



Connecting Laws to Climates: A Timely Challenge for Reflexive Lawyers

THE MONTESQUIEU
LECTURE

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ABSTRACT

In his Montesquieu lecture, Professor Ralf Michaels urged lawyers to transcend their disciplinary boundaries when addressing the challenge of law and climate change. Montesquieu himself is regarded as an example of a lawyer who did not shy away from investigating the relationship between law and society to consider the interplay between law and climate. In my response, I argue that the current reflexive nature of society, within the distinctive historical context of the Anthropocene, poses paradoxes for lawyers attempting to utilize law to grapple with climate change. These paradoxes are linked to the politicization of law, societal skepticism of science, and the role of the non-human within the legal order. They compel lawyers to critically examine the conceptual framework of law and explore Western and non-Western perspectives on subjects such as property, representation, rights, and personhood. Looking beyond boundaries also involves acknowledging the potentially problematic nature of law itself.

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In the 2023 Montesquieu lecture, Professor Ralf Michaels recounted how concerns for the climate have never really been absent from legal thinking, apart from a brief period in the 20th Century. While we, 21st century lawyers, tend to think that the influence of climate on law is a recent phenomenon, Michaels showed that for enlightenment lawyers and philosophers like Montesquieu, such influence was self-evident. Michaels recounted how the lawyers of early modernity approached the relationship between climate and law in an open and eclectic way. They were not concerned with disciplinary boundaries, nor with questions of strict causality. They did not view the relationship as monocausal or deterministic but as one factor among many that determined the spirit of the law in each society. They conjectured freely about the different influences a hot or cool climate might have on society. Interest in the relationship between law and climate waned when such theories started to raise suspicions of racism, but also when it turned out that such influence was hard to measure, and causal links between climate and the laws of society could not be found.

The current resurgence of interest in the relationship between climate and law is due to climate change. We look to law to curb the deleterious influence of human action on the climate. However, we have also come to realize that monocausal predictions run into problems and that the state of the climate is not only a scientific question but also a political one. In a sense, we are back in Montesquieu's world where we do not have access to strict causal explanations but realize that many modern-day practices, including our laws, have an impact on our climate. There is a need to reconsider climate and law as an entangled relationship marked by a high degree of uncertainty.

According to Michaels, comparative lawyers should play a part in accomplishing this re-entangling because they are comfortable with navigating differences. Their job is to 'make the other familiar and the familiar other', to quote the esteemed professor himself. Comparative lawyers act as bridge builders between different legal orders and scientific disciplines. Their expertise will be needed to establish a new type of constitutionalism for the Anthropocene. The sensibility of Montesquieu could help them reconsider the relationship between climate and law by allowing them the freedom to cross disciplinary boundaries and reappraise the way the climate shapes our law and vice versa.

As Michaels admits in his lecture though, Montesquieu's guidance cannot be followed uncritically because 'his world is not ours'. This remark seems all too self-evident. Certainly, there are many differences between Montesquieu's time and ours. Before we can assess the task ahead for lawyers, we need to compare the different assumptions that structured the world of Montesquieu to the ones that shape our contemporary world. If we want to use his interdisciplinary approach *avant la lettre* fruitfully, we need to know what possibilities and problems have emerged for us that were unthinkable for Montesquieu himself.

Of course, a comprehensive comparison cannot be carried out in the space of this short paper. Here, only one such difference will be focused on: our society is a reflexive and self-critical society, whereas Montesquieu lived in a time generally characterized by optimism regarding intellectual and scientific progress connected to the French term 'civilisation'.¹ According to the sociologist Ulrich Beck, our society has become reflexive in the sense that 'society has become a problem for itself.'² We have learned that the pivotal institutions of modernity – science, law, the market and the state – have produced grave global risks. This has exposed them to pervasive criticism. Optimism about our capabilities seems unwarranted in that light. The kind of freedom

1 This statement deserves some nuance. First, it refers specifically to the time of French enlightenment. Second, not everyone shared this view and although this interpretation has been the common view, 'enlightenment' in fact meant different things to different people, see Dorinda Outram, *The Enlightenment* (4th edn, Cambridge University Press 2019) 3-4. However, it was common to view the progress of society as developing through different stages from 'barbarie' to 'civilisation', which would result in: "the softening of manners, the blossoming of art and science, the development of commerce and industry and the comfort of modern life" see Damien Tricoire, 'The Enlightenment and the Politics of Civilization: Self-Colonization, Catholicism, and assimilationism in Eighteenth-Century France' in Damien Tricoire (ed), *Enlightened Colonialism : Civilization Narratives and Imperial Politics in the Age of Reason* (Palgrave Macmillan 2017) 33. It is against such a linear view of modernity that reflexive modernity is opposed.

