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Climate Theory as a Reminder for an Attentive and Critical Application of Comparative Law

THE MONTESQUIEU LECTURE

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ABSTRACT

This contribution provides a commentary on Prof. Ralf Michaels' Montesquieu Lecture 2023 on October 11th, 2023, titled 'On the laws in their relation to the nature of the climate – Climate Determinism and Comparative Law.' It argues that two disciplines of law that deal with the climate crisis and its impact almost on a daily basis are not examples of Montesquieu's climate theory: energy and climate law. The commentary also emphasizes the racist implications of climate theory in the sense of climate determinism and concludes that we as academics have an obligation to prevent to let any racist insinuations become acceptable, in particular inside of our universities where we have direct influence. Last but not least, the commentary elaborates on why climate theory is a great reminder that comparative lawyers too often rely on stereotypes and generalizations.

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Professor Ralf Michaels' lecture provides a profound summary of the take on climate theory by Charles Louis de Secondat, Baron de La Brède et de Montesquieu, the thinker and lawyer after whom Tilburg Law School's annual lecture as well as its faculty building has been named. Ralf Michaels' contribution inspires and enriches the scientific debate with a thought-provoking connection between Montesquieu's perspective on the relation between climate and law and today's impact of the climate crisis on law and policy. This commentary refers to the written manuscript as provided on 4 October 2023.

The commentary, after engaging with Ralf Michaels' definition of the word climate, argues that two disciplines of law that deal with the climate crisis and its impact almost on a daily basis are not examples of Montesquieu's climate theory: energy and climate law. The commentary also emphasizes the racist implications of climate theory in the sense of climate determinism and concludes that we as academics have an obligation to prevent to let any racist insinuations become acceptable, in particular inside of our universities where we have direct influence. Last but not least, the commentary elaborates on why climate theory is a great reminder that comparative lawyers too often rely on stereotypes and generalizations.

I. ON THE DEFINITION OF CLIMATE AND CLIMATE THEORY

Ralf Michaels' manuscript discusses the role of climate and its relationship with the law. The notion of climate theory refers to the idea that, as stated in the manuscript, '[c]limate works on the body, the body works on the mind, and the mind works on society with its culture and morality'; that climate, as it is phrased in the manuscript, shapes 'the spirit of the law'. This means, if I interpret Ralf Michaels correctly, that there is, as he puts it, a 'climate causation'; but this climate causation does not only change the content of a set of rules but rather influences the way of rule giving on a higher level. 'That different peoples had different laws was, to some extent at least, a consequence of nature', summarizes Ralf Michaels and reveals that climate theory has its roots in antiquity. Within Ralf Michaels' manuscript, the term climate theory is widely equated with the term climate determinism, which also becomes clear from his lecture's title.

At the beginning, Ralf Michaels stays rather vague on the definition of the word climate. Ralf Michaels' elaborations around climate could refer both to the weather-related definition and also climate in the sense of a political and/or a social climate. As it is highly questionable how weather may influence the 'spirit of the law', a political and/or social climate of course may influence its spirit: for example, a community-centred society may have different rules compared to an individual-focused society.

According to the World Meteorological Organization (WMO), climate refers to 'the average weather conditions for a particular location over a long period of time'.[1] Reading further through Ralf Michaels' manuscript, it becomes clear that the lecture is referring to a definition in the light of the WMO definition only. In this commentary the word climate also refers to the word's meaning in the sense of the WMO definition.

II. FALSE EXAMPLES FOR THE APPLICATION OF CLIMATE THEORY

1. WATER RIGHTS

Ralf Michaels presents water rights as a false example of climate theory: '[a]ccess to water must be regulated differently in wet areas than in dry areas, because it is in abundance in the first and scarce in the second', he states. Ralf Michaels explains that access to water must be regulated differently in different areas due to its different value therein. Also, when he refers to the concrete application of a comparative approach in the stated Colorado Supreme Court Case, he makes it explicit that '[w]hat is at stake here are concrete rules, not the spirit of the law.' He therefore makes a clear distinction between the different regulation of a concrete problem due to a different environment, and what he calls a different 'spirit of the law' (see above) due to the different environment.

