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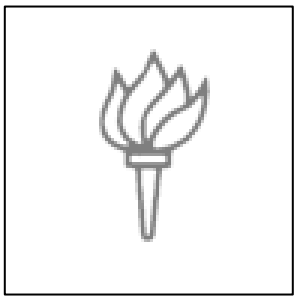

Litigating Climate Change in Ireland

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Abstract

Ireland generates the third-highest level of per capita emissions of greenhouse gases in the European Union and its government has consistently recognized the need for urgent action and acknowledged any delay therein 'will only create more consequences for society and ultimately cost us more to make the transition'. But its 2017 National Mitigation Plan, which it was required to adopt under the Climate Action and Low Carbon Development Act (2015), was generally agreed to reflect policies that would not enable Ireland to meet its targets in 2020 or beyond.

A legal challenge to the Plan brought by Friends of the Irish Environment led the High Court to acknowledge in 2019 that the group had standing to challenge the Plan and to accept, for the purposes of the case, that the Irish Constitution includes an 'unenumerated', or derived, right to a healthy environment. But the High Court rejected the challenge for several reasons and concluded that the government enjoyed considerable discretion in how to respond to global warming and how to satisfy the strictures of the Act.

This article examines the principal issues that the Irish Supreme Court will have to consider when it hears the appeal by the FIE in June 2020. It addresses the questions of standing, justiciability, the applicable standard of review, the right to a healthy environment under Irish law, and the interpretive role of the constitutional Directive Principles of Social Policy.

1. Introduction

According to its Central Statistics Office, Ireland generates the third-highest level of per capita emissions of greenhouse gases in the European Union. In June 2020, the Irish Supreme Court will hear an extremely important case relating to the Irish government's obligations to address climate change. On appeal directly from the High Court, in *Friends of the Irish Environment v. Government of Ireland, Ireland and the Attorney General* (hereafter *FIE*), a prominent Irish civil society group, Friends of the Irish Environment, seeks judicial review of the Irish Government's 2017 National Mitigation Plan, adopted as required by the *Climate Action and Low Carbon Development Act (2015)*.[1] The Plan must set out the manner in which Ireland will transition to a low carbon, climate resilient and environmentally sustainable economy by 2050, specifying the policy measures required to reduce greenhouse gas emissions to the extent necessary to achieve this aim. In formulating it, the Government was required to have regard to, *inter alia*, the ultimate objective of the United Nations Framework Convention on Climate Change and any mitigation commitment made by the European Union in relation to that objective, as well as Ireland's existing obligations under the law of the European Union and international agreements, including the Paris Agreement. The Plan was heavily criticised by Ireland's Climate Change Advisory Council, a statutory agency established by the Act, on the basis that Ireland was unlikely to meet its 2020 emission reduction targets if the measures in the Plan were adopted. This criticism led the Council to suggest that the Plan should be urgently amended to include additional policies that would enable Ireland to meet these targets. Friends of the Irish Environment argued that the Plan's failure to introduce measures that would reduce greenhouse gases meant that it was both *ultra vires* the Act and a

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[1] *Friends of the Irish Environment CLG v. Government of Ireland and Attorney General* [2019] IEHC 747 (hereafter: *FIE*).

violation of fundamental rights enshrined in the Constitution and the European Convention on Human Rights, including the right to life, the right to bodily integrity and the right to a healthy environment. At first instance, MacGrath J in the High Court ruled against Friends of the Irish Environment, holding that the Plan was *intra vires* the Act and placing great reliance on his finding that the Government enjoyed 'considerable discretion' in this area.[2] In the course of doing so, the Court declined to find that the making or the approval of the Plan itself had breached the relevant constitutional rights.

