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Climate's Empire in Comparative Law

THE MONTESQUIEU LECTURE

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ABSTRACT

The most important contribution to comparative law in Montesquieu's Esprit des Lois was the development of a quasi-sociological approach. He focused on extralegal factors to account for differences between legal orders. For contemporary readers, the most surprising among these factors is the climate. In reality, such a climate theory originated in antiquity and can be traced into the 19th century, to some extent beyond. The article traces the history of this idea until our time and discusses both why it was attractive and why it disappeared. It then demonstrates that a revival of some of Montesquieu's ideas, a new Esprit des Lois de la Nature, is desirable to deal with the current climate crisis. A comparative law in this spirit will require understanding law in its naturecultural context, will need to expand its interdisciplinarity towards the natural sciences, and must pay attention to planetary law.

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1 INTRODUCTION

"L'Empire du climat est le premier de tous les Empires," says Montesquieu in his Esprit des Lois, "climate's Empire is the first among all Empires".[1] Human laws are man-made of course, but not freely: climate shapes what lawmakers want, and climate shapes whether people will follow those laws. Rulers may believe that they rule, but they in turn are ruled, and it is the climate that rules them.

This is what we call climate determinism or, more appropriately, climate theory: climate determines, or at least shapes, behavior and law.[2] Today, climate theory seems eccentric to comparative lawyers. Climate is sometimes mentioned, briefly, as one additional factor to be considered,[3] but it is given little attention; we hardly ascribe effects to it. In fact, we hardly even remember the theory: the most recent extensive discussion in comparative law literature is fifty years old.[4] When textbooks discuss the factors that shape the law, climate is often not included at all. If climate, or the environment more generally, is mentioned, such references are brief and vague. "It is ...not open to doubt that geography can influence law," says Uwe Kischel, but for him, like others, that influence is very slim.[5]

This was once different. For Montesquieu, climate was an important, perhaps the most important, factor that accounted for differences between legal orders. And he was not alone with this view. From antiquity until at least the 19th century, climate played a central role in all sciences as a factor that explained and justified differences between legal orders. The disappearance of climate theory from comparative law is relatively recent, which makes our amnesia especially puzzling. And costly – having dismissed climate from comparative law, we do not know how to face the climate crisis in our discipline. Reviving the story should therefore also help us in the present.

2 MONTESQUIEU'S CLIMATE THEORY OF LAW

2.1 MONTESQUIEU, COMPARATIVE LAW

Montesquieu's Esprit des Lois qualified him, in the eyes of many, as the founder of modern social science, sociology and anthropology.[6] This is not so much due to his substantive findings: J.M. Kelly suggests the book "reads today like a rather quaint and rambling collection of odds and ends of legal and institutional curiosities", but he adds that "it performed the important function of drawing attention to the varying customs of different nations ... and suggesting that their variety was explained by the variety in their surrounding conditions."[7] It is methodology where Montesquieu was most influential. His method was, at least in principle, empirical: he observed differences between phenomena and explained them through different factors. And he observed, in accordance with modern legal sociology, the interrelationships between law and

1 Charles Louis de Secondat, Baron de La Brède et de Montesquieu, *De l'esprit des loix* (1748) XIX, 14. For English translations, I mostly rely on the translation by Philip Stewart (2018, updated 2021) that is freely available at http://montesquieu.ens-lyon.fr/spip.php?rubrique186. Stewart translates "Empire" in XIX, 14 as "influence" (for his explanation, see http://montesquieu.ens-lyon.fr/spip.php?article3227). Certainly, the French word has different connotations than the English one. But for my argument, it is important that the word in the phrase "Empire du climat" is the same as that used for empire in the political sense. For these connections, see also David N Livingstone, 'Reflections on the cultural spaces of climate' (2012) 113 Climatic Change 91–93. https://doi.org/10.1007/s10584-012-0409-5; M Mahony and G Endfield, 'Climate and colonialism' (2018) 9 WIREs Climate Change. https://doi.org/10.1002/wcc.510.

2 This idea of a connection between climate and laws is sometimes called climate determinism, sometimes climate theory. Understood strictly, climate determinism (or more broadly environmental determinism) would mean that the climate directly determines social outcomes. Although sometimes ascribed to Montesquieu, he did not in fact espouse such a crude theory, nor does hardly anybody else. Climate theory implies, more broadly, that climate has consequences.

3 E.g. George Mousourakis, *Comparative Law and Legal Traditions* (2019) 174–175.

4 Eduard Wahl, 'Influences climatiques sur l'évolution du droit en orient et en occident – Contribution au régionalisme en droit compare' (1973) 25 Rev. int. dr. comp. 261–276; Bernhard Grossfeld, 'Geography and the Law' (1984) 82 Mich. L. Rev. 1510ff.

5 Uwe Kischel, *Comparative Law* (2019) ch. 2 no. 35; Jaakko Husa, Introduction to Comparative Law (2nd edn 2023) 181; see also Michael Bogdan, *Concise Introduction to Comparative Law* (2013) 59–60.

6 Leonard Pospisil, Anthropology of Law: A Comparative Theory (New York 1971), 138.

7 John M Kelly, *A Short History of Western Legal Theory* (1992) 273. See also Günther Frankenberg, 'Critical Histories of Comparative Law', in Markus Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (2018) 43, 59.

its surroundings: law is shaped by society, but society is in turn shaped by law. And it focused on difference – it is in his comparative method where Montesquieu was most influential.[8]

That method was applied to law – or rather *to laws*, as the title of Montesquieu's book makes clear.[9] This is why Gutteridge suggests that "Montesquieu, in particular, has a claim to be considered as the founder of comparative law, since it was he who first realized that a rule of law should not be treated as an abstraction, but must be regarded against a background of its history and of the environment in which it is called upon to function."[10]

In essence, Montesquieu made three connected contributions to the theory and method of comparative law which are still influential today. The first was an emphasis on differences between laws. Granted, Montesquieu still subscribed, at least formally, to the idea of natural law; local laws were merely variants thereof.[11] But Montesquieu cared more about those variants than about their source, and he focused more on what sets them apart than what keeps them together; he proclaimed his intention "to avoid regarding really different cases as similar, and failing to see the differences of those that appear alike." In Montesquieu's own times, this set him on a collision course with the Church. Today, it sets him apart from those comparative lawyers who advocate worldwide unification of law and those who emphasize the similarity between laws. Unsurprisingly, comparative lawyers who emphasize difference have seen an ally in him.

They see a kindred spirit in him also with regard to a second contribution made to the study of so-called legal transplants. Alan Watson famously claimed that legal transplants – the copying of legal rules and institutions from one legal order into another – have been the main source of legal change.[12] Montesquieu would have been among Watson's critics. The political and civil

8 Melvin Richter, 'Montesquieu's theory and practice of the comparative method' (2002) 15 History of the Human Sciences 21–33.

9 Stewart's translation (supra n 1) uses "Law" rather than "Laws" in the title. Stewart explains this in part by the different meanings of 'loi' and 'law', and in part by referring to other books with titles like "The Spirit of Jewish Law" or "...of English Law" and the like: Philip Stewart, 'On the Nugent Translation of L'Esprit des lois' (2018) 39 History of Political Thought 83, 85–87. The latter point seems to undermine rather than support Stewart's argument, given that each of the books dealing with the spirit of one law appears in a series entitled "The Spirit of the Laws"; see also Kenneth Pennington, 'The Spirit of Legal History' (Review essay) (1997) 64 U. of Chi. L. Rev. 1097, 1097f. The former point has some validity, though it does not, in my mind, make Stewart's translated title convincing.

10 H.C. Gutteridge, *Comparative Law* (1949) 12; similarly Charles Donahue, 'Comparative Law before the Code Napoléon', in M Reimann und R Zimmermann, *Oxford Handbook of Comparative Law* (2nd ed 2019) 3, 24; Jerome Hall, Comparative Law and Social Theory 15 (1963); Matthias Reimann, Comparative Law – An Overview of the Discipline, IECL II-4, p. 35.

Discussions of Montesquieu's contributions to comparative law are plentiful. Longer expositions include Isaak Kisch, 'Montesquieu en de rechtsvergelijking' (1948) 23 Mens en maatschappij 343–347; Jean-Paul Niboyet, 'Montesquieu et le droit comparé' in Boris Mirkine-Gietzevich et al (eds) *La pensée politique et constitutionelle de Montesquieu: Bicentenaire de "L'Esprit des Lois" 1748–1948* (1952) 255–271; Robert Launay, 'Montesquieu: The spectre of despotism and the origins of comparative law', in Annelise Riles (ed), *Rethinking the Masters of Comparative Law* (2001) 22–38; Ran Hirschl, 'Montesquieu and the Renaissance of Comparative Public Law', in Rebecca E Kingston (ed.), *Montesquieu and His Legacy* (2009) 199–219; Lorenzo Zucca, 'Montesquieu, Methodological Pluralism and Comparative Constitutional Law' (2009) 5 Eur. Const. L. Rev. 481–500; Igor Stramignoni, Le regard de la comparaison: Nietzsche, Heidegger, Derrida, in Pierre Legrand (ed.), Comparer les droits, résolument (2009) 147–61; Malcolm Vale, 'Custom, Combat, and the Comparative Study of Laws: Montesquieu Revisited' in Paul Dresch and Hannah Skoda (eds), *Legalism: Anthropology and History* (2012); Mark Van Hoecke, 'Montesquieu en de rechtsvergelijking', in Marie-Claire Foblets et al. (eds.), *Liber Amicorum René Foqué* (2012) 647–656; Daniel Bonilla Maldonado, 'Montesquieu and Modern Comparative Law, Climate, Geography, and the Structure of Political Communities' (2019) 57 U. Louisville L. Rev. 561; republished in an altered version as ch. 2 in id., *Legal Barbarians – Identity, Modern Comparative Law and the Global South* (2021) 46–69.

