



INSIGHT

THE EU AND CLIMATE CHANGE

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JUDGES AS NARRATORS OF THE CLIMATE CRISIS?  
AN ILLUSTRATIVE ANALYSIS OF THE DECISION  
OF THE GERMAN CONSTITUTIONAL COURT  
FROM 24 MARCH 2021

FREYA SCHRAMM\*

**ABSTRACT:** The reaction to the climate crisis is dominated by recurring political failure and a reluctance to engage in ambitious climate action individually and publicly. Against this setting the judiciary has been called into action to address the climate crisis, adapting general principles, including fundamental rights, to the phenomenon of global warming. Persuasive arguments are needed to compel individuals and policymakers to act in a foresightful manner that can combat global warming. Judicial decisions can transmit such arguments within society departing from the individual case. A narrative analysis can reveal the persuasiveness of judicial reasoning and enable the re-imagining and stretching of existing law for the purpose of climate action. This *Insight* encourages Courts to engage in the role of a narrator. An analysis of the decision of the German Constitutional Court through the “interpretative lens” of *narratives* exposes how such an interdisciplinary perspective can enable the identification of the broader conviction communicated by the Court. *Narratives* showcase the interdependent relationship between judicial reasoning and societal debate by operating on an emotional level. The decision of the German Constitutional Court relating to the compatibility of the German Climate Act with fundamental rights illustrates how judges can become narrators of climate change and how this new perspective may benefit the understanding of the role of the judiciary in addressing the climate crisis.

**KEYWORDS:** separation of powers – climate crisis – *narratives* – German Constitutional Court – fundamental rights – role of the judiciary.

\* LL.M. Candidate at the University of Amsterdam in the Master’s Track European Competition Law and Regulation, freyaschramm@yahoo.de. The *Insight* was supervised by Prof. Dr. Christina Eckes, Professor of European Law, Amsterdam Centre of European Law and Governance, University of Amsterdam. The *Insight* ensued the Project Report for the Individual Research Project European Public Law and Governance Course at the University of Amsterdam, which is a 6-EC-elective within the master tracks *European Union Law* and *European Competition Law and Regulation*. The concerned project evolved around the topic of climate litigation and the separation of powers and was supervised by the senior researcher Prof. Dr. Christina Eckes.

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## I. INTRODUCTION

The climate crisis is scientifically certain and affects every one of us, as it will continue to do in the future. It is pervasive and requires immediate action by the German legislator paying tribute to the future effects of the German Climate Protection Act.

This is the perspective of the German Constitutional Court expressed in its decision from March 2021, where it called upon the German legislator to re-evaluate the German Climate Protection Act. The decision reflects the unsuccessful attempts by political actors to address the climate crisis. This recurring political failure is combined with a lack of motivation for behavioural change in an individual level. The reluctance to engage in ambitious climate action individually and publicly may be explained by the abstractness complexity, and large scale-nature of the issue. Relating individual actions to possible indirect or future consequences, challenges not only the legal assessment but also the comprehensibility of the climate crisis.<sup>1</sup> Persuasive arguments are needed to compel individuals and policymakers to act in a foresightful manner that can combat global warming.

The crucial role of the judiciary in fighting the climate crisis has been recognized since the early 2000s, when the judicial mandate to implement and enforce environmental law was manifested in the Johannesburg Principles of the Role of Law and Sustainable Development during the Global Judges Symposium.<sup>2</sup> Since then, judges have increasingly utilised general principles and norms, such as fundamental rights to advance climate action. The role of the judiciary must be re-evaluated, keeping in mind the current dissatisfaction with political responses to the climate crisis. *Narratives* can enhance the persuasiveness of judicial reasoning and enable the re-imagining and stretching of existing law for the purpose of climate action.<sup>3</sup>

This *Insight* encourages Courts to engage in the role of a narrator. An analysis of the German Constitutional Court through the “interpretative lens” of *narratives* exposes how such an interdisciplinary perspective can enable the identification of the broader conviction communicated by the Court. *Narratives* showcase the interdependent relationship between judicial reasoning and societal debate by operating on an emotional level.

This finding may challenge the commonly expected judicial objectivity and rationality, but I argue that there is no general contradiction between narrative transmission on an emotional level and the authority and objectivity of judicial reasoning and decision-making.

The starting point of this insight is the conceptualization of *narratives* as well as the legal provision – i.e., fundamental rights – mobilized as general norms to accommodate

<sup>1</sup> EM Markowitz and AF Shariff, ‘Climate Change and Moral Judgement’ (2012) *Nature and Climate Change* 243.

<sup>2</sup> Governing Council of the United Nations Environment Programme, Report of the Global Judges Symposium on Sustainable Development and the Role of Law of 12 November 2002, Annex I, UNEP/GC.22/INF/24, [digitallibrary.un.org](http://digitallibrary.un.org); LJ Kotzé and AR Paterson, *The Role of the Judiciary in Environmental Governance* (Kluwer Law International 2009).

<sup>3</sup> N Rogers, *Law, Fiction and Activism in a Time of Climate Change* (Routledge 2020).

the judicial review of climate action (section II) These concepts form the foundation for the illustrative analysis of the decision of the German Constitutional Court on the German Climate Protection Act (section III), where narrative elements are identified, and the analysis shows how they create a compelling story transmitted through the decision, I will engage in a general discussion on the apparent tension between narrative communication and judicial reasoning (section IV) followed by a conclusion (section V).

## II. CONCEPTUAL FRAMEWORK

Legal “storytelling” has been attributed the potential to attract the public’s attention and change public perception.<sup>4</sup> To understand where such change may occur, it is a prerequisite to identify where legal “stories” or “narratives” are told. Therefore, the concept of “narrative” will be explained (section II.1). Subsequently, fundamental rights and their role in climate litigation will be outlined (section II.2).