On appeal, the Supreme Court will therefore have the opportunity to resolve important arguments regarding climate change and its impact on human rights. In this article, we consider a number of key issues that are likely to arise during the course of the appeal. Section 2 analyses MacGrath J's finding regarding Friends of the Irish Environment's standing to challenge the Plan. Section 3 then turns to the justiciability of the Plan, while Section 4 focuses on the applicable standard of review, discussing proportionality and the contrast between *FIE* and the English Court of Appeal's recent decision in a case concerning Heathrow airport. Section 5 considers the right to a healthy environment and the rationale for recognising such a right as a part of Irish law, and Section 6 analyses the interpretive role that the Directive Principles of Social Policy in Article 45 of the Constitution might play within this case of exceptional importance. We argue that, in light of the fundamental rights at stake, particularly the rights to life, to bodily integrity and to the environment, as well as the rights of children, the Supreme Court has the opportunity to explore and resolve a number of crucial questions with which other courts around the world have recently been grappling.

2. Standing

Standing can be an obstacle for environmental organisations that initiate climate change litigation. When considering such cases, some courts have declined to grant standing on the basis that the organisation concerned has failed to demonstrate a unique interest that is adversely affected by the impact of climate change.[3] In the *FIE* case, however, the High Court found that Friends of the Irish Environment enjoyed standing to challenge the Plan because the case raised important environmental concerns that have an impact on the public at large.[4] This section will consider the approach taken by MacGrath J to the question of standing.

In Ireland, the traditional test for standing in constitutional cases requires applicants to demonstrate that the law being challenged has directly caused them to suffer injury or prejudice.[5] Since the 1980s, however, NGOs in Ireland have enjoyed the benefits of a relatively liberal exception to this rule. This exception was first formulated in *Cahill v. Sutton*, where Henchy J observed:

> …there will be cases where the want of the normal locus standi on the part of the person questioning the constitutionality of a statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked. For example, while the challenger may lack the personal standing normally required, those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights. In such a case the court might decide to ignore the want of normal personal standing on the part of the litigant before it.[6]

Although the exception was initially limited to cases where there was a 'transcendent need' for the plaintiff to enjoy standing, this was subsequently relaxed in *Crotty v. An Taoiseach*. That case concerned an Act that impacted 'the whole constitutional and political structure' of Ireland rather than affecting the plaintiff in a unique or special way.[7] In these circumstances, which seem analogous to the context of climate change, Barrington J found that the plaintiff had a legitimate interest in challenging the Act that justified allowing standing, regardless of the fact that the plaintiff

[2] *Ibid*, at 112.
[3] *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and others, A-2992/2017*
[4] *FIE* (n1), at 132.
[5] *Cahill v. Sutton* [1980] IR 269, at 284.
[6] *Ibid*, at 285.
[7] *Crotty v. An Taoiseach* [1987] IR 713, at 732.

was unable to establish a particular exigency.[8] Although this approach is broad, it is not unlimited, particularly when public interest groups are involved. In order for NGOs to take advantage of the exception they must establish that they have a 'bona fide concern and interest' by reference to the 'nature of the constitutional right sought to be protected.'[9] In *Digital Rights Ireland v. Minister for Communication*, McKechnie J expanded on these principles in the course of granting standing to an NGO that alleged the Irish government had mismanaged the processing and storage of the data of a large group of mobile phone users.[10] He took into account a number of factors, including that the NGO was a sincere and serious litigant who was not vexatious, the importance of the constitutional questions raised by the case, the nature of the public good that the plaintiff sought to protect, and that it was an effective way to bring the action because individual owners of mobile phones were unlikely to litigate the matter.[11] In a recent decision the Supreme Court has limited this approach to standing slightly by holding that the plaintiffs must show an actual or anticipated adverse effect on their interests, rather than simply demonstrating that their interest is bona fide.[12] However, the Court also noted that the exceptions would still apply in these circumstances. It observed that 'if…a court is satisfied that the impugned provisions had no effect upon a person, let alone on their interests or rights, that would be fatal to…the plaintiff's standing to bring the claim, unless one of the exceptions to the primary rule of standing can be established.'[13]

In accordance with these principles, MacGrath J approached the question of standing by reference to the impact on Friends of the Irish Environment's interests and the nature of the constitutional rights in question.[14] He found that it did have standing both because of the significance of the environmental and constitutional issues raised, and the fact that these issues affected both Friends of the Irish Environment's members and the public at large.[15]

