



What is the Climate? Notes on a Critical Legal Methodology

LAURA MAI 

THE MONTESQUIEU
LECTURE

 ubiquity press

ABSTRACT

In this commentary on Prof. Ralf Michaels' 2023 Montesquieu Lecture, I ask what it is that legal scholars invoke when referring to 'the climate'. Drawing on material semiotics and science and technology studies, I argue that it is productive to become attuned to how the climate is in fact a multiple phenomenon which is produced across social, cultural, economic, financial, technological, political, scientific and other domains. Building on this argument, I offer some preliminary reflections on what a turn from 'the climate' to multiple climates might mean for developing a critical legal methodology.

CORRESPONDING AUTHOR:

Laura Mai

Tilburg Law School, Tilburg
University, Tilburg, The
Netherlands

l.a.mai@tilburguniversity.edu

KEYWORDS:

climate change; critical
legal studies; co-production;
situated knowledges

TO CITE THIS ARTICLE:

Laura Mai, 'What is the Climate?
Notes on a Critical Legal
Methodology' (2023) 28(1) *Tilburg
Law Review* pp. 20–25. DOI:
<https://doi.org/10.5334/tlr.337>

In his lecture 'On the Laws in their Relation to the Nature of the Climate – Climate Determinism and Comparative Law' Ralf Michaels asks what comparative lawyers have had to say about the climate in the past, and what the unfolding climate crisis means for this branch of legal scholarship today.¹ These are, of course, urgent and important questions to table. Climate change haunts legal scholars, students, judges and lawmakers alike across virtually all jurisdictions. To date, more than 5000 climate laws and policies have been identified worldwide; and the number of climate change related lawsuits has now reached a total of over 2492 cases which are spread across 56 national and international fora.² In light of these statistics, it is no exaggeration to say that climate change has become a central concern for legal experts. And rightly so. Recent models show that greenhouse gas emissions keep rising, with the onset of the COVID-19 pandemic marking only a temporary dip in global emission trends.³ People, places and creatures across all regions are now undeniably suffering from climate impacts, with those least responsible and most vulnerable often being hit the hardest.⁴ Meanwhile, political willingness or 'ambition', as it is couched in international climate policy speak, to bring about required change remains low. The so-called 'Nationally Determined Contributions', climate pledges which the Paris Agreement,⁵ the most recently concluded international climate treaty, requires governments to submit,⁶ remain – according to recent findings by the United Nations – 'highly insufficient'.⁷ Given these dire prospects, doomsday scenarios which see the Earth irreversibly entering into, what scientists call, a 'hothouse state'⁸ no longer appear as distant dystopias but emerge as real possibilities that warrant serious consideration.⁹

Against this backdrop of the unfolding climate crisis, I read Ralf Michaels' lecture as a bold attempt to reconnect climate change with a branch of legal scholarship – comparative law – which has hitherto developed at a distance from it. Michaels highlights how this has not always been the case, and shows that, in fact, comparative lawyers once really did think about the climate. He traces climate determinism from Greek thinking to Montesquieu and beyond, detailing how this theory – with its reductionist, deterministic and openly racist underpinnings – has been used to justify differences between people and places, maintain hierarchies and explain colonial territorial expansion. Importantly, Michaels' lecture also makes clear that thinking about the law and the climate – or, as I will argue, about laws and climates – is not confined to distinct areas of legal scholarship, such as climate change law or environmental law.¹⁰ Rather, I interpret Ralf Michaels' lecture as an urgent call to legal scholars generally, and more specifically comparative lawyers, to engage with the unfolding climate crisis.

My response proceeds in two steps. I begin by asking what it is that we invoke when we refer to 'the climate'. I argue that rather than talking of the climate in the abstract and in the singular, it is productive to become attuned to how the climate is in fact a multiple phenomenon which is produced across social, cultural, economic, financial, environmental, technological, political

1 Ralf Michaels, 'On the Laws in their Relation to the Nature of the Climate – Climate Determinism and Comparative Law' (Montesquieu Lecture, Tilburg University, 11 October 2023).

2 'Climate Change Laws of the World' (*Grantham Research Institute on Climate Change and the Environment*) <<https://climate-laws.org>> accessed 12 November 2023; 'Climate Change Litigation Databases: About' (*Sabin Center for Climate Change Law*) <<https://climatecasechart.com/about/>> accessed 12 November 2023.

3 Sophie Boehm and others, *State of Climate Action 2022* (Bezos Earth Fund, Climate Action Tracker, Climate Analytics, Climate Works Foundation, New Climate Institute, the United Nations Climate Change High-Level Champions, and World Resources Institute, 2022), 5 <<https://climateactiontracker.org/documents/1083/state-of-climate-action-2022.pdf>> accessed 12 October 2023.

