Transnational Environmental Law, 12:3 (2023), pp. 461–468 © The Author(s), 2023. Published by Cambridge University Press
doi:10.1017/S2047102523000225

EDITORIAL

The Quest to Close the Accountability Gap in Environmental Law

1. INTRODUCTION

This issue of *Transnational Environmental Law* (*TEL*), like most, presents contributions that cover a variety of legal domains, among which are environmental law, biodiversity law, energy law, and climate law. The equally varied problems that the authors of these contributions examine range from climate damage and extreme weather modification to decarbonization, approached through different doctrinal and comparative methodologies. Notwithstanding their variation, each contribution to this issue emphasizes the need for a 'radical societal shift'[1] in the manner in which environmental law and adjacent fields are organized, enforced, and interpreted.

Two common threads run through all of the articles, the first of which is the persistence of the accountability gap. Classical enforcement mechanisms have been found to be ineffective for environmental problems,[2] which has led to calls for new mechanisms to close the accountability gap and to develop techniques for bottom-up enforcement. The second is the recognition that law must be studied in its broader context in order to adequately understand and conceptualize it and to facilitate radical societal shifts. Insights and concepts from other fields (such as 'mainstreaming' and 'regulatory intermediaries' taken from public policy and new governance and regulatory enrolment literature, respectively), as well as from novel theories of law and legal methodologies (such as disciplinary comparisons) can help lawyers to initiate the radical societal shift for which our times are calling.

2. ACTORS AND THE ACCOUNTABILITY GAP: BOTTOM-UP ENFORCEMENT OF ENVIRONMENTAL LAW

Governments are considered the primary actors in the initiation and promulgation of environmental legislation. However, the contributions to this issue of *TEL* show that this traditional paradigm no longer holds. In 'Empowering Through Law: Environmental NGOs as Regulatory Intermediaries in EU Nature Governance',

[1] K. Huhta & S. Romppanen, 'Comparing Legal Disciplines as an Approach to Understanding the Role of Law in Decarbonizing Societies' (2023) 12(3) *Transnational Environmental Law*, pp. 649–70.

[2] L. Krämer (ed.), *Enforcement of Environmental Law* (Edward Elgar, 2016).

Suzanne Kingston, Edwin Alblas, Micheál Callaghan and Julie Foulon examine private bottom-up enforcement as a technique for promoting compliance with European Union (EU) environmental law.[3] This approach not only serves as an alternative to conventional enforcement mechanisms but also constitutes a 'central plank of the EU's efforts to address under-compliance with EU environmental laws'[4] and, at the same time, a promising legal experiment.[5] Environmental non-governmental organizations (ENGOs) have become key actors in the private enforcement of environmental law. Both governments and international institutions expect them to 'aid in the pursuit of policy goals'[6] through a form of 'orchestration'.[7] Consequently, a type of indirect governance has emerged in which the regulator 'enlists and supports intermediary actors to address target actors in pursuit of [its] governance goals'.[8]

Kingston and co-authors draw on a broad conceptualization of enforcement.[9] César Rodríguez-Garavito and David Boyd, in their article 'A Rights Turn in Biodiversity Litigation?',[10] similarly expand our understanding of enforcement by discussing the role of litigation. Their central proposition is that corporate actors – such as fossil fuel companies, industrial agriculture firms, and plastics and pesticide producers – are contributing to the biodiversity crisis as well as to the climate crisis.[11] The reader learns, however, that 'they are not explicitly incorporated into the regulatory structures established by either international environmental regime [the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity], which widens the accountability gap'.[12] In the authors' view 'litigation is one attempt to close the accountability gap between commitments and actions'.[13]

Climate change cases, especially those that touch upon human rights issues, have already been subjected to extensive and intrusive scrutiny in both scholarly circles and the mass media.[14] Rodríguez-Garavito and Boyd note that this form of 'bottom-up pressure on states'[15] has also become more common in biodiversity litigation, which

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3 S. Kingston, E. Alblas, M. Callaghan & J. Foulon, 'Empowering Through Law: Environmental NGOs as Regulatory Intermediaries in EU Nature Governance' (2023) 12(3) *Transnational Environmental Law*, pp. 469–97.