In considering MacGrath J's assessment, it is important to acknowledge the nature of climate change and the difficulties that it creates for traditional legal doctrine in different areas.[16] Like many types of environmental harm, climate change will affect people generally and in similar ways.[17] Moreover, while there is a high likelihood that these harms will materialise in the near future if adequate mitigation measures are not implemented, in many cases those likely to be the most affected are yet to suffer any particular harm or loss. In these circumstances, traditional doctrines of standing, causation and redressability, which often require plaintiffs to demonstrate that they have suffered harm or loss as a direct result of the conduct in question,[18] have the potential to preclude litigants from seeking remedies that can either prevent climate change harms from occurring or enable them to obtain compensation when they do, thereby denying access to justice. By granting standing to Friends of the Irish Environment, the High Court adopted an approach that takes account of the particularly grave harm that climate change will cause and the consequences of not ensuring that standing is available to enable such challenges to be brought.

The High Court's approach is thus consistent with the principles regarding public interest standing applied more generally by the Irish courts and cognisant of both the nature of the threat posed by climate change and the need for government action to be subject to appropriate scrutiny. It is also consistent with the approach adopted by courts in other jurisdictions when managing cases that relate to environmental harms. In the Philippines, for example, the Supreme Court has developed rules that authorise citizen suits brought by 'any Filipino citizen in representation of others, including minors or generations yet unborn.'[19] Similar approaches have been adopted in

[8] *Ibid*, at 732.
[9] *Ibid,* at 742.
[10] *Digital Rights Ireland Ltd v. Minister for Communication and Others* [2010] 3 IR 251, at 251.
[11] *Ibid*, at 293.
[12] *Mohan v. Ireland* [2019] IESC 18, at [11].
[13] *Ibid*, at 22.
[14] *FIE* (n1), at 128.
[15] *Ibid*, at 132.
[16] Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change', *80 MLR* 183 (2017).
[17] Erin Daly and James May, *Global Environmental Constitutionalism* (Cambridge University Press: 2014), at 129.
[18] Fisher et al (n16), at 185.
[19] Daly and May (n17), 131.

both Latin America and India, as noted by Daly and May, who have observed 'in Latin America, constitutional and statutory provisions have encouraged courts to expand standing for environmental cases even to those who cannot show a direct and individual injury; in India and its neighbours, courts have had to infer broad standing from legal and cultural norms.'[20] Given the longstanding thrust of Irish law in relation to standing, the stakes involved in this particular case, and the ramifications for environmental protection of a narrowing of the rules, it is to be hoped that the Irish Supreme Court will confirm this approach on appeal.

3. Justiciability

Climate change undoubtedly poses particular challenges that courts must address. Some have argued that, as a polycentric, complex issue, it requires 'a 'break' in the continuity of existing legal practices and doctrinal 'business as usual', and there has been considerable academic commentary about the proper role of courts in relation to climate change laws and policy.[21] Climate mitigation targets cut across a wide range of sectors and require comprehensive regulation, and courts may understandably be hesitant to intervene in light of the significant policy issues at hand. MacGrath J in the High Court was clearly aware of this concern, noting that 'the Act is concerned with matters which have a significant policy content' but he ultimately refrained from explicitly concluding that the Plan was justiciable. He added, however, that the Government was held to enjoy 'a considerable discretion.'[22] The question of discretion will be discussed in Section 4 below, but the Supreme Court has already indicated, in granting leave to appeal in the *FIE* case, that '[t]he availability of judicial challenge to the legality of the Plan by the Government [and] the standard of such review if adoption of the Plan is justiciable as matter of law… are issues of general public legal importance.'[23]