4 Hans-Otto Pörtner and others (eds), *Summary for Policymakers: Climate Change 2022: Impacts, Adaptation and Vulnerability* (Intergovernmental Panel on Climate Change, 2022), 9 <www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf> accessed 12 October 2023.

5 Decision 1/CP.21: 'Adoption of the Paris Agreement' (29 January 2016) FCCC/CP/2015/10/Add.1, Annex.

6 *ibid* article 4(2).

7 'Emissions Gap Report 2022: The Closing Window. The Climate Crisis Calls for Rapid Transformation of Societies', (United Nations Environment Programme, 2022), 32 <www.unep.org/resources/emissions-gap-report-2022> accessed 12 October 2023.

8 Will Steffen and others, 'Trajectories of the Earth System in the Anthropocene' (2018) 115(33) PNAS 8252.

9 Luke Kemp and others, 'Climate Endgame: Exploring Catastrophic Climate Change Scenarios' (2022) 119(34) PNAS e2108146119.

10 For a conceptualisation of climate change law as a distinct field of legal expertise see Jacqueline Peel, 'Climate Change Law: The Emergence of a New Legal Discipline' (2008) 32(3) Melbourne University Law Review 922.

WHAT IS THE CLIMATE?

I take a central assumption which is – often tacitly – repeated in legal scholarship as the starting point of my response; namely, that there exists one climate which is generally conceptualized at the global or the planetary level.¹¹ To unpack what lies below this assumption, I invite us to stay with the notion of ‘the climate’ for a moment. What do we actually refer to when invoking it? This may appear as a rather odd question. Quite frankly, it is clear what the climate is. Or is it not? After all, climate models tell us that greenhouse gas emissions accumulate in the atmosphere; that global average temperatures have already risen by more than 1°C; and that it is the activities of some humans – those located in industrialized countries – which are responsible for this warming.¹² My point is, by no means, to dismiss these facts as irrelevant. Doing so would mean siding with climate deniers. Rather, I want to challenge the tendency to take abstract understandings of the climate, and how it is changing, as the primary point of reference for legal thinking. This is necessary because such conceptions of the climate rely on seemingly comprehensive data sets, seemingly objective measuring and recording techniques, and seemingly universal modes of sense-making and interpretation. Paul Edwards’ history of climate science, for instance, recounts how scientists learned to measure and understand the planet’s atmosphere by collecting data and developing global models that are able to trace past changes and predict future trajectories.¹³ And Earth System scientists now conceptualise the Earth as an integrated complex adaptive system of biogeophysical processes and human dynamics. The aim of this transdisciplinary endeavour is to ‘build a truly unified understanding’ of how the planet functions as a result of ‘interactions between energy, matter and organisms’.¹⁴ The questions that remain to be asked, however, include to what extent climate data and models are really comprehensive and complete, methodologies entirely objective, and knowledges universal?¹⁵ To be absolutely clear, climate models are useful to get an overall idea of past developments and future trajectories. At the same time, however, they tend to fudge over certain aspects of the unfolding climate crisis; namely, that it affects people and places in uneven and unjust ways, and they risk obscuring how laws and politics have been deeply implicated in bringing about current climatic states of affairs. As Sheila Jasanoff writes: ‘Science wrenches phenomena out of their specific contexts, makes parts meaningful independently of wholes, and recombines segments in ways that transgress boundaries fixed by law, custom, tradition or institutional practice’.¹⁶

Drawing on human geographer Mike Hulme, Ralf Michaels points out how the climate is political.¹⁷ The climate, he says, is ‘always ... constructed by humans’.¹⁸ I want to re-iterate this argument more provocatively. What are the implications of seeing the climate as something that is constructed? It means acknowledging that the climate cannot be located, placed or found. Paradoxically, it does not pre-exist out there in the sky.¹⁹ Rather, climates (note the plural) are actively produced. This is the idea that I want to push further. Here are some examples of the

11 On the distinction between the ‘globe’ and the ‘planet’, see Dipesh Chakrabarty, *The Climate of History in Planetary Age* (The University of Chicago Press 2021).

12 Hoesung Lee and José Romero (eds), *Summary for Policymakers: Climate Change 2023: Synthesis Report* (Intergovernmental Panel on Climate Change, 2023) 4-5 <www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf> accessed 12 October 2023.

13 Paul N Edwards, *A Vast Machine: Computer Models, Climate Data, and the Politics of Global Warming* (The MIT Press 2013).

14 Will Steffen and others, ‘The Emergence and Evolution of Earth System Science’ (2020) 1 *Nature Reviews Earth & Environment* 54, 54.