### II.1. “NARRATIVES”

#### a) *What are “narratives”?*

A “narrative” is an “interpretative lens”<sup>5</sup> composed of a temporalized sequence of events building on the basic assumptions defined in the setting, unfolding in a plot<sup>6</sup> that is centred around dramatic moments and characters, finally culminating to a story with a moral message.<sup>7</sup>

The setting of the scene discloses basic beliefs of the narrator, and the plot serves to clarify the relationship between these different narrative components. Furthermore, causal explanations are structured by sequencing events in the plot. The characters may be identified as protagonists and antagonists, that range from villains causing problems, victims affected by them, and heroes solving them. The moral of the story relates to the offered solution and can provide inspiration for succeeding actions. *Narratives* operate on an emotional level,<sup>8</sup> as they address empathy and identification on an individual level.

<sup>4</sup> *Ibid.*

<sup>5</sup> This expression is used by C Armeni, ‘Narratives as Tools of Legal Re-Imagination in the Climate Crisis’ (2021) JEL 485, 486.

<sup>6</sup> P Abell, ‘Narrative Explanation: An Alternative to Variable-Centered Explanation’ (2004) Annual Review of Sociology 287, 297.

<sup>7</sup> MD Jones and MK McBeth, ‘A Narrative Policy Framework: Clear Enough to be Wrong?’ (2010) Policy Studies Journal 329; M Verweij and others, ‘Clumsy Solutions for a complex World: The Case of Climate Change’ (2006) Public Administration 817, 822.

<sup>8</sup> C Armeni, ‘Narratives as Tools of Legal Re-Imagination in the Climate Crisis’ cit. 492.

Psychological research on *narratives* reveals that *narratives* are important for human cognition,<sup>9</sup> our ability to understand,<sup>10</sup> and our willingness to translate comprehension into action. They are a tool of social and cognitive construction of reality.<sup>11</sup>

On an individual level, *narratives* convey an empathetical understanding.<sup>12</sup> Delivering information via *narratives* enhances the persuasiveness of information and increases trust and credibility.<sup>13</sup> This can even go as far as increasing the likelihood to help others, if an actual victim can be identified, rather than a statistical group.<sup>14</sup>

Taking the example of the climate crisis, this would mean to focus on specifically identifiable people, such as one's children, to communicate the necessity for climate action.<sup>15</sup>

*Narratives* also have a psychological impact on a larger societal level, as they elicit truths that are shared intersubjectively.<sup>16</sup> The symbols and language of a story may emphasize certain aspects of a *narrative*, highlight particular societal truths, encourage social congruence,<sup>17</sup> and group identification. Therefore, *narratives* can promote salience.<sup>18</sup> One example of this is the health risk related to obesity: researchers conclude that public opinion is less prone to large scale *public* policy solutions, if the health risks are portrayed as specific, acquired voluntarily, and arising from within the individual.<sup>19</sup> The individual is to blame, which is why society is reluctant to engage in action collectively.

The human susceptibility to narrative communication makes the concept relevant for policymaking and policy analysis.<sup>20</sup> Public policy studies have brought forward different empirical and structural approaches to assess the use and role of *narratives* in public policy strategies, outcomes, and implementation.<sup>21</sup>

Policy analysis through *narratives* can be framed on a micro- and meso-level.<sup>22</sup>

<sup>9</sup> D Herman, *Story Logic: Problems and Possibilities of Narrative* (University of Nebraska Press 2004).

<sup>10</sup> D Herman, 'Narrative Theory and the Cognitive Sciences' (2001) *Narrative Inquiry* 1.

<sup>11</sup> C Armeni, 'Narratives as Tools of Legal Re-Imagination in the Climate Crisis' cit.; M Benson, 'Reconceptualizing Environmental Challenges – Is Resilience the New Narrative?' (2015) *Journal of Environmental and Sustainability Law* 99.

<sup>12</sup> A Rabatel, 'Le substrat énonciatif de la connaissance narrative empathique et ses enjeux philosophiques' (2015) *SIGNATA Annales des sémiotiques* 423.

<sup>13</sup> MD Jones and MK McBeth, 'A Narrative Policy Framework: Clear Enough to be Wrong?' cit. 344.

<sup>14</sup> M Averill, 'Linking Climate Litigation and Human Rights' (2009) *RECIEL* 139.

<sup>15</sup> EM Markowitz and AF Shariff, 'Climate Change and Moral Judgement' cit.

<sup>16</sup> A Rabatel, 'Le substrat énonciatif de la connaissance narrative empathique et ses enjeux philosophiques' cit.

<sup>17</sup> MD Jones and MK McBeth, 'A Narrative Policy Framework: Clear Enough to be Wrong?' cit. 343, 344.

<sup>18</sup> M Averill, 'Linking Climate Litigation and Human Rights' cit. 139.

<sup>19</sup> RG Lawrence, 'Framing Obesity: The Evolution of News Discourse on a Public Health Issue' (2004) *The International Journal of Press/Politics* 56.

<sup>20</sup> E Roe, *Narrative Policy Analysis: Theory and Practice* (Duke University Press 1994).

<sup>21</sup> MD Jones and MK McBeth, 'A Narrative Policy Framework: Clear Enough to be Wrong?' cit.

<sup>22</sup> *Ibid.*

Research on a micro-level aims to explain the impact of public policy narratives on individual opinion and looks at the persuasiveness of *narratives*.<sup>23</sup> This includes their perceived congruence and incongruence, as well as their eventual influence on policy outcomes. Micro-analysis focuses on media coverage and discussions related to *narratives*.

Analysis on a meso-level focusses on strategic use of *narratives*,<sup>24</sup> for example extending or containing the scope of a conflict.<sup>25</sup> The defined characteristics of *narratives* simplify the identification of narrative structures.<sup>26</sup>

The methodology common in policy studies combines linguistic and content analysis, which may be applied in the field of litigation analysis.