4 Ibid., pp. 470, 495.

5 Ibid.

6 Kingston et al., n. 3 above, p. 472.

7 Ibid., p. 473.

8 K. Abbott et al., *International Organizations as Orchestrators* (Cambridge University Press, 2015), p. 4 (as cited in Kingston et al., n. 3 above, p. 473, n. 24).

9 Kingston et al., n. 3 above, pp. 472–3.

10 C. Rodríguez-Garavito & D.R. Boyd, 'A Rights Turn in Biodiversity Litigation?' (2023) 12(3) *Transnational Environmental Law*, pp. 498–536.

11 Ibid., p. 500.

12 Ibid., p. 500.

13 Ibid., p. 500.

14 See also the contributions to a special issue on international climate litigation, edited by Benoit Mayer and Harro van Asselt, (2023) 32(2) *Review of European, Comparative & International Environmental Law*.

15 Rodríguez-Garavito & Boyd, n. 10 above, p. 500.

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generates similar potentialities for enforcement and prospective means of addressing the accountability gap.[16]

Margaretha Wewerinke-Singh, in her article 'The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation',[17] also focuses on accountability and protection. She asks the reader to turn their attention to an 'innovative branch of litigation to bridge the persistent gaps',[18] namely the use of rights-based litigation in the context of addressing loss and damage. She argues that this 'this bottom-up strategy leverages human rights to hold governments or corporations to account for their insufficient efforts to address climate change and its consequences'.[19] Reviewing 14 domestic and 10 international climate-related cases on loss and damage from across the globe, Wewerinke-Singh systematically analyzes the remedies that plaintiffs have sought or secured, and formulates a compelling argument for the proposition that – at least as a matter of theory – governments and corporations are 'impelled … to provide tangible remedies for the harm caused' when faced with the prospect of being held accountable under human rights law.[20] She concludes that, while 'rights-based climate litigation alone cannot reorder the globe, it is providing vital steers in the direction of climate justice'.[21]

In 'City-Level Law and Action for Climate-Resilient Development in Southern Africa', Anél du Plessis, Nicolene Steyn and John Rantlo study cities and local governments as key players and a 'fast-emerging force in international (climate change) law'[22] in local climate-resilient developments.[23] They have assumed this role by virtue of their 'close proximity to their constituents and direct exposure to the challenges arising from such issues'.[24] The authors consider cities and local governing authorities as more democratic and as possessing superior capabilities for the management of climate-related issues on a local scale.[25] The authors go on to present case studies of eight cities in four countries in the southern part of Africa (Namibia, Zimbabwe, South Africa, Botswana) where these assumptions about proximity do not apply.[26] The gain that Du Plessis, Steyn and Rantlo seek to extract from this enterprise is an inclusive understanding: we learn that 'how the world is and ought to be responding to climate change is particularly pressing in policy instruments and scholarship that

16 Ibid., p. 500.
17 M. Wewerinke-Singh, 'The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation' (2023) 12(3) *Transnational Environmental Law*, pp. 537–66.
18 Ibid., p. 552.
19 Ibid., p. 539.
20 Ibid., p. 541.
21 Ibid., p. 561.
22 A. du Plessis, N. Steyn & J. Rantlo, 'City-Level Law and Action for Climate-Resilient Development in Southern Africa' (2023) 12(3) *Transnational Environmental Law*, pp. 567–93, at 569.
23 Ibid., p. 569.
24 Ibid., p. 570.
25 Ibid., p. 571.
26 Ibid., pp. 571ff.

https://doi.org/10.1017/S2047102523000225 Published online by Cambridge University Press

focuses on the role of cities in *climate change governance* and the advancement of the international *climate change law* agenda'.[27]