Shorter discussions of Montesquieu as a comparative lawyer have been written by Frederick Pollock, The History of Comparative Jurisprudence, 5 Journal of the Society of Comparative Legislation 74, 83–4 (1903); Walther Hug, 'The History of Comparative Law' (1932) 45 Harv. L. Rev. 1027, 1049–1050; Léontin-Jean Constantinesco, *Rechtsvergleichung Vol 1 – Einführung in die Rechtsvergleichung* (1971) 78–83; Charles Donahue, "Comparative Law before the Code Napoléon', in M Reimann und R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd ed 2019) 3, 22–24; Willem J Witteveen, 'Preliminary Questions for the Global Law School – Introducing the Fifth Montesquieu Seminar', in William Twining, *Globalization and Legal Scholarship: Montesquieu lecture 2009* (2011) 7,11–14; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014) 125–133; George Mousourakis, *Comparative Law and Legal Traditions* (2019) 65–68.

See also Melvin Richter, 'Comparative Political Analysis in Montesquieu and Tocqueville' (1969) 1 Comparative Politics 129–160;

11 "Law in general is human reason, insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular instances where that human reason is applied."

12 Alan Watson, Society and Legal Change (2d ed 2001) 98.

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laws of each nation, he suggested, "…should be so well adapted to the people for whom they are made that it is only by extreme chance that the laws of one nation can suit any another."[13]

This quote is exemplary for his third contribution, the one most relevant for my topic: a quasi-sociological approach to comparative law.[14] For Montesquieu, law was neither autonomous nor could it be derived from abstract principles. Instead it was influenced by extralegal factors. Today, after the decline of formalism, this idea has become nearly commonsense in comparative law, where it is referred to as a culturalist or a contextual approach – even though such an approach is often more preached than practiced.

Montesquieu did not, like many comparative lawyers today, postulate abstractly that law is somehow related to its environment. Instead, he provided a long list of various factors. Most of his factors are still considered relevant today, and lists in contemporary textbooks still match his list closely. We still assign importance to a state's political system, of course, and we think legislative intent to be of importance. Likewise, we still think that "life style" and "inclinations" – legal culture – play an important role. By contrast, Montesquieu's focus on "the physical facts of the country" and his attention "to the freezing, torrid, or temperate climate" seems odd and archaic to today's reader. How important can these factors be?

For Montesquieu, climate was clearly important. Four of the thirty-one books of his Esprit des Lois are devoted to climate, and it appears in several other books as well. Climate was not the only or even the most important factor, he said at one point: "To the degree that one of these causes acts with more force in each nation, the others yield to it. Nature and climate almost alone dominate savages; manners govern the Chinese; laws tyrannize Japan; the ethos used to set the tone in Lacedæmon; government maxims and the ancient ethos set it in Rome."[15] But the manners of the Chinese, the laws of the Japanese, the ethos of the Greeks and the government of the Romans all, in turn, were shaped by climate, as Montesquieu argued elsewhere. In this sense at least, climate is indeed the first empire.[16]

2.2 CLIMATE THEORY BEFORE MONTESQUIEU

In so arguing, Montesquieu could draw on a long history going back to antiquity.[17] Hippocrates, the founder of scientific medicine, attributed an impact of climate on society. So did Herodotus, founder of history, and Aristotle, founder of philosophy. Their arguments differed in detail but shared essential elements. Climate has an impact on the body and its juices, the humors. The Greek assumed four such humors – blood, yellow bile, black bile, phlegm – and related them to four temperaments – sanguine, choleric, melancholic, and phlegmatic. Everyone had a specific combination of the four, and health required a proper balance. These humors were related to the four seasons – blood was spring, yellow bile summer, black bile fall, and phlegm winter – and thus also with different temperaments between cold and hot, wet and dry. Here, the relationship to climate becomes apparent. If different climates have different temperatures, then they must correlate with different relative degrees of the humors and thus with constitutionally

13 The relevant quote deserves to be rendered in full:

> The political and civil laws of each nation […] must relate to the nature and principle of the government which is established, or which one intends to establish, either because they constitute it, as do the political laws, or because they maintain it, as the civil laws do. (I.3)
>
> They must be relative to the physical facts of the country, to the freezing, torrid, or temperate climate; to the quality of the terrain, to its situation, its size; to the life style of its peoples, laborers, hunters, or shepherds; they must relate to the degree of freedom which the constitution can allow; to the inhabitants' religion, their inclinations, wealth, number, commerce, behavior, and manners. Finally, the laws are related to each other, to their origin, to the legislator's objective, to the order of things upon which they are established: it is from all these perspectives that they have to be considered.

14 Charles Donahue, 'Comparative Law before the Code Napoléon', in M Reimann und R Zimmermann, *Oxford Handbook of Comparative Law* (2nd ed 2019) 3, 23; Eugen Ehrlich, 'Montesquieu and Sociological Jurisprudence' (1916) 29 Harv. L. Rev. 582–600.

15 Esprit XIX.4. See also Défense: "tous les effets quelconques ont des causes: le climat et les autres causes physiques produisent un nombre infini d'effets. Si l'auteur avait dit le contraire, ou l'aurait regardé comme un homme stupide.

16 Roger B Oake, 'Hume and Montesquieu' (1941) 2 Modern Language Quarterly 225–248, 230, suggests that the French word "premier" here means both first in time and first in importance. On the meaning of 'empire', see supra n 1.

17 See, especially, Clarence J Glacken, *Traces on the Rhodian Shore: Nature and Culture in Western Thought from Ancient Times to the End of the Eighteenth Century* (1967) 80ff; Mario Pinna, La teoria dei climi – una falsa dottrina che non muta da ippocrate a Hegel (1988) 17ff.

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different individuals and societies. A hot climate makes people lazy because "[m]anly courage, endurance of suffering, laborious enterprise, and high spirit, could not be produced in such a state of things either among the native inhabitants or those of a different country, for there pleasure necessarily reigns"[18] – with the consequence that "monarchy prevails in the greater part of Asia."[19] And if certain regions have no seasons, then individuals living there will have a hard time balancing their humors.

This theory achieved two goals at the same time. One was explanatory and practical. Climate theory was able to explain differences between individuals, and between societies. It could therefore also help choose proper treatments – from different types of medicine to different laws. The other goal was justificatory: climate theory helped the theorist explain why he, or his society, was superior to others. We can see both in Aristotle. Climate theory explained why the Greeks were different from, and superior to, those in hotter and those in colder climates: they had Northerners' strength but not their stupidity, and they possessed Southerners' intelligence but not their weakness. And Aristotle also demonstrated how climate theory was, from the beginning, also a factor in comparative law. It was for him a consequence of climatic advantage – and not therefore of either deliberate choice or pure hazard – that the Hellenic race "continues free, and is the best-governed of any nation, and, if it could be formed into one state, would be able to rule the world."[20]

Both elements – the explanatory and the justificatory one – may help explain the huge success that climate theory enjoyed in the Middle Ages and early modernity. Islamic followers of Aristotle, like Avicenna and Ibn Khaldoun (sometimes referred to, eurocentrically, as "an Asian Montesquieu"[21]), promoted it prominently – though unsurprisingly with the slight twist that for them it explained the superiority not of Greeks but of Arabs. It is from Ibn Khaldoun, in all likelihood, that the theory traveled to France. Here, Jean Bodin promoted a climate theory in many ways similar to Montesquieu's later theory, with an analysis of how the form of a Republic should be adapted to the natural aptitudes of its peoples.[22] Like Ptolemy and Avicenna before him, he suggested that the cold climate of the North made its people strong and long-lived, whereas those in the South were feeble. The relative weight of different humors made Scandinavians phlegmatic, Germans sanguine, the French choleric and the Spaniards melancholic. Cold climate made Scandinavians good warriors; hot climate made Arabs cunning diplomats; temperate climate made the French good businessmen. (Note how widespread these stereotypes still are today.) Bodin's interest – like ours today – was less in individuals and more in societies, less in culture and more in politics and forms of government, and – perhaps most importantly – less in explanation and more in prescription.[23] Consequently, Bodin did not confine himself to explaining different laws; he also made suggestions as to what laws should look like. Laws should not, he posited, be framed against some universal standard, but instead should match the local climatic, geographic and societal requirements.[24] The Spanish failure to rule the Low Countries – Tilburg included – resulted from their inability to appreciate that laws suitable for Spain were not adequate for a region twelve degrees further north.

18 Hippocrates, *On Airs, Waters, and Places* (Francis Adams trans.), cite from Part 12. http://classics.mit.edu//Hippocrates/airwatpl.html.

19 Ibid Part 16.

20 Aristotle, *Politics*, Book 7 Part 7: Those who live in a cold climate and in Europe are full of spirit, but wanting in intelligence and skill; and therefore they retain comparative freedom, but have no political organization, and are incapable of ruling over others. Whereas the natives of Asia are intelligent and inventive, but they are wanting in spirit, and therefore they are always in a state of subjection and slavery. But the Hellenic race, which is situated between them, is likewise intermediate in character, being high-spirited and also intelligent. Hence it continues free, and is the best-governed of any nation, and, if it could be formed into one state, would be able to rule the world.

21 Baron Joseph von Hammer-Purgstall, cited in Annemarie Schimmel, *Ibn Chaldun: Ausgewählte Abschnitte aus der Muqaddina* (1951) xvii.

22 Bodin's claim to be the first political theorist to do so was a bit preposterous in view of the degree to which his argument owed to the ancient Greeks, from his focus on bodily fluids to that on the stars. Tooley argues that Bodin added nothing substantially new; he drew every one of his main ideas from accepted traditions very generally held: Marian J Tooley, 'Bodin and the Mediaeval Theory of Climate' (1953) 28 Speculum 64–83. See also Diego Quaglioni, 'Bodin e la teoria climatica in epoca moderna', in Michaela Nacci (ed), *Nazioni come individui: Il carattere nazionale fra passato e presente* (Firenze University Press 2020) 25–47; Samuel Lindholm, 'Governing according to nature: Jean Bodin on climates, humours, and temperaments', in M Piasentier and S Raimondi (eds), *Debating Biopolitics: New Perspectives on the Government of Life* (Edward Elgar 2022) 49ff.