### *b) Narratives in litigation*

At first glance, the concept of *narratives* does not seem appropriate for legal analysis, which is characterized by a preference for reason over emotion.<sup>27</sup> Nevertheless, *narratives* have been identified in judiciary reasoning and decision-making. Adjudication always includes the narration of a story: the story of the plaintiffs and their claim. Scholars have identified such a narrative style in litigation.<sup>28</sup>

Litigation addresses the cognitive hurdles associated with the perception of the dangers related to climate change and offers the opportunity to adequately translate the current crisis into understandable terms.<sup>29</sup> *Narratives* in litigation may be understood as a vehicle to integrate “facts” and “values”.<sup>30</sup>

Relating to the integration of “facts”, storylines and *narratives* have been used to establish causality and liability in tort law. In a deductive process arguing from the general to the specific, evidence of anthropogenic influence on the climate may be brought forward to assess the impact and harm caused in individual cases.<sup>31</sup> By contrast, lawsuits may translate scientific data used in the litigation procedure into terms more comprehensible to the public.<sup>32</sup>

<sup>23</sup> *Ibid.*

<sup>24</sup> F Fischer and J Forester, *The Argumentative Turn in Policy Analysis and Planning* (Duke University Press 1993).

<sup>25</sup> MK McBeth and others, ‘The Intersection of Narrative Policy Analysis and Policy Change Theory’ (2007) *Policy Studies Journal* 87.

<sup>26</sup> MD Jones and MK McBeth, ‘A Narrative Policy Framework: Clear Enough to be Wrong?’ cit.

<sup>27</sup> K Tiscione, ‘Feelthinking like a Lawyer: The Role of Emotion in Legal Reasoning and Decision-Making’ (2019) *Wake Forest Law Review* 1159.

<sup>28</sup> C Hilson, ‘Law, Courts and Populism: Climate Change Litigation and the Narrative Turn’ in SM Sterett and LD Walker (eds), *Research Handbook on Law and Courts* (Edward Elgar 2019) 81.

<sup>29</sup> G Nosek, ‘Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories’ (2017) *William & Mary Environmental Law and Policy Review* 733.

<sup>30</sup> C Armeni, ‘Narratives as Tools of Legal Re-Imagination in the Climate Crisis’ cit. 488.

<sup>31</sup> EA Lloyd and TG Shepherd, ‘Climate change attribution and legal contexts: evidence and the role of storylines’ (2021) *Climate Change* 28.

<sup>32</sup> G Nosek, ‘Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories’ cit.

“Values”, on the other hand, are integrated because litigation is a form of storytelling itself. For the claimants themselves, adjudication inherently holds a symbolic significance which can extend to communities and societies,<sup>33</sup> where they identify or sympathize with the ruled-upon claims. *Narratives* utilise rhetorical instruments and a specific tone to convey a message, targeted towards a specific audience.<sup>34</sup> Law has a lyrical and emotional aspect,<sup>35</sup> that extends beyond the courtroom to policy makers and society as a whole.<sup>36</sup> By telling the story of the claims and the plaintiff, litigation serves an educational purpose that exceeds the immediate effects of a particular court decision. Ultimately, *narratives* and storytelling function as argumentative tools that aim to persuade society and decision makers.<sup>37</sup>

This *Insight* focuses on the *outward looking* function of *narratives* in litigation, namely the creation of a convincing argument that resonates with the recipient and the breakdown of abstract information. Different legal theories and tools can be utilised to call attention to a situation and aim to establish responsibility.<sup>38</sup> One of those legal tools are fundamental rights, as a widely accepted, powerful and supposedly accessible instrument (section II.2.).

## II.2. FUNDAMENTAL RIGHTS: THE STARTING POINT AND ULTIMATE GOAL

This section specifies the concept of fundamental rights (a) and their role within climate litigation (b).

### a) *The concept of fundamental rights*

Fundamental rights are constitutionally granted, inviolable rights of a citizen *vis-à-vis* the state.<sup>39</sup> Beyond the protection against inflicting public action, case law in various jurisdictions, including Germany and the Netherlands,<sup>40</sup> has established a positive dimension of fundamental rights, creating obligations for the state to prevent interference from non-public actors.<sup>41</sup> This positive dimension of fundamental rights implies a “duty to

<sup>33</sup> E Fisher, E Scotford and E Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) ModLRev 173.

<sup>34</sup> S Levinson, ‘The Rhetoric of the Judicial Opinion’ in P Brooks and P Gewirtz (eds), *Law’s Stories* (Yale University Press 2008) 187.

<sup>35</sup> C Armeni, ‘Narratives as Tools of Legal Re-Imagination in the Climate Crisis’ cit.; M Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press 1997).

<sup>36</sup> See e.g., P Gewirtz, ‘Narrative and Rethoric in the Law’ in P Brooks and P Gewirtz (eds), *Law’s Stories* (Yale University Press 2008) 2.

<sup>37</sup> *Ibid.*

<sup>38</sup> M Averill, ‘Linking Climate Litigation and Human Rights’ cit.

<sup>39</sup> Bibliographisches Institut GmbH, *Duden | Grundrecht | Rechtschreibung, Bedeutung, Definition, Herkunft* www.duden.de.

<sup>40</sup> C Cournil, ‘Les Droits Fondamentaux au Service de l’Émergence d’un Contentieux Climatique contre l’État: Des Stratégies Contentieuses des Réquerants à l’activisme des Juges’ in M Torre-Schaub and others (eds), *Que(s) droit(s) pour le changements climatiques* (Mare et Martin 2018) 185; *Hooge Raad* judgement of the 20 December 2019 19/00135 *Urgenda Foundation v State of the Netherlands*.

<sup>41</sup> C Cournil, ‘Les Droits Fondamentaux au Service de l’Émergence d’un Contentieux Climatique contre l’État: Des Stratégies Contentieuses des Réquerants à l’activisme des Juges’ cit.

protect”.<sup>42</sup> Fundamental rights cover most aspects of human life and activity. Their “enjoyment [...] entails mutual responsibilities and duties towards other individuals, the human community, and even future generations”.<sup>43</sup>

Fundamental rights are a forceful tool, but their all-encompassing nature and ambiguous wording makes them difficult to operate. Their mobilization in climate litigation offers an opportunity to accelerate climate action, but also faces certain challenges.