15 On the role of data in climate change law and governance, see Laura Mai, ‘Measuring it, Managing it, Fixing it? Data and Rights in Transnational and Local Climate Change Governance’ *Transnational Environmental Law* (forthcoming); Laura Mai and Joshua Philipp Elsässer, ‘Orchestrating Global Climate Governance through Data: The UNFCCC Secretariat and the Global Climate Action Platform’ (2022) 22(4) *Global Environmental Politics* 151.

16 Sheila Jasanoff, ‘A New Climate for Society’ (2010) 27(2-3) *Theory, Culture and Society* 233, 234.

17 Mike Hulme, *Weathered: Cultures of Climate* (Sage 2016).

18 Michaels (n 1).

19 See also Tomothy Morton, *Hyperobjects: Philosophy and Ecology after the End of the World* (The University of Minnesota Press 2013).

climatic multiplicity which we are confronted with: Climates are constructed as environmental problems that require the regulation of gases in the atmosphere and the protection of species and ecosystems;²⁰ climates are also framed as technological problems to be solved through the deployment of alternative fuels, modes of energy production and geoengineering, including carbon capture and storage and solar radiation management;²¹ climates are, and I would argue are not enough, understood as financial problems that demand the reallocation of funds and the redesign of fiscal policies and regulatory systems;²² and in economic terms, climates emerge as the consequences of outrageous economic growth and overconsumption;²³ climates are also a development issue,²⁴ and more.

These examples illustrate how multiple versions of the climate are produced, actively achieved, imagined and performed in a coming together of physical stuff, discourses, institutions, sensory experience, knowledges and cultures.²⁵ Note how the notion of ‘co-production’ has entered the conversation.²⁶ It demands a shift in focus from Montesquieu’s project of explaining how the climate shapes minds, bodies, societies and cultures to asking how minds, bodies, societies and cultures themselves are implicated in producing multiple versions of the climate and how it is changing. With this, we can begin to see how the climate does not emerge as a singular thing but as a multiplicity of social, cultural, political, legal and other productions that ‘somehow hangs together’.²⁷

TOWARDS A CRITICAL LEGAL METHODOLOGY

Having set out how law is confronted with multiple climates, the question arises what happens if we stop pre-supposing the climate as something that exists out there and instead become attuned to how climates are produced. What happens is that we stop talking about the climate in abstract terms and are prompted to ask how law has been implicated in making the current climatic condition possible in the first place. Crucially, this is a move which holds critical potential. It allows to think at a distance from instrumentalist and functionalist means-ends relationships which law is often approached through. Rather, if law makes the production of certain climates possible, including by prescribing certain modes of consumption, production, innovation and protection, and by promoting and refusing certain understandings of justice,²⁸

20 See Malgosia Fitzmaurice, ‘Biodiversity and Climate Change’ (2021) 23(2-3) *International Community Law Review* 230; Arie Trouwborst and Andrew Blackmore, ‘Hot Dogs, Hungry Bears and Wolves Running out of Mountain: International Wildlife Law and the Effects of Climate Change on Large Carnivores’ (2020) 23(3) *Journal of International Wildlife Law and Policy* 212; Duncan French and Karen Scott, ‘International Legal Implications of Climate Change for the Polar Regions: Too much, too little, too late?’ (2009) 10(2) *Melbourne Journal of International Law* 631.

21 See Ina Möller, *The Emergence of Geoengineering: How Knowledge Networks Form Governance Objects* (Cambridge University Press 2023).

22 See Ralf Bodle and Vicky Noens, ‘Climate Finance: Too Much on Detail, Too Little on the Big Picture?’ (2018) 12(3) *Carbon and Climate Law Review* 248; Megan Bowman, ‘Turning Promises into Action: “Legal Readiness for Climate Finance” and Implementing the Paris Agreement’ (2022) 16(1) *Carbon and Climate Law Review* 41; Megan Bowman, ‘Polaris and Pluralism: Presenting a Legal Analytical Framework for Climate Finance’ (2023) 17(1) *Carbon and Climate Law Review* 3.

23 See Jason Hickel and others, ‘Degrowth Can Work – Here’s how Science can Help’ (2022) 612 *Nature* 400; Matthias Schmelzer, Aaron Vansintjan and Andrea Vetter, *The Future is Degrowth: A Guide to a World Beyond Capitalism* (Verso 2022).

24 See Luis Gomez-Echeverri, ‘Climate and Development: Enhancing Impact through Stronger Linkages in the Implementation of the Paris Agreement and the Sustainable Development Goals (SDGs)’ (2018) 376(2119) *Philosophical Transactions of the Royal Society A* 20160444.