2 Ulrich Beck, *World Risk Society* (Polity Press 1999) 20. The notion of reflexivity is used differently by different authors. When reflexivity is mentioned in this paper, it is mentioned in the sense given to it by Ulrich Beck in his books on the World Risk Society (1999) and on Reflexive Modernization, authored together with Anthony Giddens and Scott Lash. See Ulrich Beck, Anthony Giddens and Scott Lash, *Reflexive Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford University Press 1994).

to conjecture about society, law and climate that Montesquieu might have felt is now lost. In other words, we are much more aware of the fragility of the bridges we build. In this paper I will argue that reflexivity brings substantial challenges and opportunities to radically rethink the assumptions of law. Reflexivity, I argue, enables and impels us to go beyond Montesquieu and challenge the legal assumptions that both Montesquieu and we ourselves have taken for granted.

2. RACISM, RISK AND REFLEXIVITY

While Montesquieu appears modern in his description of the many natural and social factors that shape law, he seems archaic when he speculates about the influence of climate on the mentality and disposition of people. At least since the ancient Greeks, various dispositions have been ascribed to people based on their geographic location and corresponding climatic conditions, and Montesquieu continued that tradition. Southerners were described as lazy but clever, Northerners as strong and independent. Montesquieu combined and adapted these stereotypes to argue that people in the North should rule themselves, while people from the South should be ruled. Montesquieu referred to people in the South as ‘savages’, suggesting that they were led by their passions, unwilling to work without incentives and prone to criminality. He believed that the hot climate deprived them of agency and, therefore, they would never be able to build the necessary institutions for autonomy. This argument legitimized foreign Northern rule.

In Montesquieu’s time, such statements were not considered out of place. Today, such paragraphs in the work of Montesquieu make readers cringe. One colleague present at the lecture asked me if we should still name the building of our law school after the great French lawyer and philosopher. A fundamental shift in our thinking has taken place. The legacy of colonialism is under intense scrutiny today and the canon of history is being rewritten as we speak. We are all too aware of the dangers inherent in such remarks about cultures.

Such criticism affects our judgment not only when we assess racist remarks of a historical figure but also when we look at our place as humankind in the world. We now consider that such ideologies were not only violent towards other people but that they are also enmeshed with the history of the exploitation of the earth. In contrast to Montesquieu, who argued that climatic differences lay at the base of different forms of government, we have learned that our laws and ideologies influence alterations of the climate. If Montesquieu’s description of the climate as the ‘first empire’ denoted the subordination of human affairs to environmental conditions, then our conception of the Anthropocene denotes the exact opposite; human practices determine the very constitution of the earth.

This radical hierarchical inversion in the relationship between humankind and the environment has fundamental implications, as noted by various philosophers and sociologists. For the phenomenological philosopher Hans Jonas, it brings about a fundamental shift in ethical responsibility towards the earth.³ Dipesh Chakrabarty considers that now the planet itself has become an object of concern.⁴ The political sociologist Ulrich Beck describes our current epoch as the ‘risk society’, indicating that concerns over man-made risks have superseded concerns over natural scarcity.⁵ The risk society is brought about by a shift from a belief in industrial and scientific progress towards concerns over the risks that accompany them. Beck used the term ‘reflexivity’ to describe this new way of thinking. For Beck, reflexivity has large-scale sociological and institutional implications.

Similar to Montesquieu, Beck considers that the spirit of institutions is characterized by the wider constitution of the society in which they are placed. However, the societal context of Montesquieu was that of an industrial society in which science, technology and human endeavor were considered to lead to progress. Beck’s social condition is that of the risk society in which we have become skeptical of the notion of progress, either in a technological or moral sense, because of the risks it creates. As the quotations of Montesquieu above indicate, such reflexive skepticism was absent in his era, while our society is characterized by it.⁶ Therefore, Beck’s theory of reflexivity is an apt notion to utilize when we compare Montesquieu’s thinking to our own and diagnose in

3 Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (University of Chicago Press 1984).