23 Marian J Tooley, 'Bodin and the Mediaeval Theory of Climate' (1953) 28 Speculum 64, 83.

24 Tooley, ibid, 78f.

2.3 MONTESQUIEU'S CLIMATE THEORY

Much of climate theory was thus laid out before Montesquieu stepped on the scene. What set him apart from his predecessors was not so much the content of his theory but his method and focus. If Bodin was still speculative, including a reliance on astrology, Montesquieu favored a more empirical approach. And if Bodin was focused on politics more generally, Montesquieu's focus was on law. He is thus a central figure not only for climate theory in general, but even more so for climate theory in comparative law.[25]

Some of Montesquieu's arguments are immediately intuitive to us today. "The heat of the climate can be so excessive that the body will utterly lack strength" he says (XIV.2). For Montesquieu this was an argument for servitude, which would be "less unbearable than the strength of mind that is required for governing oneself". We might argue instead for employee protection laws. But the mechanism is the same: a lawmaker responds with concrete legislation to demands posed by the climate.

Another example: Alcohol, Montesquieu suggested, has different effects in different climates. In the heat it will coagulate the globules of the blood, and so people should, and will want to, drink large volumes of water instead. Therefore, alcohol must be banned, as indeed it is in Islamic countries. No such coagulation happens in the cold, where instead "the climate seems to impel people to a certain national inebriation very different from that of the person." (XIV.10). And therefore alcohol must be permitted. Again, we may question both the empirical assumptions and the conclusions Montesquieu draws. But the argument is again a rational one: differences in climate demand different legal responses.

If Montesquieu's theory had been confined to those cases in which lawmakers respond to circumstances, it would be unremarkable. But mostly, Montesquieu's is a theory not of concrete responsive lawmaking but of comprehensive impact. He was interested not in concrete laws but in the esprit of laws generally. And he was interested less in the motifs of lawmakers and more in the reasons for laws. Here, climate theory in comparative law can be viewed as a combination of two relationships – one between climate and society, the other between society and laws.

The first relationship worked like this: Climate, Montesquieu suggested, has an impact on the body – not on the humors as the Greeks argued, but instead on the fibers which are strengthened in cold climates and weakened in hot climates.[26] As a consequence, people in the cold North are more courageous than those in the hot South (XVII.2). They are more willing to work and less given to sensual pleasures. They are willing to cultivate land and need not be forced to do this (XIV.6), while those in the South need incentives like prizes (XIV.9). And those in the North are more moral than those in hot climates: "Moving in a southerly direction, it is like leaving morality itself behind; more intense passions will multiply crimes." We see, then, that this is causation with multiple elements. Climate works on the body, the body works on the mind, and the mind works on society with its culture and morality.[27]

The focus on differences among laws comes as a logical second step. Laws must match both individual psychology and collective culture: "If it is true that the character of the mind and the passions of the heart are extremely different in the various climates, laws must be relative both to the difference of those passions and the difference of those characters." (XIV.1)

Taken together, the nature of these differences is not surprising. If people in the heat are immoral and driven to crimes, punishments must therefore be harsh:[28] If people in the cold, by contrast, are virtuous and vigorous, then punishment is less central in regulating societies, and

25 The most important discussion of Montesquieu's climate theory in comparative law literature is by Bonilla (n 10).

26 "Cold air shrinks the extremities of the exterior fibers of our bodies, and that increases their compression and favors the return of blood from the extremities towards the heart. It decreases the length of these same fibers; thereby further increasing their strength. Warm air on the contrary relaxes the extremities of the fibers and lengthens them; it thus reduces their strength and compression. People therefore have more vigor in cold climates. XIV.2. On the fiber theory, see Denis Casabianca, *Montesquieu: De l'étude des sciences à l'Esprit des Lois* (2008) 354ff.

27 "ce physique du climat peut produire diverses dispositions dans les esprits; ces dispositions peuvent influer sur les actions humaines". Montesquieu, Défense de l'esprit des loix (1750), Seconde partie: climat.

28 "[A]lthough Southern people are timid, they commit heinous crimes, because the heat "has also given them such a lively imagination that everything impresses them to excess. That very organ delicacy that makes them fear death also serves to make them dread a thousand things more than death." XIV.3.

individuals can be given incentives to further their own well-being, for example through private property. Similarly, climate has an impact on the proper form of government. If people in the heat are given to pleasure, unwilling to take responsibility but cunning, then despotism is the proper form of government for them. By contrast, people in cold climate can have agency, and so despotism is wrong for them, whereas monarchy or republicanism would be appropriate.

Climate theory can thus be viewed as a combination of two relationships: one between climate and society, the other between society and laws. Differences exist between both, as Montesquieu makes clear:

> the intelligent world is far from being governed as well as the physical world. For though it too has laws which by their nature are invariable, it does not follow them constantly as the physical world follows its own laws. (I.1)

We lawyers might be relieved. Climate determinism may exist, we might think, but it is confined to the physical world. The impact of the climate on the body may be said to belong to the physical world; its impact is automatic. But the consequences for the mind and for society, and further for the laws, is of a different kind. Here, human agency can decide. Certain laws may fit better for certain societies (and thereby climates), but that is nothing more than a factor to be taken into account, not a determining cause.[29] Indeed, it will often be necessary to make laws against the climate: "bad legislators are those who have favored vices of the climate, and good ones are those who have countered them." (XIV.5).

But this would be imprecise, for two reasons. First, the difference was less strict for Montesquieu than it is for us today. As regards the first relationship, Montesquieu argued much more in terms of correlations or conjunctions than strict causations between climate and society.[30] As regards the second, human laws are not entirely independent from the constraints of the physical world.[31] For Montesquieu, laws of nature and political and civil laws belonged to the same world; they were not entirely of a different kind.[32] Therefore, the steps in the causal chain were not absolutely separated. Montesquieu did not support a strict separation between the animate and the inanimate world, nor between culture and nature. The relationship between body and mind did not rest on a strict dualism. And Montesquieu did not subscribe to a strict individualism that would make the person independent from society.

Second, the degree to which human laws are independent from the climate was different for different societies. If making proper laws is a function of human agency, then this is only possible in climates that enable humans to have such agency. This is the reason why "nature and climate almost alone dominate savages" but not others (XIX.4). And this creates a vicious circle for those living in hot climates. The climate has deprived them of agency, so that they cannot create other institutions within which they could regain such agency and they are largely stuck with despotism, slavery or servitude, and no chance for development: "the mind which has once received impressions can no longer change them" and therefore "laws … are today in the Orient what they were a thousand years ago." (XIV.4) Those in the North may also sometimes have despotic governments. But they can realize that despotism is not good – at least for them – and choose better government structures. Those in the heat are subjects whereas those in the cold are agents of history, fate, and of their own laws.

3 INFLUENCES ON COMPARATIVE LAW

Montesquieu's climate theory was not without critics even in his own time. Voltaire, for one, was not convinced by the role of climate, though he did accept the theory of causal factors.[33] If

29 Denis Casabianca, *Montesquieu de l'étude des sciences à l'Esprit des Lois* (2008) 483ff.

30 E.g. Jean-Patrice Courtois, 'The Climate of the philosophes during the Enlightenment' (2017) 132 MLN 902–911.

31 Je ne dis point que le climat n'ait produit, en grande partie, les lois, les mours et les manières de cette nation; mais je dis que les moeurs et les manières de cette nation devroient avoir un grand rapport à ses lois. (XIX. 27).

32 E.g. Denis Casabianca, *Montesquieu de l'étude des sciences à l'Esprit des Lois* (2008) 132ff; Sharon R Krause, 'The Rule of Law in Montesquieu', in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (2021) 137, 145–147.

33 See Jean-Patrice Courtois, 'The Climate of the philosophes during the Enlightenment' (2017) 132 MLN 953, 970ff.

climate shaped religion, then how could Christianity have been born in Palestine and come to Norway?[34] And how could we explain that Egyptians had invented science in antiquity and now were "leisurely and happily dancing and singing within their poverty and slavery?"[35] Government, not climate, was what mattered. "Everything in body and soul changes with the time", he said, before making a prediction that must have seemed outlandish in his time: "perhaps one day the Americans will teach art to the peoples of Europe.[36] Hume argued at length that moral as opposed to physical causes were responsible for national character.[37] But for most, climate mattered. Bentham, often caricatured as a one-size-fits-all utilitarian, in reality believed that place, and climate, played a crucial role for national character and proper laws.[38] Thomas Jefferson subscribed to it, as did many others in North America.[39] In other words, not everyone agreed, but everyone engaged.

This is true also in law. The prime example comes from an English author, William Falconer.[40] In very schematic ways, Falconer analyzed the influence of different climates on the objects and the forms of the law, the mode of trial, and punishments.[41] Not surprisingly, a temperate climate worked best: here the law served neither as punishment nor as mere compensation, but solely to deter crimes; elaborate laws protected the accused; and trials were "excellently adapted to discovering the truth". It is no coincidence that this sounds like a weakly concealed description of English law: Falconer's main substantive difference from Montesquieu was to place England in a moderate and not cold climate. And if it sounds like an assemblage of stereotypes and just-so stories, this is also true: climate theory began to turn into a simplistic deterministic mechanism.