1 'Climate' (*World Meteorological Organization*) <https://public.wmo.int/en/our-mandate/climate> accessed 13 November 2023.

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Applying Ralf Michaels' distinction to the two areas of law that are strongly dealing with the challenges arising from climate change, I must conclude that also energy law and climate law are false examples for the application of climate theory. As Assistant Professor in European and national regulation of the energy transition at Tilburg University, I deal with energy and climate law on a daily basis. This is why, while reading Ralf Michael's manuscript, my emphasis laid on the question whether energy and climate law – in contrast to water rights – are examples for climate theory. But, neither of them is.

2. ENERGY LAW

Energy law, in a more narrow definition, is pro-active economic law providing for *ex ante* regulation, with a focus on the steering instruments to build and maintain energy markets, and on protecting consumers.[2] In a broader definition, it is the law governing the energy sector.[3] No matter which definition we apply, energy law is a field of law that is itself shaped by a problem-based approach.[4]

For example, if the challenge arising from the climate crisis is to address the goal of no net emissions of greenhouse gases in 2050 ('climate neutrality'),[5] energy law needs to put in place the right incentives for deploying renewable energies without a carbon foot print in order to decarbonize the electricity system. The instruments that need to be supplied to achieve this may differ in regard to climate conditions: in a country where there is a lot of wind, those steering mechanisms should focus on deploying wind turbines. In an area where there is a lot of sun, those steering mechanisms should focus on deploying photovoltaic panels. These climate conditions shape the object of the regulation, the different energies and thus also the rules that want to accelerate their deployment and their use. The climate conditions do not influence the spirit of the law. When we adopt Ralf Michaels' distinction, energy law is – just like the water rights example – a false example for climate theory.

3. CLIMATE LAW

Perhaps surprisingly for some, also climate law is a false example for climate theory.

Climate law deals with a set of rules to limit anthropogenic greenhouse gas emissions to a sustainable level.[6] The climate crisis poses new challenges to which the law may need to adapt. Law that limits greenhouse gas emissions needs to be put in place. Rising sea levels may make it necessary to review flood prevention rules. Increasing migration due to climate effects forces countries to come up with new migration law and humanitarian action. It is against this background that Ralf Michaels states: "[i]f law occurs conditioned by climate, then climate must have a place in comparative law.' The changing climate poses new challenges, and therefore – using Ralf Michaels' distinction – the changing climate shapes the object of the regulation, but not the spirit of the law. The climate crisis is an extra-legal phenomenon. Using the manuscript's reference to the 'climate catastrophists', we can say that climate change consists of 'mechanical processes in the climate', which themselves cause new legal challenges. In consequence, although the climate crisis poses an existential threat to civilization, even climate law is a false example of climate theory.

This finding leads to the following thought: should we then not request climate to 'have a place in comparative law' – as Ralf Michael proposes – but rather ask for comparative methods to have a place in climate law?[7]

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2 Max Baumgart and Saskia Lavrijssen 'Exploring regulatory strategies for accelerating the development of sustainable hydrogen markets in the European Union' (2023) Journal of Energy & Natural Resources Law <https://doi.org/10.1080/02646811.2023.2257528> accessed 13 November 2023, 4.

3 Daniela Winkler, Max Baumgart and Thomas Ackermann, *Europäisches Energierecht* (Nomos 2021) 5; Max Baumgart, 'Einführung' in Max Baumgart (ed.), *Energierecht. Fälle und Lösungen* (Nomos 2022) 19.

4 Kaisa Huhta 'The coming of age of energy jurisprudence' (2021) 39(2) Journal of Energy & Natural Resources Law 199, 204–205.

5 cf. for example European Commission, 'The European Green Deal', COM(2019) 640 final, 2.

6 In more detail: Alexander Zahar, 'What is Climate Law?' (2021) SSRN: <https://ssrn.com/abstract=3779606> accessed 13 November 2023.

