

Climate Change

Is law able to solve a global and intergenerational challenge?

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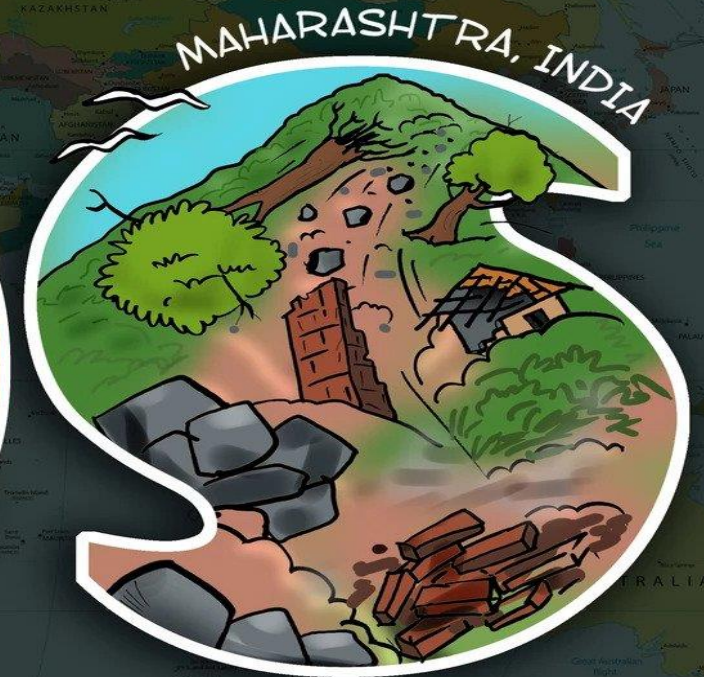
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The Challenge of Climate Change and the Law

Climate change and its consequences are one of the biggest threats and challenges for mankind 5

*What On Earth!*TM

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We need regulation – regulation is what we need! ⁶

- What would happen without climate law and policies?
- Likely, without any political measures the consumption of fossil fuels would reduce at a certain point of time, simply due to technical and economic developments (esp. rising costs of fossil energies and reducing costs of renewable energies). In the long run, this could even lead to full decarbonization.
- But there is a far-reaching consensus that this would be too late to avoid serious negative consequences for mankind. Thus, there will be **dramatic transformation** and it is **up to us to determine how much it will be forced on us or how much we control and govern it**. It clearly should be a deliberative process and for this state governance and regulation is needed.

The answer of the law – ever stricter targets and goals

Meanwhile, there is a quite solid consensus in research, politics and also international law regarding necessary greenhouse gas mitigation goals

Article 2 Paris Agreement

This Agreement ... aims to strengthen the global response to the threat of climate change ... including by: Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change...

More and more countries set binding climate neutrality goals, e.g. Germany 2045, EU 2050

Why is Climate Regulation so Challenging?

Climate change as a purely global problem

The atmosphere as a global common good

We know for centuries how difficult it is to protect common goods (“the tragedy of the commons”)

- it is difficult to bring individual state interests and personal interests in line with common interests



Climate as wicked problem and systemic risk

Climate Change as a wicked problem that is difficult or impossible to solve because of incomplete, contradictory, and changing requirements that are often difficult to recognize

Climate change involves systemic risks which are risks that unexpected and unlikely interactions could threaten the survival of natural and human systems

Systemic risks are typically characterized by inherent complexity, profound uncertainty and, at times, overwhelming ambiguity

Transformation of the energy system and the society as a whole

The term transformation vs. transition

The term “transition” is not a contrast to the term “transformation”; transition denotes more the process of “going across”, implying movement from one state or condition to the other; by contrast, the term transformation describes changes that profoundly affect the attributes of the “thing” which is being transformed; it emphasizes the normative aspect, the dimension of the challenge and the political task

The law is used to regulate via incremental changes

Challenge: Is incremental change with a transformative agenda possible?