3.1 LEGISLATION

But climate theory also was prominent in the budding discipline of comparative law. First, Montesquieu's work became influential for the nascent science of legislation.[42] Carlo Antonio Pilati argued in 1770 that Italian law reform, like law reform generally, should be adapted to the conditions of the country: to its type of government, to its climate, and to the traditions and habits of its people.[43] Filangieri, 35 years later, developed a theory of laws of "relative goodness" – relative that is to local conditions, including climate, which he discussed at length.[44]

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34 Voltaire, *Pensés sur le Gouvernement* (1752) XXIX (XXVII): "On a prétendu [1] que les religions sont faites pour les climats; mais le christianisme a régné longtemps dans l'Asie. Il commença dans la Palestine, et il est venu en Norvége. L'Anglais qui a dit que les religions étaient nées en Asie, et trouvaient leur tombeau en Angleterre, a mieux rencontré."

35 Voltaire, *Essai sur les mœurs et l'esprit des nations* (1756) 447. "Si le climat influe sur le caractère des hommes, le gouvernement a bien plus d'influence encore que le climat."

36 Tout change dans les corps et dans les esprits avec le temps. Peut-être un jour les Américains viendront enseigner les arts aux peuples de l'Europe. Oeuvres de Voltaire, Vol. 6 – Dictionnaire philosophique (1838) 292. 292.

37 David Hume, 'On National Characters' in id, *Essays, Moral, Politics, and Literary* (1777) 246ff.

38 Bentham, Place and Time, in Stephen G. Engelmann (ed.), Jeremy Bentham: Selected Writings (2011); see Stephen G. Engelmann, Bentham's "Place and Time", 32 Tocqueville Review 43–66 (2011); Twining, Appendix, in Twining (n 10) 59–67.

39 See his letter of 1785 to Marquis de Chastellux in Julian P Boyd (ed), *The Papers of Thomas Jefferson, Volume 8* (1953), 468: "In the North, they are cool; sober; laborious; independent; jealous of their own liberties, and just to those of others; interested; chicaning; superstitious and hypocritical in their religion. In the South they are fiery; voluptuary; indolent; unsteady; zealous for their own liberties, but trampling on those of others; generous; candid; without attachment or pretentions to any religion but that of the heart." For an explicit attempt to base these differences on climate, see A Cash Koeniger, 'Climate and Southern Distinctiveness' (1988) 54 Journal of Southern History 21.

40 William Falconer, *Remarks on the Influence of Climate, Situation, Nature of Country, Population, Nature of Food, and Way of Life: On the Disposition and Temper, Manners and Behaviour, Intellects, Laws and Customs, Form of Government, and Religion, of Mankind* (1781), available at https://wellcomecollection.org/works/ndckyc75/items.

41 Ibid 75–108. I ignore here Falconer's discussion of customs, ibid 109–117, and forms of government, 117–129.

42 Gerhard Dilcher, ‚Gesetzgebungswissenschaft und Naturrecht' (1969) 24 Juristenzeitung 1, 3f.; Heinz Mohnhaupt, ‚Montesquieu und die legislatorische Milieu-Theorie während der Aufklärungszeit in Deutschland', in Heinz Mohnhaupt, Historische Vergleichung im Bereich von Staat und recht (2000) 189–204; for doubts, see Jan Rolin, 'Recht, Gesetz und Gesetzgebung bei Montesquieu: Zur Kontextualisierung eines Klassikers des politischen Denkens' (2003) 15 Aufklärung 239–274.

43 Carlo Antonio Pilati, Di una riforma d'Italia, ossia Dei mezzi di riformare i più cattivi costumi e le più perniciose leggi d'Italia (2nd ed 1770) 73ff.

44 Gaetano Filangieri, *The Science of Legislation* (1805) 177ff; see 288 for the lesser impact on temperate zones. See Marcello Maestro, 'Gaetano Filangieri and his laws of relative goodness' (1983) 44 Journal of the History of Ideas 687; Pinna (n 6) 320ff.

Like Montesquieu, he did not argue for determinism: legislators should embrace advantageous effects of climate but counter those that are harmful. Other theorists of legislation agreed.[45] For Emerico Amari, Montesquieu served as a model for the new science of comparative law, in presenting a physical theory. In his treatise on comparative legislation, he discussed climate as the first among the relevant factors, although he emphasized that its role should not be exaggerated.[46]

Support was not uniform, however. Some criticism emerged from universalism: morality was the same everywhere, and differences between peoples not big enough to justify differentiated treatment.[47] Other comparative lawyers followed Voltaire's critique. In 1767, Creutz assigned no influence at all to climate for proper legislation.[48] Later, Henry Maine chided Montesquieu for "pay[ing] little or no regard to the inherited qualities of the race, those qualities which each generation receives from its predecessors, and transmits but slightly altered to the generation which follows it."[49] In the same vein, Frederick Pollock suggested that Montesquieu "overrated the influence of climate and other external conditions, and underrated, if he did not wholly neglect, the effects of race and tradition", and he added "that institutions which belong to different stages are not commensurable terms in any scientific comparison."[50] Climate theory had little space for legal development; theories of legal progress therefore began to distance themselves.

3.2 NATIONALISM

Climate theory became especially important in attempts to find and explain national legal cultures – especially the writer's own. Pasquale Stanislao Mancini, the great Italian international lawyer, presumably subscribed to the theory in part as a foundation for the nation, the concept on which he built his ideas of law.[51] Even stronger influence can be found in Germany. In 1761, Johann Heumann v. Teutschenbrunn aimed at discovering a "Geist der Gesetze der Deutschen" – a clear translation from Montesquieu's Esprit des Lois, but now given a nationalist bent.[52] Esprit later turned into "Volksgeist" and was as such hugely influential on the Historical School.[53] Herder, who introduced it still thought that climate played a considerable role, though he did not think of it as deterministic – "Das Klima zwinget nicht, es neiget."[54] Jhering sympathized with such thoughts; for him climate made "half of a people's temperament."[55] Nonetheless, he believed that this could be overcome: "Nein! nicht Europa hat die Europäer gemacht, sondern der Europäer hat Europa gemacht"[56] And so, although

45 For Germany, see, e.g., Friedrich Julius Heinrich von Soden, *Geist der peinlichen Gesetzgebung Teutschlands* (1792) 63; Nikolaus Thaddäus Gönner, *Beiträge zur neuen Gesetzgebung in den Staaten des teutschen Bundes* (1815) 281 (but with support for legal transplants at 60; see also 113); Carl Johann Gottlieb August Jahn, *Verbesserungs-Gegenstände für Gesetzgebung und Rechtspflege* (1827) 7.

46 Emerico Amari, *Critica di una scienza delle legislazioni comparate* (1857) 169–175. On Amari as comparative lawyer, see Giuseppe Bentivegna, *Filosofia civile e diritto comparato in Emerico Amari* (1995), and several chapters in Erik Jayme, *Rechtsvergleichung – Ideengeschichte und Grundlagen. Von Emerico Amari zur Postmoderne: Vorträge, Aufsätze, Rezensionen* (2000).

47 Christian Gottlieb Gmelin, *Grundsätze der Gesetzgebung über Verbrechen und Strafen* (1786) § 19, pp 34–35.

48 Friedrich Karl Kasimir Freiherr von Creutz, *Der wahre Geist der Gesetzgebung* (1761) §§ 70ff, pp 61ff; see also Friedrich von Kossiach, *Von der Stärke eines Staats in ihrem wahren Gesichtspunkt* (1782) 30–33.

49 Henry Maine, Ancient Law (1861) 116.

50 Pollock (n 10) 83.

51 "Ad ogni modo, I differenti sistemi han questo di commune che tutti non possono disconoscere il fatto primitive e costante del rapport e dell'influenza dei siti e delle regioni sulle popolazioni che le abitano." In: Erik Jayme (ed.), Della nazionalità come fondamento del diritto delle genti die Pasquale Stanislao Mancini (1994/1851) 39 fn 1.

52 Johann Heumann von Teutschenbrunn, *Der Geist der Gesetze der Teutschen* (1761) 4: "Der Himmels-Strich, unter welchem wir hervorkommen und leben, hat in uns ordentlicher Weise einen Einfluß."

53 Jan Schröder, 'Zur Vorgeschichte der Volksgeistlehre. Gesetzgebungs- und Rechtsquellentheorie im 17. und 18. Jahrhundert' (1992) 109 Zeitschrift für Rechtsgeschichte – Germanistische Abteilung, 1–47.

54 Johann Gottfried von Herder, *Ideen zur Philosophie der Geschichte der Menschheit* (Band 2) (1785) 103–104. For Herder's influence on the historical school, see, especially, Victor Ehrenberg, *Herders Bedeutung für die Rechtswissenschaft* (1903); Herrmann U Kantorowicz, 'Volksgeist und historische Rechtsschule' (1912) 108 Historische Zeitung 295ff.

55 Rudolf von Jhering, *Vorgeschichte der Indoeuropäer* (1894) 97; see also Rudolf von Jhering, *Entwicklungsgeschichte des römischen Rechts* (1894) 43.

56 Ibid 5.

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Volksgeist remained the crucial foundation of attempts to establish a national legal culture, its foundation in climate slowly disappeared.

3.3 LEBENSRAUM

Montesquieu's climate theory was picked up most enthusiastically in geography. German geographer Friedrich Ratzel developed ideas of climate determinism into a fully-fledged theory accounting for differences between races and territories that he called anthropogeography.[57] This had an influence on comparative law. Based on Ratzel's ideas, Manfred Langhans-Ratzeburg developed what he called geojurisprudence.[58] Territory makes law we could say, and differences between legal orders emerge not immediately from climate but from spatial differences. For Kelsenian positivists, this was clearly inacceptable as a part of legal science.[59] For the Nazis, however, geojurisprudence was an attractive tool in the fight for a new "Lebensraum".[60]

3.4 THE ATTRACTIONS OF CLIMATE THEORY

Why was the theory attractive? Certainly, it appealed to a desire to find rational explanations for observed phenomena. In this sense it matched the Enlightenment's interest in rationality, though it also stood in tension with agency. But some of the observed phenomena were clearly spurious, and the alleged scientific explanation speculative. Some reasons must then be ideological.