4 Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (University of Chicago Press 2021).

5 Ulrich Beck, *Risk Society, Towards a new Modernity* (Sage Publications 1992).

6 Beck, Giddens, and Lash (n 3).

3. REFLEXIVITY AND COMMUNITY

As industrialization expanded and technological rationality advanced, the side effects of industrialization such as environmental pollution became apparent. During industrial times, these effects were often seen as natural byproducts of beneficial industrialization. Even though smog posed health risks in cities like London, people generally valued the freedom associated with owning cars or having access to cheerful open coal fires.⁷ However, as modernity progressed and environmental hazards multiplied, these issues started to take center stage and demanded an increasingly prominent place on the social agenda.⁸ When scarcity and hunger diminished, debates on how to distribute scarce goods gradually gave way to a new type of social conflict: debates on how to distribute the risks that accompany industrial production.

The process of modernization became reflexive when we realized that the increasing risks were consequences of our technological progress and that they could not be controlled by technological rationality. The critique was not limited to technology; all institutions of modern society were implicated in the production of risk. The state, the market and the law all played a role in creating and maintaining extractivist policies and exploitation that harmed biodiversity, the rights of other people and our living environment.

For Beck, the process of reflexivity consists of three intertwined sub-processes: first, society has become a problem for itself and has started to engage in thorough self-criticism and examination. Second, global civilization's self-endangerment has triggered awareness of and interest in global events. Third, phenomena that were previously considered outside the political sphere have become politicized.⁹ Beck tended to evaluate these trends positively. In fact, as one of the few social scientists he subscribed to a rather hopeful vision of the future. That society became a problem for itself might lead to the gradual emergence of a world encompassing public sphere. Cooperative international institutions and governance regimes are being created to curb the self-endangerment of world society. The increased politicization of phenomena leads to social movements that can bypass nation-state politics. Lay knowledge becomes more important as experts gradually lose their hitherto self-evident monopoly, because they are allied to the same risk-producing institutions.

Reflexivity, according to Beck, is a necessary process that may give rise to new communal ties due to the realization of shared vulnerability. Beck argued that such awareness could encourage further democratization and solidarity, as we will be compelled to cooperate with people from different continents, ethnicities, religions and worldviews. He labeled this new form of solidarity 'cosmopolitan solidarity' and characterized it as 'the cosmopolitanization of everyday life, in which people must find meaning in their lives through interactions with people unlike themselves, rather than in relation to people like themselves'.¹⁰ In this way, world risk society could transform into a cosmopolitan society, in which new bonds of solidarity are being established based on the idea of being exposed to similar risks.

4. THE 'SCHMITTIAN' SCENARIO

However, Beck recognized that the forces unleashed by reflexivity are not necessarily positive. The way the media report on global risks, such as financial meltdowns, climate change and terrorism, creates a fearful response to the fact that 'the global other is in our midst'. This style of risk reporting creates room for a 'politics of fear' that politicians can exploit.¹¹ The criticism of modern institutions, combined with fear of the other, can lead people to seek refuge among

7 Peter Brimblecombe, 'A History of Urban Air Pollution' (2003) 13 *Atmosphere* 45.

8 Beck (n 6) 77-80.

9 Beck (n 3) 20.

10 Ulrich Beck, *De Wereldrisicomaatschappij: Op zoek naar de verloren zekerheid* (Wereldbibliotheek 2015) 23. translation from Dutch TA.

11 Ulrich Beck, 'Living in the world risk society: A Hobhouse Memorial Public Lecture given on Wednesday 15 February 2006 at the London School of Economics' (2006) 35 *Economy and Society* Volume 329; Joy Y Zhang, 'Cosmopolitan risk community in a bowl: a case study of China's good food movement' (2018) 21 *Journal of Risk* 71.

those with whom they share close kinships. Within likeminded groups, they may find a false sense of security and form militant bonds against others they perceive as enemies. Ulrich Beck refers to this scenario as the ‘Schmittian scenario’.¹² In this way, the reflexive process of institutional critique may also take the form of religious fundamentalism, neo- nationalism, neo-racism and neo-tribalism.¹³