*b) The controversial role of fundamental rights in climate litigation*

Courts all over the world have recognized a relationship between climate action and the protection of fundamental rights, specifically the rights to private life, health, and human dignity.<sup>44</sup> The mobilization of fundamental rights in this context takes the form of claims for protection against the consequences of the climate crisis,<sup>45</sup> and the obligation to maintain an environment that offers the possibility to make use of one's fundamental rights, i.e., live in a habitable and safe environment that provides sufficient resources to sustain life.

Claiming fundamental rights protection in climate cases is an emerging trend.<sup>46</sup> The turn towards fundamental rights has been linked to the relative robustness and persistence of this legal tool in comparison to environmental law.<sup>47</sup> Explicit references to climate protection in fundamental rights catalogues are still an exception,<sup>48</sup> but it can be considered the ambit of the judicial branch to adapt general principles, including fundamental rights, to new phenomena like global warming.<sup>49</sup>

<sup>42</sup> *Ibid.*

<sup>43</sup> Preamble of the Charter of Fundamental Rights of the European Union [2012].

<sup>44</sup> E.g., Irish High Court judgement of 21 November 2017 IEHC 695 *Friends of the Irish Environment CLG v Fingal County Council*.

<sup>45</sup> United States District Court of Oregon judgement of 2020 18-36082 SC n.6:15-cv-0157 *Juliana et al. v United States of America et al*; Lahore High Court judgement of 4 September 2015 W.P.No.25501/201 *Ashgar Leghari v Federation of Pakistan*.

<sup>46</sup> J Setzer and LC Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ (2019) WIREs Climate Change 580.

<sup>47</sup> *Ibid.*

<sup>48</sup> MA Cohendet and M Fleury, ‘Droit Constitutionnel et Droit International de l’Environnement’ (2020) *Revue française de droit constitutionnel* 271.

<sup>49</sup> M Payandeh, ‘The Role of Courts in Climate Protection and the Separation of Powers’ in W Kahl and MP Weller (eds), *Climate Change Litigation* (Beck, Nomos, Hart Publishing 2021) 62, 77.

Case law and doctrine have emphasized the potential of fundamental rights and climate litigation.<sup>50</sup> Fundamental rights are a “counter-majoritarian”<sup>51</sup> instrument, which gives a voice to marginalized and vulnerable groups that are disproportionately affected by the climate crisis. A standard, independent from the legislator’s specific objectives, can be established and the legislator can be confronted with specific scientific predictions,<sup>52</sup> which lead to the requirement of a minimum level of protection.

In the context of *narratives*, the potential of fundamental rights to render complex and distant issues more accessible and comprehensive has been emphasized.<sup>53</sup> Perceptions of the climate crisis can profit from a prioritization of its *effects* on *individuals* rather than mere scientific projection. This “humanisation” of global warming and its tangible effects can result in an ethical imperative to act further translated into legal obligations.<sup>54</sup> The mobilization of fundamental rights in climate litigation illustrates the dialogue between the judiciary and the legislative branch. Legislative acts which are inspired by and centred around fundamental rights introduce an opportunity to align the objective to protect fundamental rights and the battle against the climate crisis.<sup>55</sup>

Nonetheless, the mobilization of fundamental rights in climate litigation faces several challenges. One of these challenges is the establishment of causality, including the attribution of a certain outcome to an action, e.g., the emission of greenhouse gases or the failure to reduce emissions, across time and space.<sup>56</sup>

<sup>50</sup> J Setzer and LC Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ cit; C Cournil, ‘Les Droits Fondamentaux au Service de l’Émergence d’un Contentieux Climatique contre l’État: Des Stratégies Contentieuses des Réquerants à l’activisme des Juges’ cit.; T Gross, ‘Climate Change and Duties to Protect with Regard to Fundamental Rights’ in W Kahl and MP Weller (eds), *Climate Change Litigation* (Beck, Nomos, Hart Publishing 2021) 81; JAW Van Zeven, ‘The Role of the EU Charter of Fundamental Rights in Climate Litigation’ (2021) SSRN Scholarly Papers papers.ssrn.com; M Limon, ‘Human Rights and Climate Change: Constructing a Case for Political Action Symposium’ (2009) *HarvEnvtlLRev* 439; M Averill, ‘Linking Climate Litigation and Human Rights’ cit., M Petel, ‘Droits humains et contentieux climatique: une alliance prometteuse contre l’inertie politique’ (2021) *Journal Européen des Droits de l’Homme*.

<sup>51</sup> The “counter-majoritarian” argument is famously formulated by AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986) stating that the court exercises judicial review against the prevailing majority, accusing it of being anti-democratic.

<sup>52</sup> G Nosek, ‘Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories’ cit.; M Petel, ‘Droits humains et contentieux climatique: une alliance prometteuse contre l’inertie politique’ cit.

<sup>53</sup> M Averill, ‘Linking Climate Litigation and Human Rights’ cit.

<sup>54</sup> M Limon, ‘Human Rights and Climate Change: Constructing a Case for Political Action Symposium’ cit. 451.

<sup>55</sup> General Assembly United Nations, Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary general – Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights of 15 January 2009, UN Doc A/HRC/10/61; M Averill, ‘Linking Climate Litigation and Human Rights’ cit.

<sup>56</sup> J Setzer and LC Vanhala, ‘Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance’ cit.



A second challenge is the reactive nature of fundamental rights. Appropriate climate action requires foresightfulness and transformation, whereas fundamental rights are reactive and backward-looking, as they generally require an existing violation of the claimed right. It is uncertain how predicted impact and damage may be addressed through fundamental rights.<sup>57</sup> Additionally, litigation is carried out between the parties to the procedure and cannot provide representation for all interests affected. Fundamental rights in climate litigation are feared to impose the interests of a minority on the majority.<sup>58</sup>

Generally, the tension between *individual* fundamental rights and the *collective* socio-political crisis of global warming has been put forwards as a limitation. Fundamental rights are the legal correlate of individual perspectives, which may hinder the quest for a common ground, essential to address the all-encompassing issue of the climate crisis.<sup>59</sup>

An analysis of the decision of the German Constitutional Court explores to what extent the praise and critique of fundamental rights mobilization in climate litigation is sound, and specifically whether fundamental rights contribute to a comprehensive and contextualised depiction of the climate crisis in form of a *narrative* (section III.). The analysis is limited to a meso-analysis of the decision itself and does not include media coverage.