The articles described in the preceding paragraphs all provide ways in which non-state or substate actors can better contribute to bottom-up enforcement of environmental law. Manon Simon, Jan McDonald and Kerryn Brent adopt a different approach in their article 'Transboundary Implications of China's Weather Modification Programme'.[28] They shed light on the Chinese Weather Modification Programme, specifically in the light of the Chinese obligations to monitor, assess, and prevent transboundary impacts under international customary law. The authors describe a state of affairs in which 'issues of local government accountability, enforcement, and public participation remain',[29] and they call for 'greater caution in respect of large-scale weather modification'.[30] They conclude that, although Chinese legislation on safety is sound and detailed, the Chinese domestic legal framework ought to be adjusted both procedurally and substantively so that it aligns with the no-harm principle and with other provisions of international customary law.[31] They also highlight the important role that numerous actors can play in environmental law in the absence of an international agreement on weather modification.[32] For example, the World Meteorological Organization, a specialized agency of the United Nations, can potentially orchestrate international cooperation and exchanges of information.[33] Simon, McDonald and Brent further stress that the Chinese Weather Modification Programme 'continue[s] to feed geopolitical tensions'.[34] This observation is exemplary of another thread that runs through the contributions to this issue: namely, the need for legal problems to be approached in a more holistic manner.

3. LAW IN BROADER POLITICAL AND DISCIPLINARY CONTEXTS

The super-wickedness of the problems of environmental law and of its sister discipline, climate law, has been covered in some depth in a previous *TEL* Editorial.[35] What lies at the heart of these problems is that they call for interdisciplinary approaches, for a 'radical societal shift',[36] and for analyses that account for (geo)political context.[37] The contributions in the current issue also span several areas of legal expertise, but they also go

[27] Ibid., p. 573.

[28] M. Simon, J. McDonald & K. Brent, 'Transboundary Implications of China's Weather Modification Programme' (2023) 12(3) *Transnational Environmental Law*, pp. 594–622.

[29] Ibid., p. 613.

[30] Ibid., p. 631.

[31] Ibid., p. 621.

[32] Ibid., p. 621.

[33] Ibid., p. 622.

[34] Ibid., pp. 597, 618, 622.

[35] T.F.M. Etty & J. van Zeben et al., '"This Battle is Hard and Huge": Intractable Problems in Transnational Environmental Law' (2023) 12(1) *Transnational Environmental Law*, pp. 1–13.

[36] Huhta & Romppanen, n. 1 above, pp. 649–70.

[37] Du Plessis, Steyn & Rantlo, n. 22 above.

https://doi.org/10.1017/S2047102523000225 Published online by Cambridge University Press

beyond it, including scholarship on compliance, regulatory enforcement,[38] and public policy.[39] This interdisciplinarity is aimed at advancing our understanding of environmental law conceptually and theoretically, as well as in practice.

3.1. *Insights from Other Disciplines*

In 'A Conceptual Model for Climate Change Mainstreaming in Government',[40] Alice Bleby and Anita Foerster discuss the potential of 'mainstreaming' as a concept and practice. The notion of 'mainstreaming' comes from the public policy literature and entails the integration of cross-cutting issues of equality, human rights, and gender into the decision making, policy, and operations of government.[41] Drawing on several taxonomies of mainstreaming,[42] as well as on an empirical study of mainstreaming as practised in Victoria (Australia), Bleby and Foerster develop a conceptual model for climate mainstreaming that can find uses not only in academia but also among practitioners.[43] They build on works by Gupta as well as Wamsler and co-authors in order to formulate a mainstreaming model for climate change that is sensitive to the specificities of national and subnational governments.[44] The model contains two pillars: 'the objectives for climate mainstreaming' and 'regulatory, institutional, and capacity and capability-building pathways'.[45] Its purpose is to produce an actionable classification of mainstreaming-related activities and to identify the barriers to and the enablers of the practice.