One reason was that climate theory could both explain and justify differences between the laws of different nations. That was important intellectually, but also politically. Climate theory enabled – and continues to enable – both Eurocentric perspectives and a justification of European hierarchy.[61] It provided a natural reason explaining why the laws of Europeans were superior to those in the rest of the world. And, more importantly perhaps, it justified why the legal achievements of European nations could not be replicated elsewhere – why, for example, the British should not extend the protection of their laws to their colonial subjects.

Indeed, a second attraction of climate theory was how it could be used to justify treating people differently within one legal system. Forcing people from hot climates to work was both necessary – they were naturally lazy – and defensible – they were accustomed to the heat and therefore less subject to its threats. This made slavery more appropriate for them. Montesquieu already dedicated one infamous chapter to a justification of slavery that may or may not be hypothetical (reminding one of OJ Simpson's "If I Did It"): "If I had to defend the right we have had to make slaves of Negroes, here Is what I would say" (XV.5).[62] The State of Mississippi invoked climate theory in its 1861 secession declaration, justifying simultaneously

57 Friedrich Ratzel, *Anthropogeographie* (1882/1891); see also Dennis Rumley, Julian V Minghi and Frank M Grimm, 'The content of Ratzel's politische Geographie' (1973) 25 Professional Geographer 271–277. In the United States, Ratzel would later influence the field of geography, including its racist turn in the early twentieth century – Ellsworth Huntington and Ellen Semple are the most well-known representatives of this development, but not the only ones. See, e.g., Ellen Semple, *Influences of Geographic Environment. On the Basis of Ratzel's System of Anthropo-Geography* (1911) 607ff et passim; Ellsworth Huntington, *Civilization and Climate* (1924); see also Ian Klinke, 'A theory for the "Anglo-Saxon mind": Ellen Churchill Semple's reinterpretation of Friedrich Ratzel's Anthropogeographie' (2022) 77 Geographica Helvetica 467–478.

58 Manfred Langhans-Ratzeburg, *Begriff und Aufgaben der geographischen Rechtswissenschaft (Geojurisprudenz)* (1928). See David Thomas Murphy, *The Heroic Earth: Geopolitical Thought in Weimar Germany, 1918–1933* (1997) 112–117.

59 Hans Richter, Book Review (1928) 54 Archiv des öffentlichen Rechts 140–153.

60 See Andrew Gyorgy, 'The Application of German Geopolitics: Geo-Sciences' (1943) 37 Am. Pol. Sc. Rev. 677, 686: "*Geojurisprudenz* is thus neither law, nor geography, nor politics. It is the projection of National Socialist power dreams and wishful spatial thinking into the sphere of jurisprudence".

61 James M Blaut, 'Environmentalism and Eurocentrism' (1999) 89 Geographical Review 391–408.

62 The formulation, as well as the tone of the argument itself, have led most analysts to think of the section as being clearly ironic. See, most recently, Vickie B. Sullivan, Montesquieu on Slavery, in The Cambridge Companion to Montesquieu 182–197 (2023); most emphatically and polemically, René Pommier, *Défense de Montesquieu: sur une lecture absurde du chapitre 'De l'esclavage des nègres'* (2014). But revisionist readings exist, suggesting that Montesquieu should be read to have meant what he said. Julien T Lafontant, *Montesquieu et le problème de l'esclavage dans l'Esprit des lois* (1979); Odile Tobner, *Du racisme français: quatre siècles de négrophobie* (2007).

the institution of slavery in hot regions and the need for Africans to be slaves.[63] With regard to British India, one Legislative Council member argued that "it would be even absurd to sentence an Englishman and an Indian to the same term of confinement in a jail" given that the heat was much tougher on Europeans than on Indians.[64] In the Panama canal zone, West Indian workers received lower wages and fewer benefits than their white coworkers because "being accustomed to the tropics and the different mode of living they do not require special quarters or a frequent change of climate, which is so necessary to the health of the more skilled employee from a temperate zone".[65] Climate theory had turned into racist comparative law; the relevant differences were no longer those between climates but those between bodies.

4 THE END OF CLIMATE THEORY

4.1 THE QUIET DISAPPEARANCE OF CLIMATE

And then climate slowly disappeared from comparative law – mostly less by rejection than by silence. It is no longer mentioned among the factors explaining the differences between laws or as being relevant to the understanding of laws. It has no more use in classifying legal orders. It cannot explain legal change. And it plays no role in any of the relevant methods. Formalist comparative lawyers, focusing on rules and institutions only, have no place for climate. For instrumentalist comparative lawyers who understand law as a means to an end, climate is no more than a background condition that can usually be ignored; the same is true for functionalist comparative lawyers. And culturalist approaches, aimed at explaining law within a broader context, do not care for climate because the context they are interested in is confined, mostly or entirely, to social and societal aspects. Comparative law has become interdisciplinary, but that interdisciplinarity remains within the social sciences and the humanities – history, sociology, economics, anthropology, political science, and maybe linguistics, but not geography, geology, or physics.[66]

Exceptions are rare. Eduard Wahl tried to reestablish the notion in a 1973 article dedicated to climatic influences on Eastern and Western law, but his article was full of stereotypes, void of evidence of climatic influence, and of limited use or influence.[67] Eleven years later, Bernhard Grossfeld lamented that contemporary law often overlooked important factors: "primarily the natural environment (particularly the geographical situation of a country), the climate, population density, and language and religion)".[68] His suggestion that Islamic colonization in Spain never managed to move further north than 41° latitude because "[b]eyond that, the geographic environment colors the law and enables or hinders the transfer of legal institutions"[69] strikes me as less "obvious" (his term) than spurious. Otherwise, there is – as far as I can see – near silence.

63 "Our position is thoroughly identified with the institution of slavery— the greatest material interest of the world. Its labor supplies the product which constitutes by far the largest and most important portions of commerce of the earth. These products are peculiar to the climate verging on the tropical regions, and by an imperious law of nature, none but the black race can bear exposure to the tropical sun." A Declaration of the Immediate Causes which Induce and Justify the Secession of the State of Mississippi from the Federal Union, Jan 9, 1861.

64 Maddock's Minute of September 4, 1844, in NAI Legislative Proceedings, October-December 1844, October 12, 1844, No. 5, cited after Elizabeth Kolsky, 'Codification and the Rule of Colonial Difference: Criminal Procedure in British India' (2005) 23 Law and History Review 631, 663.

65 PCC 28 B 233/1919, cited after Stephen Frenkel, 'Geography, Empire, and Environmental Determinism' (1992) 82 Geographical Review 143, 149.

66 E.g. Maurice Adams and Mark van Hoecke (eds), *Comparative Methods in Law, Humanities and Social Sciences* (Elgar 2021); Jaakko Husa, Interdisciplinary Comparative Law: Rubbing Shoulders With the Neighbours or Standing Alone in a Crowd (Elgar 2023); Giuseppe Bellantuono, 'Introduction: Comparative Law and Interdisciplinary Bridges' 12 (2021) Comparative Law Review 1–8; Uwe Kischel, *Comparative Law* (OUP 2019) 10–26; K Zweigert and H Kötz, *Introduction to Comparative Law* (OUP 3rd edn 1998) 6–12.

67 Eduard Wahl, 'Influences climatiques sur l'évolution du droit en orient et en occident – contribution au régionalisme en droit compare' (1973) 25 Rev. int. dr. comp. 261–276; German version 'Klimatische Einflüsse auf die Entwicklung des Rechts in Ost und West, Ein Beitrag zum Regionalismus in der Rechtsvergleichung' in Wolfgang Hefermehl and Rudolf Nirk (eds), *Festschrift für Philipp Möhring zum 75. Geburtstag, 4. September 1975* (1975) 1–18. On Wahl, see André Lepej, *Eduard Wahl (1903–1985): Rechtswissenschaft und Rechtspolitik* (2023).

68 Bernhard Grossfeld, ‚Geography and Law' (1984) 82 Mich. L. Rev. 1510, 1511; no further insights concerning geography and climate are to be found in Bernhard Grossfeld and Marion Welp, 'Adolf Bastian und die Geographie im Recht' (1994) 25 Rechtstheorie 503–524; Bernhard Grossfeld, *Einige Grundfragen des Internationalen Unternehmensrechts* (1987) 14.

69 Bernhard Grossfeld, 'Geography and Law' (1984) 82 Mich. L. Rev. 1510, 1513.

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It is hard to discuss and analyze the absence of a theory. But three areas in which climate theory is mentioned may serve to illustrate its actual decline. A first and often used example concerns water rights: access 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.[70] Grossfeld cites the Colorado Supreme Court for an explicitly comparative argument:

> [T]he common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith.[71]

In a broad sense, this seems to accord with Montesquieu's suspicion as to the possibility of legal transplants.[72] But it has little to do with Montesquieu's climate theory. What is at stake here are concrete rules, not the spirit of the law. And the reason for differentiated treatment is merely that water has different values in different areas; it is not remarkable that rules for valuable objects will always differ from those for worthless objects.

A second example demonstrates the decline of climate theory. In 1931, Walter Prescott Webb published his hugely popular book "The Great Plains – A Study in Institutions and Environment".[73] The book was an explicit "comparative study of what was in the east and what came to be in the west"[74] Webb suggested that the Great Plains were radically environmentally different from areas in the East, and that these differences shaped society by forcing settlers to develop new technological tools, new institutions, and new ways of life – including different laws. That thesis has inspired fascination despite its methodological flaws: "[t]he book is based largely on secondary sources, … [a]nd Webb's grasp of the material relies more on feeling, intuition, and personal involvement than on original research and a firm grasp of the facts."[75] His argument has not withstood scrutiny. Kermit Hill, testing the thesis in the 1990s, found it unconvincing: the motor of legal innovation was economic needs and trade with the rest of the USA and the world; differences among the regions of the USA seemed overstated.[76] In fact, argues Mark Ellis, it was the shared legal culture of settlers from different parts of the East Coast that enabled them to quickly establish new law in the settled areas[77] The Wild West, in other words, was not only less wild than we imagine, it was also less quintessentially Western.