### III. THE CASE OF THE GERMAN CONSTITUTIONAL COURT

Examining law as a *narrative* means analysing more than rules and substance, but rather language, the idea expressed and the form in which it is presented.<sup>60</sup> Firstly, the substantial aspects of the decision will be briefly recalled (section iii.1.). Secondly, a meso-assessment of the strategic use of narrative elements will be carried out (section iii.2.), followed by a comprehensive interpretation of the rhetoric of the decision (section iii.3.).

#### III.1. A CASE OVERVIEW

In March 2021, the German Constitutional Court (hereafter “the Court”) was concerned with the question whether the German Climate Protection Act is compatible with the German Fundamental Law (*Grundgesetz*), specifically the fundamental rights of the claimants.<sup>61</sup>

The Court affirmed that the fundamental right to physical integrity and health includes the obligation to protect life and health from dangers of climate change.<sup>62</sup> A

<sup>57</sup> J Peel and HM Osofsky, *A Right Turn in Climate Change Litigation?* (Cambridge University Press 2017).

<sup>58</sup> L Bergkamp and JC Hanekamp, ‘Climate Change Litigation against States: The Perils of Court-Made Climate Policies’ (2015) *European Energy and Environmental Law Review* 102.

<sup>59</sup> J Rochfeld, *Justice pour le climat! Les nouvelles forms de mobilization citoyenne* (Odile Jacob 2019).

<sup>60</sup> P Gewirtz, ‘Narrative and Rethoric in the Law’ cit.

<sup>61</sup> *Bundesverfassungsgericht* decision of 24 March 2021 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20; for a legal analysis and explanation of the decision see, e.g., C Eckes, ‘Separation of Powers in Climate Cases’ (10 May 2021) *Verfassungsblog verfassungsblog.de*; K Kotulla and M Kotulla, ‘Bundesverfassungsgericht und Klimaschutz – wenn die Zukunft über die Gegenwart mitentscheiden darf’ (2022) *NuR* 1.

<sup>62</sup> *Bundesverfassungsgericht* decision 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 cit. operational part of the decision n.1.

decisive aspect of the decision is the focus on the future consequences of the German legislation, which disproportionately postpones emission reduction at the expense of fundamental rights protection in the future. The enjoyment of fundamental rights is set in relation to the reduction of carbon emissions over time.

Nevertheless, the Court emphasizes the margin of discretion of the German legislator. Fundamental rights only impose an outer limit within which the German legislature must re-evaluate its normative decisions and legislation.

### III.2. THE NARRATIVE CHARACTERISTICS OF THE DECISION

*Narratives* are embedded in a setting (a), identify actors (b), unfold in a plot (c) and culminate in a moral of the story (d). The following sections show that each of these characteristics of a *narrative* are present in the analysed decision.

#### *a) The setting: the climate crisis as a German and intertemporal issue*

The setting of the *narrative* discloses the basic beliefs of the narrator and structures the components. It is particularly important to indicate which interests – e.g., economic, social, or health-related – are the main consideration.<sup>63</sup> The Court begins with a report on the factual foundation of climate change and climate protection. On almost ten pages accounting for almost 10 per cent of the decision, the Court explains how human carbon emissions result in global warming, what the consequences are, and which action must be taken to stop anthropocentric global warming. The extensiveness and depth of the Court's presentation of the climate crisis is exceptional and suggests that the underlying natural phenomenon receives closer attention. The scientific prefix of the decision on the German Climate Protection Act is unprecedented.<sup>64</sup>

The Court's presentation centres around the environment and human health, whereas economic interests and social implications of climate action are not mentioned. The Climate crisis is real and already affecting human health; this is the basic belief established by the Court.

The Court's *narrative* is set in Germany. Although the Court recognizes climate change as an inherently *global* phenomenon, every effect that the Court acknowledges on a

<sup>63</sup> G Nosek, 'Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories' cit.

<sup>64</sup> For example, in the *Sterbehilfe Bundesverfassungsgericht* decision 2 BvR 2347/15 from 2020 the Court traced back the legislative history of the relevant legal act but did not include scientific contributions about the psychological and physical conditions and consequences related to non-curable fatal disease. Neither did the Court start off the decision with a presentation of scientific research in the *Hartz IV* decision 1 BvL 1/09 from 2010 relating to the level of financial support necessary to live a dignified life, although it could have included research about how limited financial means affect the development of children, the social involvement or long-term health. In another similarly important case from 1993 on abortion (2 BvF 2/90, 4/92 and 5/92 para 151) the Court only briefly mentioned scientific suggestions about the biological beginning of human life without engaging in an in-depth assessment.

global scale is linked to a specific German region. The Court's presentation remains centred around abstract numbers and statistics but sheds some light on Germany, by naming cities like Hamburg, Bremen, and Kiel, threatened by storm tides or the alps and the Rhine-Main region, which face droughts.

It is particularly interesting to note that the Court not only includes natural consequences but also declares climate change as an important reason for migration.<sup>65</sup> Linking climate change to the politically charged topic of flight and migration could be interpreted as targeting traditionally conservative recipients.

Defining the timeframe of climate change is a recurring theme in the decision, starting at the age of industrialization,<sup>66</sup> moving to the present and looking ahead at the future.<sup>67</sup> The Court shows the interdependence of actions related to climate change across time. Climate change is characterised as "irreversible"<sup>68</sup>: what has been done, cannot be corrected. This characterization is also projected onto current actions, which determine the future.<sup>69</sup> Building on this retrospect, the Court creates a prospect for the future and thereby establishes an inseparable link between present actions and future outcomes.<sup>70</sup>

#### *b) The actors: who is to blame?*

*Narratives* are generally characterised by a distinct distribution of roles between the victim and the villain, and the form of storytelling is attributed a particular power for oppositionists and outsider groups.<sup>71</sup>

In the case before the German Constitutional Court, the claimants are young individuals accusing the German legislator and the German State of a failure to protect their future. Future generations and children are seen as the new central figures of climate change *narratives*, incarnating the fear of an uncertain future.<sup>72</sup> Fundamental rights partially amplify this dichotomy between the ones entitled to protection and those owing it. Does the Court adopt this univocal assignment of guilt?