In their study introduced in Section 2 above, Kingston and co-authors also draw extensively on contributions to other disciplines in order to elaborate on the function of ENGOs in EU environmental law. They examine the problem from the lens of regulatory intermediaries, which has previously been used in the context of the new governance and regulatory enrolment, especially in fields such as the regulation of financial services and food safety.[46] They elaborate on the 'tri-facing' role of ENGO intermediaries between the EU, Member States, and citizens.[47]

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38 Kingston et al., n. 3 above.

39 A. Bleby & A. Foerster, 'A Conceptual Model for Climate Change Mainstreaming in Government' (2023) 12(3) *Transnational Environmental Law*, pp. 623–48.

40 Ibid.

41 G. Allwood, 'Mainstreaming Gender and Climate Change to Achieve a Just Transition to a Climate-Neutral Europe' (2020) 58(S1) *Journal of Common Market Studies*, pp. 173–86, at 177 (as cited in Bleby & Foerster, n. 39 above, p. 624, n. 2).

42 Bleby & Foerster, n. 39 above, p. 632.

43 Ibid. pp. 626.

44 J. Gupta, 'Mainstreaming Climate Change: A Theoretical Exploration', in J. Gupta & N. van der Grijp (eds), *Mainstreaming Climate Change in Development Cooperation: Theory, Practice and Implications for the European Union* (Cambridge University Press, 2010), pp. 67–96, as well as C. Wamsler, C. Luederitz & E. Brink, 'Local Levers for Change: Mainstreaming Ecosystem-based Adaptation into Municipal Planning to Foster Sustainability Transitions' (2014) 29 *Global Environmental Change*, pp. 189–201 (both cited in Bleby & Foerster, n. 39 above, p. 624, nn. 4 and 3 respectively).

45 Ibid., pp. 633–6, 636–46.

46 Kingston et al., n. 3 above.

47 Ibid., pp. 472–5.

https://doi.org/10.1017/S2047102523000225 Published online by Cambridge University Press

3.2. *Insights from Other Fields of Law*

Kaisa Huhta and Seita Romppanen's article 'Comparing Legal Disciplines as an Approach to Understanding the Role of Law in Decarbonizing Societies'[48] suggests a novel methodological approach to legal scholarship, namely disciplinary comparison. Building on Tuori's theory of the multilayered nature of modern law,[49] they argue that in order to resolve (super-wicked) problems such as decarbonization, one must examine not only the uppermost stratum of legislation but also the 'subsurface levels of law, referred to as the *legal culture* and the *deep structure of the law*'.[50] In their case study, energy law and climate law are treated as comparable disciplines to shed light on the 'doctrine, institutional set-up, competences, and decision-making powers'[51] that shape the legal path to decarbonization. Huhta and Romppanen ask that climate and energy scholars 'understand the increasing interdependence between climate and energy law'.[52] Notably, they do not include the discipline of environmental law in the equation but posit that further research is needed to determine whether their methodology can be useful in tackling other social challenges that involve radical departures from long-dominant paradigms.[53]

Jérémie Gilbert's article 'Creating Synergies between International Law and Rights of Nature'[54] examines other areas of (international) law in order to determine whether the rules of nature and international law are compatible with each other.[55] Gilbert argues that, despite extensive evidence of asynchronism, some fields of international law can be fructified by the rights of nature and that discourse should revolve not around dominance over or ownership of nature, but around the formation of a rational relationship between humans and their organic environment.[56] He then turns to an analysis of concepts such as care and kinship, as well as to the representation of nature in international law. The concepts in question were first popularized in international law under the guidance of Indigenous peoples. He concludes that these 'innovative systems of nature representation, custodianship duties, and stewardship'[57] could pave the way for new interpretations of various international law principles and approaches – such as state sovereignty, the precautionary approach, and intergenerational equity – as well as new perspectives on the means by which such principles can be brought into practice.[58]

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48 Huhta & Romppanen, n. 1 above.