Beck was optimistic, but when we look at our world today, the picture seems rather ‘Schmittian’. During the COVID-19-pandemic, we could witness firsthand how people responded to an acutely emerging global risk. For example, when the pandemic struck in the Netherlands, there were initial signs of intergenerational solidarity, but also conflicts between the young and the old over the question of who should receive treatment for COVID-19 in cases of acute shortages.¹⁴ Solidarity was also weak in the international arena, with rich countries securing quick access to a surplus of vaccines while poorer regions suffered shortages, even though the actual vaccines were produced there. This phenomenon has been labeled ‘vaccine nationalism’.¹⁵

While the pandemic waned, Russia went to war against Ukraine, resulting in the largest military conflict on the European continent since the Second World War. At the time of writing the conflict between Israel and Palestine flared up resulting in atrocious violence between populations closely living together on a small and densely populated piece of land. The conflict also led to heated debates and confrontations in the street of the capitals of Western European as well as in schools.¹⁶ The attitude towards the ‘others in our midst’ seems to be mixed at best.

While the time of writing is but a moment in history, we seem to be at a crossroads. Global risks like war, zoonotic pandemics and climate change intensify, and the institutions traditionally looked upon to solve them are decreasing in legitimacy. Comparative lawyers must build their bridges in volatile times, but the necessity of these bridges remains beyond doubt.

5. BRIDGES OVER TROUBLED WATER

Reflexivity raises several thorny paradoxes when we consider how lawyers may build bridges between science, law and society. The first paradox comes into play because of the politicization of law. As Beck observes, expert systems become increasingly politicized. The same is true for law. In Montesquieu’s day, law was intertwined with the customs and traditions of a given society. Currently, law is used to realize socially desirable ends, effectively shaping the social order.¹⁷ The paradox is that increasingly conflicts emerge over the content of the law, rather than law resolving conflicts. In the Netherlands, the case of Urgenda versus the State serves as an example.¹⁸ The Dutch court ordered the State to reduce greenhouse gas emissions, and political conflict emerged over whether the court could mandate such an action, rather than how to comply with the verdict.

Second, reflexivity raises a paradox of scientific knowledge. In the Enlightenment era, tradition and religion gave way to scientifically informed skepticism. Beck calls this practice ‘primary scientization’, and Weber referred to it as the ‘disenchantment of the world’.¹⁹ In this conception, a given world of people, things and cultures was scientifically scrutinized, mapped and classified. However, climate change and other risks have shown that science and technology themselves are complicit in risk production, and scientific skepticism has turned on itself. We have come to realize

12 Zhang (n 12) 71.

13 Klaus Rasborg, “‘(World) risk society’ or “new rationalities of risk”? A critical discussion of Ulrich Beck’s theory of reflexive modernity” (2012) 108(1) Thesis Eleven 16.

14 Tobias Arnoldussen, “Dividing the goods or dividing the beds? De dreiging van triage in de risicomaatschappij” (2020) 41(3) *Recht der Werkelijkheid* 51.

15 Yanqiu Rachel Zhou, ‘Vaccine nationalism: contested relationships between COVID-19 and globalization’ (2022) 19(3) *Globalizations* 450.

16 Sebastiaan Quekel, ‘Zeker zes Joodse kinderen in Amsterdam van school gewisseld na pesterijen: “Mijn dochter was doodsbang om naar school te gaan”’ *Parool* (Amsterdam, 18 October 2023) <<https://www.parool.nl/amsterdam/zeker-zes-joodse-kinderen-in-amsterdam-van-school-gewisseld-na-pesterijen-mijn-dochter-was-doodsbang-om-naar-school-te-gaan-b156d43d/>> accessed 6 November 2023; Sarah Belouezzane and Louise Couvelaire, ‘Israel-Hamas war: French Jewish community shocked and worried’ *Le Monde* (Paris, 10 October 2023). https://www.lemonde.fr/en/france/article/2023/10/10/israel-hamas-war-french-jewish-community-shocked-and-worried_6162394_7.html accessed 12 November 2023.

17 Rob Schwitters, ‘De sociale werking van recht’ in R.J.S. Schwitters (ed), *Recht en samenleving in verandering, een inleiding in de rechtssociologie* (Kluwer 2008) 77-79.

18 Urgenda (2019) ECLI:NL:HR:2019:2006.

19 Beck (n. 6) 158-163; Anthony J. Cascardi, *The Subject of Modernity* (Cambridge University Press 1992) 16.

that we do not have a given world anymore, but a world created by our scientific and technological practices. This means bridges cannot be built unproblematically between the natural and social sciences or between science and law, because the natural world itself is inherently social.