7 cf. in the context of energy law: Baumgart and Lavrijssen (n 3), 19–21.

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III. THE IMPLICATIONS OF CLIMATE THEORY

The previous paragraph showed that there are good reasons that even the fields of law that are actually dealing with the challenges posed by the climate crisis are not examples of climate theory, but responses to the challenges of a changing climate. Even more, reading Ralf Michaels' manuscript, one must come to the conclusion that Montesquieu's climate theory is an ancient concept with racist insinuations. In the words of Ralf Michaels: '[a]nd the racist implications of his theory should make us careful'. If it is true, as Ralf Michaels elaborates, that there may be a renewal of climate theory in the sense of climate determinism not only due to some earlier academic work, but also due to the climate crisis, then we as academics and especially teachers at universities have an obligation to fight any further attempts to renew climate theory due to its racist implications.

IV. STEREOTYPES AND GENERALIZATIONS

Another conclusion that can be drawn from the discussion of climate theory in Ralf Michaels' lecture is how much the domain of comparative law used to, and maybe in parts still uses to, work with stereotypes. Up to this day, one of the first things students learn in a comparative law class is the traditional approach for scholars of comparative law to cluster national legal frameworks into legal families. They discuss how Zweigert and Kötz categorise the Romanistic legal family, the Germanic legal family, the Common law family, and the Nordic legal family as separate groups, but present Chinese law, Japanese law, Islamic law, and Hindu law separately.[8] When I was myself a student at the university of Geneva, my highly esteemed comparative law professor Thomas Kadner Graziano encouraged us not to rely on the categorisation of legal frameworks into families when carrying out a legal comparison as one legal question may already be answered completely differently in two legal orders, even if they are said to belong into the same legal family.[9] Take for example the question of whether to ban ipso facto clauses (a provision in a contract which permits its termination by a party due to the other party's financial condition) in reorganisation and/or liquidation proceedings: Until the Corporate Insolvency and Governance Act 2020 came into force (see now section 233B of the Insolvency Act 1986), England had banned the exercise of ipso facto clauses only for reorganisation proceedings, whereas in the United States of America (USA) they were also banned for liquidation proceedings.[10] Although their legal orders are both categorized as belonging to the Common law family, the law of England and the law of the USA already displayed two very different approaches to this subject at that time.

In this regard, the discussion how climate theory relies on (racist) stereotypes may remind us that we sometimes also rely too much on stereotypes and generalizations in other areas of comparative law.

V. CONCLUSION

Against the aforementioned elaborations, I conclude that, rather than following the suggestion of upgrading Montesquieu's theory,[11] there is no room for climate theory in comparative law today. Instead, climate theory can remind us to be attentive and critical in the application of comparative law. It makes us aware of stereotypes and the downsides of unwarranted generalizations. Nevertheless, comparative methods can be of great help in finding effective and just solutions for the challenges that are posed to us by the climate crisis.

8 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn., Oxford University Press 1998) 73 and 288.

9 For more reasons to follow this approach: Thomas Kadner Graziano 'Rechtsvergleichung lehren und lernen – Ein Vorschlag aus Genf' (2014) Zeitschrift für Europäisches Privatrecht – ZEuP 2014, 204, 209–2011; Thomas Kadner Graziano 'A Multilateral and Case Oriented Approach to the Teaching and Studying of Comparative Law – a proposal' (2015) 23(6) European Review of Private Law – ERPL 927, 930–934; Thomas Kadner Graziano, *Comparative Contract Law – Exercises in Comparative Methodology* (3rd edn., Edward Elgar 2023) 8–11.

10 Patrick Keinert, *Vertragsbeendigung in der Insolvenz. Insolvenzbezogene Lösungsklauseln im Rechtsvergleich* (Mohr Siebeck 2018) 186–189.

11 Ralf Michaels refers to the work of Bruno Latour.

COMPETING INTERESTS

The author has no competing interests to declare.

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