The Court acknowledges that future generations,<sup>73</sup> and people in vulnerable regions are particularly impacted by climate change.<sup>74</sup> It also allocates responsibility for climate change, pointing to the highly developed countries as the main contributors to climate change and even specific industries.<sup>75</sup> The Court's presentation, however, is more

<sup>65</sup> *Bundesverfassungsgericht* decision 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 cit. para. 28.

<sup>66</sup> *Ibid.* para. 29.

<sup>67</sup> *Ibid.* para. 146.

<sup>68</sup> *Ibid.* para. 185.

<sup>69</sup> *Ibid.* para. 186.

<sup>70</sup> *Ibid.* paras 122, 186.

<sup>71</sup> P Gewirtz, 'Narrative and Rethoric in the Law' cit.

<sup>72</sup> C Armeni, 'Narratives as Tools of Legal Re-Imagination in the Climate Crisis' cit.

<sup>73</sup> *Bundesverfassungsgericht* decision 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 cit. paras 131, 206.

<sup>74</sup> *Ibid.* para. 174.

<sup>75</sup> *Ibid.* paras 29-30.

nuanced. The Court pays tribute to the complexity of the issue when it states that our current way of life results – whether directly or indirectly - in carbon emission, referring not only to industry activities but also “everyday behaviours”<sup>76</sup>. Contradicting the allegations of the claimants, the Court even recognizes the efforts of the German legislator to protect fundamental rights. The obligation of the German State to protect against the dangers of climate change is said to be fulfilled.<sup>77</sup>

One of the unique features of the climate crisis is that it is not perceived as a purposeful wrong by one villain.<sup>78</sup> Everyone contributes to it continuously. The Court’s *narrative* aligns with this peculiarity, the absence of a villain. However, the Court does identify a hero: the German Fundamental Law (*Grundgesetz*).<sup>79</sup>

When telling the story of the case, the Fundamental Law intervenes by not allowing the State to idly accept the consequences of climate change.<sup>80</sup> The Court even goes as far as to say that the Constitution *itself* requires the restriction of carbon-emission-intensive activities now.<sup>81</sup> The language is active, bringing the Fundamental Law to life and calling for immediate action.

A supporting actor of the Court’s climate *narrative* is the Intergovernmental Panel on Climate Change (IPCC). The Court repeatedly references the IPCC’s report and scientific findings. It declares the IPCC a reliable source,<sup>82</sup> reinforcing its authority. The IPCC is operating in the background of the *narrative*, “handing props” to the protagonists.

### c) *The plot*

The plot enables the narrator to structure the relationship between the actors on the one hand, clarify the relationship between the component parts and establish causal relationships on the other. The plot of the Court’s climate *narrative* evolves around fundamental rights opposing the German Climate protection Act as an action of the German legislator.

The victims themselves play a secondary role in the unfolding of this plot, it is rather the Constitution, specifically the norms of fundamental rights, the German legislator, and science present in the substantial assessment qualifying as the “main stage” of the Court decision.

The Court calls the German legislator to account for the *future* protection of fundamental rights by acting now.

The relationship between the component parts of fundamental rights and the German Climate Protection Act as an attempt to combat climate change is told as follows:

<sup>76</sup> *Ibid.* para. 37.

<sup>77</sup> *Ibid.* para. 143.

<sup>78</sup> EM Markowitz and AF Shariff, ‘Climate Change and Moral Judgement’ cit.

<sup>79</sup> *Bundesverfassungsgericht* decision 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 cit. paras 118, 187.

<sup>80</sup> *Ibid.* para. 118.

<sup>81</sup> *Ibid.* para. 187.

<sup>82</sup> *Ibid.* para. 16.

fundamental rights exist independent of time, but they are dependent on the world their beneficiaries live in.

The exercise of fundamental rights directly or indirectly causes carbon emission, through commercial business, production, trading, and consumption of goods and energy, services, traveling and commuting. According to the latest scientific evidence, every emission of carbon into the atmosphere irreversibly and successively results in global warming. These carbon emissions accumulate long-term and aggravate global warming progressively. The contribution of our behaviour in the present to the change in climate over time means that the enjoyment of fundamental rights in the future depends on how we act now.

The German Climate Protection Act specifies how we must adapt our current and future behaviour, and therefore irreversibly determines the future enjoyment of fundamental rights.<sup>83</sup> The plot is future-oriented, imagining a world in which carbon emissions are not reduced in due time.<sup>84</sup> The Court even includes a dystopian scenario of how the future might be, if the German legislator does not act sufficiently or too late,<sup>85</sup> illustrating its story with the phenomenon of “tipping points”, which have detrimental effects to whole ecological systems, aiming to encourage the German legislator to use the IPCC suggestions as guidance.<sup>86</sup>

Science is attributed the role of a tool the legislator can use. The question to what extent global warming can be accepted and what consequences can be tolerated, is an evaluative problem that only the German legislator can tackle.<sup>87</sup>

Nevertheless, the German legislator is not free to decide on climate action.<sup>88</sup> The German constitution – the hero of the *narrative* – does oblige the legislator to include recent scientific evidence when balancing the different interests as well as considering the effects of its current regulatory framework on the exercise of fundamental rights in the future. The role of science in addressing the climate crisis is acknowledged as an important parameter in decision-making but limited to support the German legislator, who is empowered as the leading authority.

The Court outlines where the German legislator can write the *narrative* of climate action itself by granting a margin of discretion,<sup>89</sup> nuanced, and relativized by the limits imposed by fundamental rights.<sup>90</sup> By describing this balance between the power of the different actors, the Court also admits its own limitations in controlling the legislator’s discretion, distributing the authorship of who ultimately writes the *narrative* of the climate crisis and its effects in the future.