My third example concerns a still vibrant use of climate to establish identity – the question of a Nordic legal family. Zweigert and Kötz touch on climate theory when they suggest, in their influential textbook, that "the Age of Enlightenment's idea of codification lost some of its allure in Scandinavia, as so many continental ideas seem to do when they enter the cooler climate of the North"[78] More overtly, Husa et al. suggest that "[s]ocial capital, the social bonds at the individual level, relations of trust … may well have long historical roots, as poverty, the cold climate, and other risks to life may have generated solidarity beyond the normal centuries ago."[79] (Much has changed since Aristotle and Montesquieu thought of Northerners as fierce independent warriors.) But they admit that evidence is scant, adding that "[i]t would not be easy to try to test

70 Uwe Kischel, *Comparative Law* (OUP 2019) 10–26; Bernhard Grossfeld, 'Geography and Law' (1984) 82 Mich. L. Rev. 1510, 1514.

71 *Coffin v. Left Hand Ditch Co.* (1882) 6 Colo. 443, 446, 447, cited in Bernhard Grossfeld, 'Geography and Law' (1984) 82 Mich. L. Rev. 1510, 1514.

72 An extreme version was proposed during the Cold War by Karl Wittfogel, a German-American communist turned anticommunist. Wittfogel updated Montesquieu's idea of climate-based oriental despotism into a theory he called "hydraulic despotism": those who control the water control the people. Karl A Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (1957).

73 Walter P Webb, *The Great Plains. A Study in Institutions and Environment* (1931).

74 Walter P Webb, *The Great Plains. A Study in Institutions and Environment* (1931) 507.

75 George O'Har, 'Where the Buffalo Roam – Walter Prescott Webb's The Great Plains' (2006) 47 Technology and Culture 156, 158.

76 Kermit L Hall, 'The Legal Culture of the Great Plains' (1992) Great Plains Quarterly 658.

77 Mark R Ellis, 'Legal Culture and Community on the Great Plains: State of Nebraska v. John Burley' (2005) 36 Western Historical Quarterly 179–199,181–182. See also Mark R Ellis, *Law and Order in Buffalo Bill's Country: Legal Culture and Community on the Great Plains, 1867–1910* (2007).

78 Zweigert and Kötz (n 66) 284–285.

79 Jaako Husa, Kimmo Nuotio and Heikki Pihlajamäki, 'Nordic Law – Between Tradition and Dynamism', in id., *Nordic Law – Between Tradition and Dynamism* (2008) 1, 36.

this point directly" and "[t]he social ethos could of course also be a myth."[80] Similarly, Ole Lando grounds the existence of a Nordic legal family on a climate-theoretical argument but admits that evidence may be hard to garner: "Nobody, I believe, can measure how much climate, history, language and religion create a common mentality, but they certainly do".[81] Indeed, an existing study on "Nordic Moral Climates", invoking Montesquieu's climate theory, shows fairly little of such influence.[82] Mostly, it seems, climate is invoked here as an ex post fokloric, perhaps ironic, element to establish identity – but no more than that. Serious climate theory this is not.

4.2 COLONIZATION AND GLOBALIZATION

Why the decline? A first reason for the decline of climate theory was that it stood in contrast to colonization and globalization. If climate shapes men, then men will change when moved from one zone to another. Herodotus had already reported how Cyrus counseled the Persians against conquering more fertile lands with weaker inhabitants – they would win due to their superior strengths, but after settling, the warmer climate would weaken them.[83] Bodin also believed that people would change when moving to a new climate, though it would take some generations.[84] Montesquieu agreed: "the children of Europeans born in the Indies lose the courage of their own climate." (XIV.3) This made transplanting people – like transplanting laws – useless because they would lose their natural advantages. Montesquieu thought that the Spanish colonization of the New World was a disaster because the climate was wrong for them. And so creole lawyers in the Caribbean were able to invoke Montesquieu in their favor: laws had to match local conditions and could thus not be dictated from France.[85] Those in favor of colonization had to argue against this aspect, and they did: the aforementioned Teutschenbrunn argued that the Vandals (whom he claimed as Germans) kept their customs and laws when they established an empire in Africa.[86] We can see obvious traces of this tradition in today's discussions on legal globalization: transplants are considered easy ("one size fits all"), and so is the transfer of people.

4.3 DISCIPLINARY CLIMATE INDEPENDENCE

A second reason for the decline is disciplinary in nature: climate was driven out of the relevant disciplines. In sociology, Durkheim praised Montesqieu in general, but he was suspicious of climate determinism.[87] Montesquieu had attributed differences in suicide rates to differences in climate. Durkheim demonstrated meticulously that a correlation between suicide rates and climate, or between suicide rates and seasonal temperatures, could not be found.[88] But his opposition was also disciplinary. Social facts, Durkheim argued famously, must be explained through social facts. They are neither reducible to individuals, nor can they be derived from non-human facts outside of society. Sociology and social disciplines have to be, in that sense, self-sufficient.

Parallel arguments exist in anthropology. Franz Boas rejected geographical determinism with empirical arguments resembling those of Durkheim: "no direct relation between these conditions

80 Others have supported this view, too. Jørn Øyrehagen Sunde, 'The History of Nordic Legal Culture and Court Culture: The Story of What Should not Have Been, but Still Came to Be' in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds), *Rethinking Nordic Courts* (2021) 49, 54–55.

81 Ole Lando, Nordic Countries, a Legal Family? A Diagnosis and a Prognosis, Global Jurist Advances, vol. 1, no. 2, 2001.

82 Ulla V Bondeson, *Nordic Moral Climates: Value Continuities and Discontinuities in Denmark, Finland, Norway, and Sweden* (2003), xv–xvi.

83 "'Do so,' said he; 'But if you do, make ready to be no longer rulers, but subjects. Soft lands breed soft men; wondrous fruits of the earth and valiant warriors grow not from the same soil.' Herodotus, *Histories*, Book IX.122.

84 See Marian J Tooley, 'Bodin and the Mediaeval Theory of Climate' (1953) 28 Speculum 64, 76f.

85 See Malick W Ghachem, 'Montesquieu in the Caribbean: The Colonial Enlightenment between "Code Noir" and "Code Civil"' (1999) 25 Historical Reflections/Réflexions Historiques 183–210.

86 Johann Heumann von Teutschenbrunn, *Der Geist der Gesetze der Teutschen* (1761) 8.

87 "The relation is not readily discernible between temperate climate and the tendency to suicide; to require such a hypothesis the facts must be unusual agreement. Now, far from there being a relation between suicide and a given climate, we know suicide to have flourished in all climates. […] We must therefore seek the cause of the unequal inclination of peoples for suicide, not in the mysterious effects of climate but in the nature of this civilization, in the manner of its distribution among the different countries." Emile Durkheim, *Suicide: A Study in Sociology* (2005, French orig. 1897) 54–55.

88 Emile Durkheim, *Suicide: A Study in Sociology* (2005, French orig. 1897) 54–56 (climate), 56–73 (seasonal temperatures).

and the development of early culture has been proved to exist".[89] Like Durkheim's, his main criticism was in part disciplinary: he did not deny that climate had an impact; what he rejected was a determinist view. Climate "acts through the intermediary of economic conditions. These, being a part of culture, are much more closely related to other manifestations of cultural life than environment".[90] Climate, therefore, became at best a societal theme.

These developments were influential on comparative law. The self-limitation of sociology to social facts translated into sociologically informed comparative law. Eugen Ehrlich pointed out in 1916:[91]

> As law is essentially a form of social life, it cannot be explained scientifically otherwise than by the working of social forces. The natural circumstances brought forward by Montesquieu, geographical configuration or climate, cannot have any influence on law except by operating on society, which in turn acts on law. Thus in order to discover the social foundation of law we must seek the very form in which it is engendered by society.

This "social" or "cultural" turn in comparative law was thus a turn away from not only formalism and natural law, but also the natural sciences. Comparative law lost interest in these natural circumstances. Culturally inspired comparative law currently gives much weight to context and is willing to accept difference, but that difference is confined to the human world. Today's comparative lawyers in favor of difference today invoke cultural and not natural differences.

4.4 FACTUAL CLIMATE INDEPENDENCE

More important than these ideological and disciplinary reasons may be a third one: factual climate independence. Comparative law in the 20th century was no longer concerned with climate because climate played less of a role in reality. As early as 1903, Frederick Pollock suggested that Montesquieu had "overrated the influence of climate and other external conditions, and underrated, if he did not wholly neglect, the effects of race and tradition."[92] "Man cannot exist unless he meets the challenge of his habitat", agreed Melville Jean Herskovits in 1955, only to add that "man not only adapts himself to his natural setting, but as his adaptation becomes more effective, he is freed from the demands of his habitat, making it possible for him at times to challenge or even defy its limitations."[93] Otto Kahn-Freund, in his widely influential article on legal transplants from 1974, translated the point to comparative law: "Montesquieu's list of environmental factors has not lost its validity in the course of the more than two hundred years since he wrote it", he said.[94] However, in the 200 years since Montesquieu, "the geographical, the economic and social, and the cultural elements have greatly lost, but [...] the political factors have equally greatly gained in importance."[95] "Montesquieu could not have written the way he did about geographical or economic or sociological and cultural factors in a world in which over wide areas only a tiny proportion of the gainfully employed population works on the land, and in which in the developed countries most people earn their living in industry, commerce and public service in ways almost indistinguishable from one country to another."[96]

This factual explanation may be the most important one for the decline. It was now *in fact* the case that many people were independent from climate. The 19th and 20th century had brought numerous inventions creating such independence. The steam machine made us independent from natural energy sources like water. Electric light made us independent from the dark, and sunscreen made us independent from the sun. Air conditioning made us independent from

89 Franz Boas, 'Anthropology' in Edwin R A Seligman and Alvin S Johnson (eds), *Encyclopedia of the Social Sciences* (1935) 99.