The third paradox relates to the status of the non-human. As reflexive awareness increases, existing hierarchies, including the subordination of the non-human to the human come under criticism. We have supported our way of life by exploiting non-human entities such as animals, rivers and forests. It is dawning on us that conflicts do not only arise between humans but also between humans and non-human entities. This has led to calls to bring the non-human within the scope of the law. However, as Hans Lindahl shows in his forthcoming work, the traditional model of law as ‘institutionalized and authoritatively mediated collective action’ (IACA model of law) does not suffice when we consider non-human agency.²⁰ The traditional model of law is based on the distinction between a human subject and a non-human object, but the more we learn about ecological interconnections, the more this distinction becomes questionable. The paradox here is the realization that our current legal order is complicit in our predicament, but we do not yet have the concepts to articulate a different one. Simply turning to the natural sciences for inspiration does not solve the problem, as they themselves are rooted in the distinction between a human subject and a non-human object.

6. OPPORTUNITIES FOR NEW FOUNDATIONS

Michaels urged comparative lawyers to re-entangle society, law and the sciences, doing so with a sensibility borrowed from Montesquieu. This entails avoiding mono-causal explanations and rigid disciplinary boundaries. However, we cannot simply return to Montesquieu’s world. In fact, the exploration above reveals that the re-entanglement of law, society and science has perhaps already occurred, albeit not in the most socially beneficial way. Do we not already inhabit a re-entangled world, one that is both similar to and radically different from Montesquieu’s? If this is the case, then what should be the mission of comparative lawyers?

In my view, the assignment for comparative lawyers is more radical than building bridges between institutions that have themselves faced severe and justified criticism. Should we not take one step further and consider redesigning the foundations from which these bridges are constructed? While reflexivity presents the challenges raised earlier, it also offers access to avenues of thought previously unexplored. Montesquieu’s time saw the emergence of science, state bureaucracy and the systematization and codification of law. In his era, faith in progress was dominant, and the superiority of Western institutions and ways of thinking was unquestioned. His remarks on law and climate demonstrate that he did not have the possibility to contemplate law and science in terms other than those familiar to him. Reflexive criticism opens space for us to rethink our institutions without the biases of the past, which have now been exposed.²¹

The reflexive awareness of the potentially adverse effects of our own institutions allows us to be more open to learning from other cultures than Montesquieu could have been. Comparative lawyers now have the opportunity to examine legal systems in other jurisdictions, less familiar to ours, and observe how other cultures create legal orders that better incorporate the non-human into the human polity.²² Reflexive criticism of science and colonialism provides room to consider indigenous knowledge as scientifically valuable. Advances in ecological knowledge and etiology make it easier for us to consider the idea of non-human agency. The disruption of hitherto self-evident hierarchies enables us to discover new legal terms suitable for a ‘geopolity’, to borrow Lindahl’s term. This reconceptualization should go beyond the current terminology that is so firmly embedded in a framework of human autonomy and economic growth. For instance, in Latin America, there are attempts to constitutionalize respect for the Earth through the figure of Pachamama and the concept of *buen vivir*.²³

²⁰ Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press 2018) 46-96.

²¹ Ulrich Beck, *The Metamorphosis of the World* (Polity Press 2016).

²² The work of Tilburg University’s PhD Candidate Ximena Arenas Orbegozo comes to mind, laid out in her forthcoming PhD Thesis: ‘Who Are We – Explorations into the Antecedents to the Atrato Tutela’.

²³ Boaventura de Sousa Santos, ‘The Resilience of Abyssal Exclusions in Our Societies: Toward a Post-Abyssal Law’ (2017) 22 *Tilburg Law Review* 257; Dorine van Norren, ‘The Sustainable Development Goals viewed through Gross National Happiness, Ubuntu, and Buen Vivir’ (2020) 20 *Int Environ Agreements* 431–458.

Michaels noted that Montesquieu's thought stood on the passage between the old world of global harmony and the new world of causal connections. Perhaps our thinking today stands on the opposite passage. We are departing from the old world of causal connections towards a new world of global harmony. The task for comparative lawyers will be to build a bridge between these eras, but before it can be constructed, new foundations need to be laid that can support it. Investigations into the fundamental conceptual apparatus of law must be undertaken, based on Western and non-Western understandings of subjects like property, representation, rights and personhood.


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