<sup>83</sup> *Ibid.* paras 130, 186.

<sup>84</sup> *Ibid.* paras 192-194.

<sup>85</sup> *Ibid.* paras 155, 161.

<sup>86</sup> *Ibid.* para 162.

<sup>87</sup> *Ibid.* paras 35, 160.

<sup>88</sup> *Ibid.* para. 211.

<sup>89</sup> *Ibid.* paras 165, 172.

<sup>90</sup> *Ibid.* paras 206, 212.

*d) The moral of the story*

The message of the Court is unambiguous: climate change is scientifically proven and affects every human being now and in the future. However, the story of the climate crisis is not only dreadful, the *narrative* told by the Court is also empowering: the German legislator is held reliable to act in due time to combat global warming in a foresightful, considerate, and precautionary manner, because fundamental rights oblige it to do so. Intervention by the German legislator can curb the severity of climate change. Between the lines, the Court highlights that, if carbon emissions are reduced in due time, an appropriate reconciliation of fundamental rights and climate change is possible.

The perspective of continuity and interdependence is not only emphasised with regards to the timely dimension of climate change but also with regards to its international dimension. One of the obligations of the German legislator is the duty to engage in international efforts to act against climate change.<sup>91</sup> The global character of global warming does not release the national legislator, because a purely national solution is hopeless, but rather extends the scope of responsibility to encourage and support global efforts. The Court's *narrative* functions as a script giving prospect of what lays ahead.<sup>92</sup>

### III.3. INTERPRETATION: A NARRATIVE ILLUSTRATION OF THE CLIMATE CRISIS?

This narrative approach unravels the interaction and different roles of the actors across time and space, showing the respective powers and limitations of the legislator, the constitution, and science.

The framing of the timely dimension in climate lawsuits has been identified as a trend in legal mobilization, revealing the tension and possible contradictions between future-looking scientific prospects and policy outcomes focussed on the present.<sup>93</sup> The decision of the Court aligns with this observation.

The language the Court uses is generally neutral and rational. Yet, where the Court seeks to highlight a specific point, it engages in a more accentuated formulation. For example, the reoccurring emphasis on the "irreversible"<sup>94</sup> character of climate change or the possibly "unreasonable"<sup>95</sup> restrictions of fundamental rights in the future, permeates considerations on how to deal with it. Furthermore, the Court integrates the claimants strong wording, where it tries to make a point: the burden to limit carbon emission in the future

<sup>91</sup> *Ibid.* paras 199-200.

<sup>92</sup> C Armeni, 'Narratives as Tools of Legal Re-Imagination in the Climate Crisis' cit., N Rogers, *Law, Fiction and Activism in a Time of Climate Change* cit.

<sup>93</sup> C Hilson, 'Framing Time in Climate Change Litigation' (2018) *Oñato Socio-Legal Series* 361; J Setzer and LC Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' cit.; M Verweij and others, 'Clumsy Solutions for a complex World: The Case of Climate Change' cit.

<sup>94</sup> *Bundesverfassungsgericht* decision 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 cit. paras 108, 118, 119, 130, 133, 185, 186, 187, 198, 218, 229, 262.

<sup>95</sup> *Ibid.* paras 117, 194, 245, 246.

is compared to a “slam on the breaks”, an “emergency stop”<sup>96</sup> speaking to the readers imagination.

The Court appropriates active language when articulating the conditions, the constitution imposes on the legislator creating a more engaging and activating text. The Court presents the German Fundamental Law as something we can rely on in times of difficulty and uncertainty, which may provide a feeling of security.

But does the Court’s decision achieve what has been identified as the main benefits of *narratives*? Does the Court create sympathy with the claimants by repurposing fundamental rights to create a transformative legal climate *narrative*?<sup>97</sup> Does it make the science of the climate crisis more comprehensible and relatable?

The Court breaks down the science of climate change when it summarizes the factual connections in a “simplified”<sup>98</sup> and therefore more comprehensive manner.

References to individual stories, however, are used sparingly. Anecdotal evidence is missing, and the victims are listed only in the abstract. The Court repeatedly reminds the reader that *everybody* is responsible for carbon emissions and, consequently, global warming.<sup>99</sup> The Court refuses to engage in a simplified dichotomy of villain- and victimhood but paints a more nuanced and realistic picture. This decision illustrates that individual fundamental rights can be mobilized to defend a public, societal issue, going beyond the individual case.<sup>100</sup>

The Court’s decision also weakens the concern that climate litigation jeopardizes a fair balance between interests in climate action, relating to the notion that not all interests are represented in the courtroom.<sup>101</sup> In the decision, the legislator – representing the plurality of the democratic society - is empowered to take charge of the reconciliation within the ramifications of the constitution. The Court does not carry out the reconciliation of interests inflicted in the climate crisis, but only delimits the freedom of the legislator in relation to the constitution.

The “interpretive lens” of *narratives* provides a tool for the judiciary to strengthen its involvement in the democratic debate by operating on an emotional level (section IV) – a hypothesis which challenges traditional understandings of judicial “objectivity”.

<sup>96</sup> *Ibid.* para. 192.

<sup>97</sup> N Rogers, *Law, Fiction and Activism in a Time of Climate Change* cit.

<sup>98</sup> *Bundesverfassungsgericht* decision 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 cit. para. 16.

<sup>99</sup> *Ibid.* paras 37, 184, 122, 194.

<sup>100</sup> See on the societal relevance of fundamental rights litigation M Petel, ‘Droits humains et contentieux climatique: une alliance prometteuse contre l’inertie politique’ cit.

<sup>101</sup> L Bergkamp and JC Hanekamp, ‘Climate Change Litigation against States: The Perils of Court-made Climate Policies’ cit.

#### IV. ADDRESSING EMOTIONS AT THE EXPENSE OF “OBJECTIVITY”?

Emotions have a difficult standing within legal decision-making. The idealised aspiration to provide an objective decision, that prevents individual interests and prejudice from obtaining legal authority, still persists. Judges’ decisions are meant to be “true” and objective statements of the law.