49 K. Tuori, *Critical Legal Positivism* (Routledge, 2017), p. 147 (as cited in Huhta & Romppanen, ibid., p. 650, n. 6).

50 Huhta & Romppanen, n. 1 above, p. 650.

51 Ibid., p. 668.

52 Ibid., p. 669.

53 Ibid., p. 670.

54 J. Gilbert, 'Creating Synergies between International Law and Rights of Nature' (2023) 12(3) *Transnational Environmental Law*, pp. 671–92.

55 Ibid., p. 673.

56 Ibid., pp. 678–84.

57 Ibid., p. 691.

58 Ibid., p. 692.

https://doi.org/10.1017/S2047102523000225 Published online by Cambridge University Press

Du Plessis, Steyn and Rantlo stress that, even though their 'analysis is interested in the law',[59] it is not a critical analysis of it but rather 'an evaluation of the political, de facto choices made by selected local governments as to how and to what extent to utilize their governing authority (legislative and executive) towards climate-resilient development'.[60] This mode of analysis is often employed in studies of subnational constitutional law.[61] As far as the climate law agenda is concerned, the authors call for context-specific understanding. According to the authors, the need for such an understanding emerges from the institutional limitations of urban governance in southern Africa and from the conflicting influences that socio-political demands for sustainability and the gravity of climate change impacts have come to exert in the region.[62]

Lastly, the articles by Margaretha Wewerinke-Singh and by César Rodríguez-Garavito and David Boyd turn to human rights law in order to examine litigation over climate change-induced loss and damage[63] and 'to anticipate likely trends, opportunities, and obstacles for future [rights-based biodiversity] cases'.[64] Rodríguez-Garavito and Boyd use a rights-based biodiversity database to substantiate their hypothesis that rights, as well as the institutional edifice that has been erected around them, are beginning to supply the bases of legal claims that have the protection of diversity, whether of species or of ecosystems, as their principal purpose.[65]

4. CONCLUSION

The articles in this issue all expand the focus of environmental law to include new actors and new means of bridging the accountability gap. The pursuit of a higher vantage point from which to analyze developments in environmental law and adjacent fields is another commonality. Of course, much works remains to be done. The Anthropocene has seen the wide institutional dispersal of authority and the wide conceptual dispersal of law combine to form a large and seemingly unnavigable accountability gap. That gap often presents itself as an insurmountable obstacle to the realization of plans and models of the kinds that are presented in this issue. It is our hope that future contributions to *TEL*, to the literature in general and, most importantly, to policy will enable us to land on the further shore in the near future.

5. *TEL* EDITORIAL BOARD ANNOUNCEMENTS

As *TEL* Editors, we owe a debt of gratitude to our stellar team of Assistant Editors for their invaluable contributions to this journal's quality control and production process.

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[59] Du Plessis, Steyn & Rantlo, n. 22 above, p. 569.

[60] Ibid., p. 569.

[61] R.F. Williams, 'Foreword: Comparative Subnational Constitutional Law', in P. Popelier, G. Delledone & N. Aroney (eds), *Routledge Handbook of Subnational Constitutions and Constitutionalism* (Routledge, 2022), pp. xv–xxvi, at xviii (as cited in Du Plessis, Steyn & Rantlo, n. 22 above, p. 569, n. 12).

[62] Du Plessis, Steyn & Rantlo, n. 22 above, p. 573.

[63] Wewerinke-Singh, n. 17 above, p. 537.

[64] Rodríguez-Garavito & Boyd, n. 10 above, p. 502.

[65] Ibid., p. 501.

https://doi.org/10.1017/S2047102523000225 Published online by Cambridge University Press

After two years of dedicated service, Edwin Alblas and Howard Jyun-Syun Li will move on to other endeavours, with which we wish them every success. At the same time, we are delighted to extend a warm welcome to two new Assistant Editors: Laura Kaschny (Tilburg University, The Netherlands) and Orla Kelleher (Maynooth University, Ireland), both of whom have already made themselves invaluable in their first months on the job.

https://doi.org/10.1017/S2047102523000225 Published online by Cambridge University Press