[47] J. HICKEL, *Less is more – how degrowth will save the world*, London, 2021; N. FITZPATRICK, T PARRIQUE AND I. COSME, *Exploring degrowth policy proposals: A systematic mapping with thematic synthesis,* in *Journal of Cleaner Production*, 2022, 365; M. SCHMELZER, A. VETTER AND A. VANSINTJAN, *The future is degrowth: A guide to a world beyond capitalism*, Brooklyn and London, 2022; C. FYOCK, *What Might Degrowth Mean for International*

influence of traditional economic narratives of growth in the law in order to address and correct these narratives in a legally coherent way. Moreover, narrative and discursive capabilities help jurists identify aspects of the law that may be compatible with alternative economic models, and therefore do not need to change, allowing for an effective and efficient targeting of reform efforts.[48]

The climate crisis also necessitates a rethinking of narratives surrounding *justice and equity*. Recognizing the disproportionate impact of climate change on vulnerable communities, scholars and activists like John Dryzek and Hindou Oumarou Ibrahim emphasize inclusive narratives of climate justice.[49] These narratives advocate for the equitable distribution of the burdens and benefits of climate action and underscore the imperative of intergenerational and intragenerational justice. The absence or oppression of certain voices and perspectives is something that contemporary Law & Humanities scholarship may also help to critically examine.[50] Additionally, science fiction works, such as Kim Stanley Robinson's *The Ministry for the Future*, provide ideas on how intergenerational justice could be implemented in real global governance structures.

Thus, like the rise of digital technologies, climate change and the imperative of sustainability have ushered in a profound transformation of societal and legal narratives and paradigms. Climate change challenges narratives of human dominion over nature, underscores systemic interconnectedness, necessitates legal paradigms grounded in public trust and ecological responsibility, prompts a critical examination of economic narratives and advocates for narratives of climate justice. In the face of this existential crisis, a recalibration of our narratives and paradigms – both within the law and outside of it – is, in the view of this author, not merely advisable but imperative.

5. *Concluding remarks*

In conclusion, this article underscores the profound relationship between legal language and the narratives that underpin it, emphasizing the need for legal scholars and practitioners to learn how to adapt to evolving circumstances in the real world. The "twin transitions" of an increasingly digitalized society and the pressing climate change crisis demand not only innovative legal solutions but also a re-evaluation of the narratives woven into the fabric of our legal frameworks. An approach informed by Law and Humanities scholarship, including legal hermeneutics, discourse analysis and narratology may help in that process of re-evaluation. Our exploration of both transitions has revolved around overarching themes of power, voice, agency and responsibility. Questions will need to be asked – continuously - about who speaks within the legal discourse, and whether that discourse still corresponds to our present realities.

Crucially, this work has highlighted the essential skill of recognizing narratives and norms within legal language, as well as acknowledging that language is far from normatively innocent. Narratives are dynamic, perpetually unfinished, and ever-evolving, much like the world they seek to describe. Thus, adapting to changing circumstances requires us to consistently reassess whether our legal vocabulary and regulatory tools remain fit for the future. In navigating these shifts, we not only gain a deeper understanding of the stories our laws tell, but also the potential to craft narratives that reflect our shared aspirations for justice, sustainability, and a harmonious coexistence with our ever-changing world. In this ongoing narrative of human progress, our legal language becomes a potent vehicle for shaping our collective destiny, ensuring that it remains responsive to the complex and multifaceted challenges of our time.

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[48] See for instance R. MAUGER, *Finding a needle in a haystack? Identifying degrowth-compatible provisions in EU energy law for a just transition to net-zero by 2050*, in *Journal of Energy & Natural Resources Law*, 41(2), 2023, pp. 175-193.

[49] J. DRYZEK, *The Politics of the Earth*, Oxford, 2021. See also D. MCGREGOR, S. WHITAKER, M. SRITHARAN, *Indigenous environmental justice and sustainability in Current Opinion in Environmental Sustainability*, 43, 2020, pp. 35-40; K. KEALIIKANAKAOLEOHAILILANI, AND C. GIARDINA, *Embracing the sacred: an indigenous framework for tomorrow's sustainability science*, in *Sustainability Science*, 2016, 11, pp. 57-67.

[50] See for instance the rich monograph by N. ROGERS, *Law, Fiction and Activism in a Time of Climate Change,* Abingdon, 2020.

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