90 Franz Boas, 'Anthropology' in Edwin R A Seligman and Alvin S Johnson (eds), *Encyclopedia of the Social Sciences* (1935) 100.

91 Eugen Ehrlich, 'Montesquieu and Sociological Jurisprudence' (1916) 29 Harv. L. Rev. 582, 584.

92 Pollock (n 10) 83.

93 Melville J Herskovits, *Cultural Anthropology* (1955) 95, 103.

94 Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Mod. L. Rev. 1, 8.

95 ibid.

96 Id at 9. Alan Watson disagreed on the relevant weight of environmental and political factors but only because he viewed both as relatively irrelevant. Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 L.Q.R. 79.

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the heat. Fertilizers made us independent from the quality of the soil. Pesticides made us independent from bugs. Advanced methods of irrigation made us independent from the rain. Greenhouses made us independent from the cold. Trucks and trains made us independent from reliance on food that could grow nearby. In short, it was possible to deny a determinative role to climate because climate clearly no longer had such a determinative role. The temperature rise in the 20th and 21st centuries has been much greater than at any time previously in human history, and yet it has had less impact on many of us than did the Little Ice Age.

Notably, as Kahn-Freund already mentioned, factual climate independence existed more strongly in the developed North than in the South. In an ironic way, the asymmetry of technical advances replicated the hierarchies described by Montesquieu. He had argued that those in the North have agency because they are strong, whereas those in the South have none because they are lazy. Now those in the North had agency because they were wealthy enough to protect themselves from the climate (and can afford to be lazy), while those in the South had none because they remain subject to it (and are thus forced to work ever harder). It has become one of the tasks of comparative law to help those in the South achieve such agency, too; the field of law and development was, and is, a means towards that end. At the same time the remaining inequalities between North and South have given fodder to those who viewed the less developed world, including its laws, as intrinsically less capable.

5 THE RETURN OF CLIMATE?

A theory once hugely influential has been thoroughly discredited, and for good reasons it seems. It plays next to no role anymore in today's scholarship, with few exceptions. Why should we care?

5.1 THE NEW CLIMATE DETERMINISM

First, climate theory is not really dead. Its stereotypes, the presumed superiority of societies in the cold North over those of the hot South, have survived the decline of the theory that produced them.[97] It underlies Jared Diamond's "Guns, Germs, and Steel" and David Landes' study on "The Wealth and Poverty of Nations", both bestsellers published just before the turn of the century.[98] Diamond suggests that Eurasia's West-East orientation within one midlatitude temperate climate zone facilitated agriculture and enabled migration and thereby helped Europeans develop better than those elsewhere. Landes argues (as though nothing had changed since the 18th century) that temperate climates are optimal, that people cannot work properly in the heat, and that slaves had to come from hot climate zones. Not surprisingly, both Diamond and Landes find Asia despotic and explain this with climate. Such theories have obvious implications for the law. If hot countries are doomed anyway, then law and development is futile. Law reforms cannot help further growth, or even ease inequality: legal transplants are advisable only between countries with a similar distance from the equatorial line.[99]

Such a renewal of climate determinism finds new inspiration in the climate crisis. If climate independence was, as I have argued, one reason for the decline of climate determinism, then that independence is now over. If Montesquieu was right that "nature and climate almost alone dominate savages", perhaps we are all savages now, subject to the folly of the climate. Indeed, the same Jared Dimond draws parallels between the collapse of Rapa Nui's civilization and our own predicament with the climate crisis, a daring comparison that must necessarily paper over many important differences.[100] Others go further: climate catastrophists suggests that civilization is necessarily doomed, subject to the climate's mechanical processes.

Unsurprisingly, such new climate determinism reaches into the law. Montesquieu's correlation between hot climate and intolerance, or despotic regimes, is being revived, though sometimes

97 Pierre Gourou, 'Le déterminisme physique dans « l'Esprit des lois »' (1963) 3 L'Homme 5, 10f.

98 Jared Diamond, *Guns, Germs and Steel: The Fates of Human Society* (1997); David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor* (1998). For an earlier variant, see Eric L Jones, *The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia* (1981).

99 Philip M Parker, *Psychoeconomics – The Basis for Long-Run Economic Growth* (2000) 212. A reviewer finds that "the language moves from science to fiction." Paul J Zak, Book Review (2000) 2 Journal of Bioeconomics 275.

100 Jared Dimond, *Collapse: How Societies Choose to Fail or Succeed* (2005).

with a twist: now, an allegedly despotic China serves as a model for effectiveness.[101] A group of Russian scholars even draws on Montesquieu to predict, bizarrely, "the expansion of the territory with a hot climate[,] and certain countries will gradually gravitate from polycracy to monocracy, which, in turn, will result in economic, political, legal, moral and other changes, reducing the number of adherents of Christianity in favour of Islam and in the establishment of new customs and traditions."[102] Indeed – if there is only one overarching societal goal, namely to stop climate change – law is severely limited and determinism is plausible.[103] Some argue that the climate crisis will lead to a globally uniform law.[104] Others think it must lead to a disappearance of law and anarchy.[105] After law had separated itself from climate altogether, now climate seems to be back with a vengeance.

Of course, the new climate theory is not the same as the old. For example, our understanding of climate is dramatically different from that of previous times. For the Greeks, climate was a geographical term; the Greek word κλίμα refers to the angle of the sun. Only around Montesquieu's time did that geographical concept come to be slowly replaced by a physical one. But the underlying science was long badly understood; for Herder climate was "ein Chaos von Ursachen".[106] Today, its impact can be predicted and measured with better (and more frightening) precision than in former centuries. And this improved understanding of natural sciences in general has simultaneously led to an improved belief in deterministic, mechanical facts, and to a downplaying of human agency and discretion, including in the law. So it is not surprising that we should also find a new climate determinism in the law.

5.2 AGAINST CLIMATE DETERMINISM AND CLIMATE INDEPENDENCE

This new turn to determinism is a dangerous development. If it was wrong to expel climate from comparative law altogether, it would be equally wrong to simply let ourselves be governed by it now. Climate determinism is not the only alternative to climate independence. "Climate is, and always has been, political," says Mike Hulme, a professor of geography at the University of Cambridge, who argues forcefully against what he calls climate reductionism – namely to think about the future entirely through the predictions of climate science.[107]

We saw two moves that led to the decline of climate in comparative law: the disciplinary separation of social sciences and humanities (and law) from physical sciences, and the empirical independence from climate that replaced the equally exaggerated idea of climate determinism. The right response is to revise both steps. As to the first, it is a mistake to yield the specific expertise about societal developments existing in our disciplines to disciplines that know far less about society. It made sense for Durkheim to establish a new discipline by differentiating it from another, but that is not a compelling reason to preserve such a distinction today.[108]

As a consequence, we can realize that distinctions like those between society and climate, between nature and culture, are products of disciplinary thinking that do not withstand scrutiny. We are not ruled by climate in a deterministic way, nor are we independent from it. Climate conditions us, but it does not determine our lives. Culture and history, as we know,

101 R A Beck, 'Viewpoint: Climate, liberalism and intolerance' (1993) 48 Weather 63–64; Lisa J Piergallini, 'An Empirical Investigation of Montesquieu's Theories on Climate' (2016) 10 International Journal of Economics and Management Engineering 2017–2028. Aleksey Anisimov, Marina L Davidova and Ervin A Ahverdiev, Conceptual Studies of the Historical and Modern-Day Influence of Climate on Forms of Government, Political and Socio-Economic Processes: A View from Russia (2021) 48 Cuadernos Salmantinos de Filosofía 353–372.

102 Aleksey Anisimov et al, 'Conceptual Studies of the Historical and Modern-Day Influence of Climate on Forms of Government, Political and Socio-Economic Processes: A View from Russia' (2021) 48 Cuadernos Salmantinos de Filosofía, 353–372,

103 For a critical view, see, Mike Hulme, *Climate Change Isn't Everything – Liberating Climate Politics from Alarmism* (2023).

104 See Geoff Mann and Joel Wainwright, *Climate Leviathan: A Political Theory of Our Planetary Future* (2018).

105 Hugh C. Dyer, 'Climate Anarchy: Creative Disorder in World Politics' (2014) 8 International Political Sociology 182–200.

106 Johann Gottfried Herder, *Ideen zur Philosophie der Geschichte der Menschheit* (1965) 276.

107 Mike Hulme, Foreword, in Sara Miglietti and John Morgan (eds), *Governing the Environment in the Early Modern World: Theory and Practice* (2017) xii; Mike Hulme, 'Reducing the future to climate: A story of climate determinism and reductionism' (2011) 26 Osiris 245–266.

108 Franz Mauelshagen, 'Bridging the Great Divide: The Anthropocene as a Challenge to the Social Sciences and Humanities' in Celia Deane-Drummond, Sigurd Bergmann and Markus Vogt (eds), *Religion in the Anthropocene* (2017) 87, 95.

