Editorial Note

Addressing the (Lack of) Effectiveness of Environmental Law and the Gap between Law in the Books and Law in Action

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In this second issue of this volume we present a series of contributions addressing two ever green topics, those of designing effective legal frameworks for protecting the environment and of addressing the gap between law in the books and law in action.

First, Charlotte Streck, Moritz von Unger and Sandra Greiner’s account of the latest Climate Change COP 25 meeting in Madrid underlies the failure by States to agree upon a strengthening of the international agreements concerning the action to mitigate climate change. Once again, despite the importance of adopting a new agreement, States could only agree upon continuing searching for an agreement at the Conference of the Parties in 2020. This outcome should not come as a surprise. Governments failure to adopt effective policies to fight against climate change can be witnessed also at national level. In the Netherlands, the Urgenda case reached its final stage on 20 December 2020, thanks to the judgment of the Dutch Supreme Court confirming the outcome of the first instance and appeal judgments, thus ordering the State to do more.1 As also

1 Dutch Supreme Court, Urgenda v The Netherlands, ecli:NL:HR:2019:2006. This judgment will be analysed in the next issue of this journal. For an account of the first instance court judgment see in this journal, in particular, L. Bergkamp, A Dutch Court’s ‘Revolutionary’ Climate Policy Judgment: The Perversion of Judicial Power, the State’s Duties of Care, and Science, JEEPL 2015 12(3–4), 241–263; A.S. Tabau and C. Cournil, New Perspectives for Climate Justice: District Court of The Hague, 24 June 2015, Urgenda Foundation versus the Netherlands, JEEPL 2015 12(3–4), 221–240. See also for a more general discussion on climate change, human rights and judicial protection in this journal, L. Krämer, Climate Change, Human Rights and Access to Justice, JEEPL 2019 16(1), 21–34.
underlined by Streck, von Unger and Greiner, and written in this journal in 2018, the fact that the judiciary has to deliver judgments based on tort law to influence government policies should not only be seen as a chance in terms of public interest litigation, but also as a warning for the inability of public law to address fundamental societal challenges. Such a development places a lot of pressure on the judiciary. Judiciary which might not always be best placed to review public law shortcomings. Tort law knows its limitations, as also proven by the many cases in which tort law based judgments did not end with an order towards the government to take actions to protect the environment, both in the Netherlands, as regards air quality law, and in other countries as regards climate change action. More generally, as evidenced by a recent stream of manuscripts, the judiciary is not always well equipped to deal with the complexity of environmental cases, given the intrinsic technical nature of such cases.

5 See e.g. the recent account of climate law cases in J. Jendrośka, L. Squintani & M. Reese, ‘The courts as guardians of the environment – New developments in access to justice and environmental litigation’, ICLG to Environmental & Climate Change Law, 2020, 6–13 with reference to case law from Germany, Ireland and the UK. See also in this journal, Bernhard W. Wegener, Urgenda – World Rescue by Court Order? The “Climate Justice”-Movement Tests the Limits of Legal Protection, JEEPL 2019 16(2), 125–147.
The importance of equipping enforcement and judicial bodies with the rights tools emerges also from the contribution of Farah Bouquelle and Luc Lavrysen in this issue. This contribution is one of the few scientific publications focusing on the legal aspects of the fight against trading in endangered species. Its analysis of the functioning of the enforcement and judiciary system in Belgium in this field concludes with an enumeration of possible solutions for improving the functioning of the system, which could also serve as a source of inspiration for discussions about the improvement of enforcement and judiciary systems in other countries and other areas of environmental law.

The need for improving the effectiveness of environmental law in practice emerges also from the contribution of Anne Vanhellemont in this issue. Her study of the reporting obligations under a selection of EU environmental measures brings forward the fragility of such regulatory framework and makes proposals for improvements. Improvements in the reporting practice would benefit the quality of environmental information which, besides improving societal discussions, would arguably also benefit the functioning of enforcement and judiciary systems by providing enforcement and judiciary bodies with clearer and more reliable data about the status of the environment and the effectiveness of actions aiming at improving it.

As suggested by Kendro Pedrosa’s contribution in this issue of JEEPL, the Court of Justice of the European Union is aware of the importance of ensuring that Member States provide clear and reliable data about the status of the environment and the effectiveness of actions aiming at improving it. His contribution focuses on the Craeynest and others judgment in the field of air quality law.7 His analysis shows how the Court in this judgment limits States freedom about how to assess ambient air quality. It also discusses the approach followed by the Court about the powers that national courts should have to review Member States choices in this field of environmental law.

All in all, the contributions in this issue of JEEPL greatly contribute the academic and societal discussions about the importance of designing effective environmental law and addressing the gap between law in the books and law in action. I wish the reader a great pleasure in reading these contributions.