This idealised notion of “objectivity” assumes that law is a coherent and complete system which allows the deduction of correct solution for any factual situation.<sup>102</sup> From this perspective, judges represent human agents who administer the unambiguous guidance laid out in the law.

However, the role of emotion and the susceptibility of judicial decision-making to external, non-legal influences is undeniable. Law is not rigid or determinate, but rather a flexible tool to shape society or react to changes in society. Interpreting vague and indetermined legal norms in a way that adapts them to current phenomena and societal changes is an ambit of the judiciary,<sup>103</sup> influenced by external and possibly emotional factors. Judges are aware of the situatedness of their decisions in the political and societal environment, shaping their interpretation of general norms and principles.<sup>104</sup>

Therefore, judicial “objectivity” and deduction is not absolute and definitive but consists of formulating hypotheses about the law and its application to a particular factual situation, which are open to contestation by public opinion.<sup>105</sup> Decision-making by judges is to be understood as a process which exists in relation to constraints and expectations imposed by society and a debate influenced by emotions.

This presumption that judicial reasoning can be “tested”<sup>106</sup> intersubjectively suggests the added value of narrative elements in judicial decisions. Narrative communication is more adapted to individualized cognitive abilities. It invites the recipient to evaluate their beliefs and assumptions about the issue against the “moral of the story” and the frame the judge describes in their decision.

Therefore, *narratives* serve a dual purpose: on the one hand, they can provide an opportunity to identify the values and emotions which influenced the judicial decision.<sup>107</sup> On the other hand, narrative transmission may be instrumentalized to increase engagement with judicial decisions.

Fundamental rights lend themselves to an individualization which facilitates the identification of narrative elements. But such an individualization is not indispensable to

<sup>102</sup> NB Reynolds, ‘The Concept of Objectivity in Judicial Reasoning’ (1975) *Western Ontario Law Review* 1, 3.

<sup>103</sup> M Payandeh, ‘The Role of Courts in Climate Protection and the Separation of Powers’ cit.

<sup>104</sup> *Ibid.*

<sup>105</sup> NB Reynolds, ‘The Concept of Objectivity in Judicial Reasoning’ cit. 21, 23; J Dewey, ‘Logical Method and Law’ (1924) *Cornell Law Review* 17.

<sup>106</sup> NB Reynolds, ‘The Concept of Objectivity in Judicial Reasoning’ cit. 23; KR Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (Routledge & Kegan Paul 1963).

<sup>107</sup> On how Narratives are used by lawyers see L Townsley, ‘Thinking like a Lawyer Ethically: Narrative Intelligence and Emotion’ (2014) *Legal Education Review* 69, 75.



convey a core message, which the case of the Court exemplifies. The identification of actors, the reveal of beliefs and the setting of scenes do not require individuals. The Courts may utilize a “moral of a story” to position itself within a particular debate and establish the debate on the grounds of a particular setting, namely the pressing reality of the climate crisis and the necessity to engage in ambitious climate action now. The *narrative* put forth by the Court additionally creates a shared sense of relief. As the personified German Constitution is said to come to the rescue, the Court resonates with an emotional desire to feel heard and address the fear surrounding the uncertain climate crisis.

It is important to clarify that narrative transmission does not diminish the underlying legal argument or discredit legal decision-making. It concerns *how* the decision and argument is *presented* and intended to be understood. Trying to make the presentation of judicial decisions more compelling is not weakening judicial credibility or contradicting judicial “objectivity” as defined above, but rather increases the likelihood of the control process of judicial reasoning in society.

The composition of the judicial decision, the underlying moral message of the judgement, and specific linguistic elements are instrumentalised to address emotions. Setting the scene by, for example, including a description of the phenomenon of global warming or using more accentuated language to emphasize specific aspects of the factual situation giving rise to the decision,<sup>108</sup> does not impede legal reasoning, but acknowledges when recipients are more likely to engage with a judicial decision. Narrative transmission may contribute to the willingness to advance climate litigation, which gives the judges the opportunity to revisit their interpretation of the law and legal arguments, “testing” their prior hypothesis, and therefore strengthening the “objectivity” of an interpretation through engagement.

## V. CONCLUSION

In the pressing context of the climate crisis, the contribution of the judiciary to combating global warming through climate litigation prompted the need to re-evaluate its relationship to other institutions of public authority, particularly the legislator and the executive power. This re-evaluation is exercised with an increased awareness for the situatedness of judicial decision-making in specific socio-political environment.

This *Insight* adds a new and interdisciplinary perspective on the role of the judiciary in climate litigation by identifying and conceptualising a “narrative lens” and applying it to the decision of the German Constitutional Court. The decision analysed here exemplifies all pertinent elements of a *narrative*: it provides structure, assigns roles without simplifying or playing a “blame game”, and conveys an apparent moral message.

This paper challenges and confronts the “ideal” of judicial reasoning as objective or emotionless with the complex and pluralistic structures of a democratic society wherein

<sup>108</sup> See also U.S. Supreme Court judgement of 2007 549 U.S.497 *Massachusetts v EPA*, where Justice Stevens included a description of the phenomenon and the science of global warming.

judicial reasoning takes place. Addressing the recipients' emotions through narrative elements may be beneficial to the overall reach and effect of a decision in society.

The direct effect of the analysed legal decision is a re-evaluation of the German legislative approach with considerable influence on carbon emissions. The indirect effects may extend far beyond this, as the decision addresses individual behaviour and international cooperation. The judiciary may occupy the role of a narrator to incentivise society through decisions written in a compelling manner in taking conveyed beliefs as a starting point of a debate.

This analysed decision can provide illustrative evidence for the use of *narratives* in judicial decisions. The implementation of the narrative lens in judicial decisions remains an interesting field of research, especially assessing the situations where Courts appropriate them. Are Courts more likely to include an emotional layer to their cases where the duty to resolve a conflict is accompanied by controversial societal debates or an increasingly complex reality?

Further engaging in related research can strengthen the hypothesis that narrative communication increases the involvement of society with the issue decided upon.