25 This argument has been advanced by scholars working in the Foucauldian tradition, science and technology studies and human geographers, see Angela Oels, ‘Rendering Climate Change Governable: From Biopower to Advanced Liberal Government’ (2005) 7(3) *Journal of Environmental Policy and Planning* 185; Bentley B Allan, ‘Producing the Climate: States, Scientists, and the Constitution of Global Governance Objects’ (2017) 71(1) *International Organization* 131; Jasanoff (n 16); Hulme (n 17).

26 See Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2006).

27 Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Duke University Press 2003) 87.

28 These include notions of intergenerational and reparative justice. Regarding the former, see Daniel Betram, ‘“For You Will (Still) Be Here Tomorrow”: The Many Lives of Intergenerational Equity’ (2022) 12(1) *Transnational Environmental Law* 121; Hans Lindahl, ‘Place-Holding the Future: Legal Ordering and Intergenerational Justice for More-than-Human Collectives’ in Elisabeth Gräß-Schmidt and Ferdinando Menga (eds), *Rethinking Responsibility* (Mohr Siebeck forthcoming). Regarding the latter see Sarah Mason-Case and Julia Dehm, ‘Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present’ in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021); Sarah Riley Case, ‘Looking to the Horizon: The Meanings of Reparations for Unbearable Crises’ (2023) 117 *AJIL Unbound* 49.

then law no longer emerges as a means to fix the problem but as something that has been complicit in bringing about current climates.²⁹

What, then, does the suggestion to attend to the multiple ways in which climates are produced mean in concrete methodological terms? As a preliminary attempt to engage with this question, I end with two suggestions. First, I want to suggest that it is necessary to carefully scrutinize which kinds of knowledges we draw upon when thinking about laws and climates. And second, I propose to move analyses from global, planetary and international levels to local contexts, concrete encounters, settings and practices.

Regarding my first suggestion, Ralf Michaels explains that while comparative lawyers have long drawn on insights from economics, sociology, the political sciences and anthropology, it is now time to ‘relearn’, and pay renewed attention to, how it is entangled with the natural sciences.³⁰ I would like to add some caution and highlight the importance of looking behind the veil of objectivity which is wrapped around natural science accounts of climate change. In this respect, Donna Haraway’s notion of ‘situated knowledges’ is useful.³¹ It powerfully emphasises how there is no ‘conquering gaze’ that sees everything ‘from nowhere’.³² ‘There is no unmediated photograph or passive camera obscura in scientific accounts of bodies and machines [and climates]. There are only highly specific ... possibilities, each with a ... detailed, active partial way of organizing worlds’.³³ Accordingly, each representation of the climate, and how it is changing, holds its own assumptions, biases and blind spots; each climate, as it were, emerges as situated, partial and context dependent. This approach to knowing climates demands cultivating attention to the specific and subjective, thus unsettling technologies of abstraction – ‘the method by which modern science achieves its [claims to] universality’.³⁴ Thinking about climates in terms of partial knowledges would, then, indeed offer an alternative starting point for inter- and transdisciplinary endeavours. It allows to appreciate that knowledges are always ‘stitched together imperfectly, and *therefore* [are] able to join with another, to see together without claiming to be one another’.³⁵

This leads me to the second suggestion with which I will end. If there are multiple representations of the climate and how it is changing, staying with abstract and universalizing methodologies for producing knowledges is insufficient. Instead, what is needed are close-up, lively and ‘thick’³⁶ descriptions of how climates are produced in and by, and how they in turn shape and affect, people, places and creatures beyond – or, perhaps more accurately below – global and planetary levels; that is, in specific contexts, sites, encounters and practices. While not being a comparative lawyer by training myself, it seems to me that comparative law with its focus on jurisdictional difference is well placed to take on such a critical legal methodology.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATIONS

Laura Mai  orcid.org/0000-0001-8975-1078
Tilburg Law School, Tilburg University, Tilburg, The Netherlands

29 The complicity of central legal concepts (including notions of ‘sovereignty’, ‘jurisdiction’, ‘territory’, ‘development’, ‘environment’, ‘labour’ and ‘rights’ amongst others) in bringing about ecological degradation and injustices has been highlighted by critical legal scholars. See Usha Natarajan and Julia Dehm (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge University Press 2022).

30 Michaels (n 1).

31 Donna Haraway, ‘Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspectives’ (1988) 14(3) *Feminist Studies* 575.

32 *ibid* 581.

33 *ibid* 583.

34 Jasanoff (n 16) 234.

35 Haraway (n 31) 586 (emphasis in the original).

36 Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 10.

TO CITE THIS ARTICLE:

Laura Mai, 'What is the Climate? Notes on a Critical Legal Methodology' (2023) 28(1) *Tilburg Law Review* pp. 20–25.
DOI: <https://doi.org/10.5334/tilr.337>

Published: 14 December 2023

COPYRIGHT:

© 2023 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

Tilburg Law Review is a peer-reviewed open access journal published by Ubiquity Press.