Regulating with a multitude of government levels, policy and legal fields as well as actors

Multilevel governance

Int- level most demanded, but weak; municipalities important, but sometimes weak, sometimes uncoordinated; regional level, national and supranational levels: all levels have power to legislate: these legislations need to be coordinated

Climate policy is subject to a shared competence between EU and its National States (based mainly on the environment and energy competences, but also market harmonization, trans-european networks and others)

European Union has established a significant body of climate law with a sophisticated set of instruments, e.g. emissions trading with border adjustment, innovative command-and-control policies like fleet standards for cars, innovative informational instruments like labeling or information disclosure

EU is constantly adapting and reinforcing them (important round of “Green Deal” and “Fit for 55”)

Regulating with a multitude of government levels, policy and legal fields as well as actors

- Climate change policies are intertwined with other policy fields
 - On the one hand: dilemata or hard choices like environment
 - On the other hand: options for win-win-situations like green growth
- Cross-cutting field of law
 - Nearly all areas of law affected; thus, only restricted number of specific law acts
- Many actors
 - Not only political actors (see multi-level governance), but also private ones: companies (like TSO), NGO, prosumers...
 - Consequence: next to system-based approach agency-based approach needed; power structures matter
 - “vicious circle of inaction”

Normative and political nature of climate transformation

Normative and political nature of climate policies

Problem 1: Climate governance needed, which is more than regulation

Problem 2: resistance or acceptance

Problem 3: climate change and climate policies distributive conflict

- on international level (north-south) and national (winners and losers)
- just transition with intertemporal cost-benefit distribution

Related question: can democracy handle the climate crisis

Relevant power structures and differences

Regulating with a long time horizon

Climate transformation regulation is a challenge or task that expands over a time horizon of decades (see targets and goals)

It is impossible to establish a consistent and comprehensive regulatory concept for the whole period. Instead, we have to take into account the process character of the task taking into account uncertainties regarding different relevant aspects:

- Development of climate change and its impacts (and the knowledge about it)
- Socio economic developments (demographics; economy and lifestyle; institutions, environment and natural resources, technology)
- Development of climate policies

Regulating with a long time horizon

Consequence: regulation the yet unthinkable

This means that the evolving climate law has to work with scenarios regarding these developments and adapting them on the base of new knowledge; policies of others have to be integrated on the base of prognosis; regarding own policies a choice between different (alternative) options should be made (phases, steps...)

How to regulate pathways towards far reaching targets (in substance and time)

International Climate Law Framework

The Weakness of public international law

In theory this is the right place to tackle climate change; in practice this is not possible

No central legislature – consensus based law-making via customary law or treaties

Fragmentation

No direct enforceability (but retaliation etc.)

UNFCCC process not enough or a success story?

Background: international law is necessarily based on consensus

Positive aspects: - Setting up a convincing goal (Article 2) to be concretized in subsequent protocols - Setting up convincing and powerful principles, like the principle of common but shared responsibilities

How to get to legally binding commitments of national states? The approach of binding international mitigation obligations had to fail; this could have been predicted in a rational choice perspective e.g. Kyoto Protocol States reluctant to binding mitigation commitments – only industrial states agreed on rather moderate commitments Russia has more or less been bought by insane concessions („hot air“) In the end no enforcement possible – see the case of Canada 7

UNFCCC process not enough or a success story?

The Paris Agreement established a viable bottom-up system based on formal principles Pledge and review mechanism: “Nationally Determined Contributions”

- NDCs every five years
- Article 3 requires “ambitious efforts”
- Principle of progression: no step back
- public register and reviewing system
- Global stock-take assessing progress (first time 2023)

Paris Agreement is demanding for transformative change

How to improve the effectiveness of international climate law

- Just transition (special importance of climate finance and technology transfer)
- Integrating civil society
- Front-runners, cooperations and climate clubs: supranational approach as one way out of the international climate law and policy crisis
- A central challenge for climate (mitigation) regulation is linking the international legal framework with national legal orders (including supranational ones like EU): “Marry” climate law with development and trade law!

Main Challenges for the Law on the Road towards Reaching the Climate Goals

The dependency of national (and supranational) climate laws from an effective international legal order

National (and supranational) law as final place of regulation

- but they cannot solve a global problem alone
- stuck in multi-level governance
- stuck in short-sighted perspectives of the electorate
- stuck in national interests and topics

How to bridge?



Possible roads forward – legal (policy) aspects

Motivation

States: advantages of frontrunners, e.g. EU

Companies: giving legal certainty for the way ahead and investments

People: participation in legislation and involvement in energy transformation

Special challenge: how to deal with populism and the fact that people are afraid of change?

Bundling of interests and topics

- Climate policy and green industrial policy („green growth“)
- Climate policy and social policy

Possible roads forward – legal (policy) aspects

New concepts for climate legislation

- Linking and streamlining with international climate law
- Sunrise legislation
- Inserting goals and targets, intermediary and sectoral targets into the law
- Rotating planning system (sufficiently binding and flexible) with focus infrastructure

Framing a transnational dogmatic of climate law

The case of climate litigation based on shared insights on human rights

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Thank you for your attention!



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