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are not destiny, nor can we shape them at our will. Instead, law and society coproduce each other: each is conditioned by the other. The same is true for climate: law is neither determined by climate nor can it shape climate, nor is it independent from it. Rather law is conditioned by it. And climate is always also constructed by humans – the notion of the Anthropocene makes that clear. Nature and culture cannot be viewed as opposites; they are coproduced and not separable – Donna Haraway speaks, appropriately, of natureculture.[109] History must include planetary history, as Dipesh Chakrabarty proposes.[110]And politics must involve the nonhuman world not just as object and resource but as agent – Michel Serres' *contrat naturel* comes to mind, as does Bruno Latour's parliament of things.[111]

Such insights, familiar by now in other disciplines, must also matter in law. We see promising approaches. Alain Pottage's "Holocene jurisprudence" is an attempt; Horatia Muir Watt's Ecological Jurisprudence is another.[112] Alexander Damianos argues in favor of a law of the Anthropocene – one that is critical of human impact on nature but does not purport the ability to place itself outside of it.[113] Louis Kotzé and others make the case for an "earth system law".[114]

6 "L'ESPRIT DES LOIS DE LA NATURE" – TOWARD CLIMATIZING COMPARATIVE LAW

Bruno Latour has suggested thinking about a new and extended Esprit des Lois – an "Esprit des Lois de la nature", as a shift from our contemporary ancien régime to a new nouveau régime, a régime climatique.[115] This would of course be a move forward. At the same time, with the explicit invocation of Montesquieu's work, it would also be a move back in time. Such a move cannot be complete, nor should it be. Montesquieu's worldview is not ours. His empirical knowledge was vastly inferior to ours. And the racist implications of his theory should give us pause. And yet, going back to Montesquieu may help us to move forward today. Ironically, the conceptual world of Montesquieu was one in which suggestions like those made above would have appeared less absurd. Sara Miglietti is among those who propose the integrated ecology of renaissance climate theories as a possible model for us today.[116] Courtois and Larrère offer similar assessments of the 18th century.[117] Courtois, in particular, shows how Montesquieu argued for neither climate determinism nor climate independence but a correlation or conjunction between climate, society, and laws. In his world, laws of physics and the laws of humans were not fully different from each other: there was no absolute causality in the former and no absolute discretion in the latter.[118] And there was no strict separation between the human and the non-human world. In all these ways, Montesquieu suddenly appears surprisingly contemporary.

109 Donna J Haraway, *The Companion Species Manifesto: Dogs, People, and Significant Otherness* (2003); Donna J Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (2016); Philippe Descola, *Par-delà nature et culture* (2005).

110 Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (2021).

111 Michel Serres, *Le contrat naturel* (1990); Bruno Latour, *Making Things Public* (2005).

112 Alain Pottage, 'Holocene jurisprudence' (2019) 10 Journal of Human Rights and the Environment 153–175; Horatia Muir Watt, *The Law's Ultimate Frontier: Towards an Ecological Jurisprudence* (2023).

113 Alexander Damianos, 'Law and Geology for the Anthropocene: Toward an Ethics of Encounter' (2022) 34 Law & Critique 165–183.

114 Louis J Kotzé et al, 'Earth system law: Exploring new frontiers in legal science' (2022) 11 Earth System Governance 100126. https://doi.org/10.1016/j.esg.2021.100126; see also, Juan Auz, 'The Political Ecology of Earth System Law: Outlining a Lex Capitalocenae' (2023) 40 Wis. Int'l 217.

115 Bruno Latour, *Face à Gaïa: Huit conférences sur le Nouveau Régime Climatique* (2015) 12; Bruno Latour, *Down to Earth: Politics in the New Climatic Regime* (2018).

116 Sara Miglietti, 'Between Nature and Culture: The Integrated Ecology of Renaissance Climate Theories' in Pauline Goul and Phillip Usher (eds), *Early Modern* Écologies. *Beyond English Ecocriticism* (Amsterdam University Press 2020) 137, 138–139: "If it is true that the fundamental challenge of our time is to generate an integrated 'ecology of relationships' that would allow us to overcome the modern divide between man and nature, then it seems to me that Renaissance climate theories have much to offer contemporary debates."

117 Jean-Patrice Courtois, 'The Climate of the Philosophes during the Enlightenment' in Sara Miglietti (ed), *Climates Past and Present: Perspectives from Early Modern France* (Special Issue of Modern Language Notes 132 (2017); Catherine Larrère, 'Montesquieu et l'espace' in Thierry Paquot and Chris Younès (eds), *Espace et lieu dans la pensée occidentale: de Platon à Nietzsche* (La Découverte 2012) 147–169.

118 Jean-Patrice Courtois, 'Le Physique et le moral dans la théorie du climat chez Montesquieu', in Caroline Jacot Grapa et al (eds), *Le Travail des Lumières. Pour Georges Benrekassa* (Champion 2002) 139–156.

Of course, an "Esprit des lois de la nature" must, like its model, the Esprit des Lois, be a comparative law work. What does that require? And what does it make possible? I want to suggest three possibilities.

6.1 LAW IN NATURECULTURAL CONTEXT

First, we should continue to understand law in context but expand what we mean by context. For a long time, the context of law that we looked at was social – cultural, economic, political. We must learn – relearn – that context is also physical. It includes territory and, yes, climate. A comparison of laws in their context must also be a comparison of laws in their climatic context. It is not only the cultural but the naturecultural context that we have to account for.

Take legal transplants. We know that Montesquieu was wrong to posit that it would be a great coincidence if laws made for one context could be transplanted to another. They can; it is just the case that they do not remain unchanged: they are adapted to their new context.[119] Why should that concern only the cultural and not the natural context? Why should we not expect that laws can be transplanted between different climatic contexts, but that they also will be adapted?

The coproduction of law and climate involves a comparison in two different ways, depending on whether the rule or the climate is held constant. In one direction, we can analyze how different climates condition law: how do similar contract rules fare between different climates, say in France on the one hand and in OHADA countries on the other? Climate is not isolated as a factor here, but neither is it excluded – it becomes one of many aspects of the context. In the other direction, we can analyze how different laws condition climate, for example: what is the impact on climate of different ways of regulating the traffic industry?

6.2 A BROADER INTERDISCIPLINARITY

Second, we should expand interdisciplinary. The idea of comparative law as an autonomous discipline has, like that of autonomous law, fortunately disappeared. Comparative law today is in exchange with economics, sociology, history, and anthropology, and more recently also with critical theories. But it is not yet, at least not significantly, in exchange with the climate sciences – geology, physics, chemistry, and the like. Such interdisciplinarity is difficult, likely more difficult than the kind of interdisciplinarity we have experienced before. It goes beyond extracting insights made in other disciplines and plugging them into our own discipline – though that of course is also necessary. Some approaches exist, for example in the field of law and geography, and also in the connections between science and technology studies (STS) and law. In all these fields we find discussions on how the law is involved in the cocreation of both nature and culture – and how the latter duo helps cocreate law.

What we as comparative lawyers can perhaps add to this research is experience with variance. When Latour devises his rather abstract parliament of things, comparative law can help expand his idea with its expertise in actually existing parliaments. Whereas Serres speaks of a *contrat naturel*, he does not specify what kind of contract he has in mind. We comparative lawyers know the variance of contracts, and we can compare his model to existing ones. Should we require nature to provide consideration in order for a contract to be binding, as is done in the common law? Must the contrat naturel have a *cause*, as French law requires, and what would it be? Moving further, the contrat naturel requires turning nature into a legal subject that can enter into contracts. This is indeed done in the emerging debate about rights of nature – and that is a comparative discussion.[120]

6.3 PLANETARY LAW

This leads to a third proposal: planetary law. We are now used to looking at law as world law, or global law, or transnational law. In all these, the relevant aspects remained social. But the totality is bigger than that – it is, in the fortunate juxtaposition proposed by Chakrabarty, not

119 See Ralf Michaels, '"One Size Fits All" – On the Mass Production of Legal Transplants' in Günter Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture Law* (2013).

120 Daniel Bonilla Maldonado and Ralf Michaels (eds), Global Legal Pluralism and Rights of Nature (forthcoming).

only global but also planetary, including concerns not only of humanity but also of the planet.[121] Planetary law, rather than (or at least in addition to) global law, can become a domain of comparative law, as transnational law has been before.[122]

What this might enable is the comparison of law beyond human law. We know, in comparative law, not to confine the notion of law to state law, and we appreciate the need to include religious laws and customary laws.[123] Can we also include laws of nature? For Montesquieu, this would have appeared less absurd than it may appear to us today. These notions did not belong to entirely different spheres. Can we reestablish that? Can we understand laws of nature as regulations; does climate regulate? Should we understand climate as law enforcement, enforcing laws of nature on those foolish enough to have broken the natural contract? On the other hand, should we understand climate as a lawbreaker?

This has implications for theories of legal change, long a core concern of comparative lawyers. Traditionally, we studied change in human laws only. We must of course continue to do so in response to climate change. Can we apply ideas of legal change to natural laws, too? Should we understand climate change as legal change? Can a harsher climate be understood as a harsher law?

"Climate is the first of empires", Montesquieu suggested. Maybe we should take him at his word. We should compare climate to other empires.[124] But we should also use such knowledge to determine in what way we want to be governed by climate. We should try to avoid climate despotism. We should see whether we can replace climate's empire with climate's republic. Maybe we can enter into a peace treaty with climate, perhaps even establish a confederation. If these are even questions that we can ask, then comparative law has already moved forward. And, perhaps surprisingly, we have Montesquieu to thank for the inspiration.

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121 Dipesh Chakrabarty, *The Climate of History in a Planetary Age* (2021).

122 See, Laura Mai and Emille Boulot, 'Harnessing the Transformative Potential of Earth System Law: From Theory to Practice' (2021) 7 Earth System Governance 2. https://doi.org/10.1016/j.esg.2021.100103; Eric C Ip, 'An Emergent Planetary Health Law' (2023) 72 International & Comparative Law Quarterly 1047–1067, doi:10.1017/S0020589323000325.

123 Ralf Michaels, 'On the comparability of religious laws' (2022) Ancilla Iuris 18–40.

124 For a comparison of empires, see, e.g., Phiroze Vasunia, 'The Comparative Study of Empires' (2011) 101 The Journal of Roman Studies 222–237, with further references in n 2.