The initial threshold question of whether the courts can adjudicate at all on the adequacy of governmental action with regard to climate change is one which has confronted many courts around the world in recent years, as indicated by the list contained in an **Annex** below of the principal cases over the past five years. Many common law courts have answered this question in the affirmative, finding that they should 'play a role in Government decision making about climate change policy.'[24] The High Court of New Zealand in *Thomson v. Minister for Climate Change Issues,* reviewing half a dozen such climate policy-related cases in the US, Canada and England as well as the Netherlands, noted that 'courts have not considered the entire subject matter as a 'no go' area.'[25] That is, courts have consistently held that climate mitigation targets and plans are *not* exempt from judicial review and that, though governments must have some latitude in setting climate policy, governmental discretion is not absolute. There is a growing body of case law suggesting that the fact that decisions relating to climate change have 'significant policy content' does not exempt these decisions from judicial review.[26] The English Court of Appeal recently emphasised the fact that 'climate change is a matter of profound national and international importance of great concern to the public', while nonetheless addressing an 'entirely legal question'.[27] Indeed, the High Court in *FIE* noted that, 'while the court should be vigilant in ensuring that it does not trespass upon the Executive power of State, nevertheless, consistent with its constitutional functions, the court should also be slow to determine that an issue is not justiciable and

[20] Daly and May (n17), 132.
[21] Fisher et al (n16); see also Jacqueline Peel and Hari Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015); Lucas Bergkamp and Jaap Hanekamp, 'Climate Change Litigation Against States: The Perils of Court-Made Climate Change Policies', *24 European Energy and Environmental Law Review 102* (2015).
[22] *FIE* (n1), at 112.
[23] Supreme Court Determination, *Friends of the Irish Environment CLG v. Government of Ireland and Attorney General,* [2020] IESCDET 13, 13 February 2020.
[24] *Thomson v. Minister for Climate Change Issues* [2017] NZHC 733, at 133.
[25] *Ibid*, at 133.
[26] See, for example: *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25, *Massachusetts v. Environmental Protection Agency* 127 S CT 1438 (2007), *Plan B Earth v. Secretary of State for Transport and others* [2020] EWCA Civ 214; *Stichting Urgenda v. Government of the Netherlands (Ministry of Economic Affairs and Climate Policy)*, ECLI:NL:HR:2019:2007; and *Juliana v. United States* No 6:15 CV1517-TC (DC Or, 8 April 2016), upheld on review in *Juliana v. United States* 217 F Supp 3d 1224 (DC Or, 10 November 2016).
[27] *Plan B Earth v. Secretary of State for Transport and others* [2020] EWCA Civ 214, at 2.

therefore excluded from review.'[28] There therefore appears to be a general consensus that climate policy-related cases should not be precluded from judicial review.

It is nonetheless important to consider the arguments made in respect of non-justiciability. Unsurprisingly, some governments have argued that their plans, policies and targets in relation to the reduction of greenhouse gas emissions and other mitigation measures are non-justiciable because courts should not rule on questions with such broad political and economic policy implications. The Irish government's argument that the Plan is 'a non-justiciable statement of government policy which is not subject to the remedy of judicial review' echoes that made by the government of New Zealand, to the effect that 'the 2030 target decision involves questions of socio-economic and financial policy' and 'is not susceptible of determination by any legal yardstick', and by the United Kingdom government that these issues raise 'serious political and economic questions which are not for [the] court'.[29] All of these arguments were rejected in the respective courts, as noted below.

A second argument advanced by governments is that climate mitigation is a matter for them to decide *over time,* taking into account the economic context at the time, and that current policy does not and cannot represent the entirety of actions the government will take to achieve longer-term targets. Ireland's National Mitigation Plan is characterized as a 'living document', and the government emphasised in the High Court that it did not provide 'a complete roadmap,' and that several other plans would contribute to the eventual achievement of the National Transition Objective.[30] The economic downturn is invoked through the claim that 'finding the appropriate and most equitable manner to address this issue is not going to be easy particularly given the economic circumstances of recent years and where finances are still continuing to stabilise and recover.' Similarly, 'reduced investment capacity over the period of the economic downturn' is put forward as a justification for the 'likely shortfall in terms of reaching Ireland's target of a 20% reduction by 2020'.[31] Indeed, the Act itself requires the executive to take into account the need for the objectives of a national mitigation plan to be achieved 'at the least cost to the national economy' and without imposing 'an unreasonable burden on the Exchequer'.[32] This invocation of economic capacity seems to be designed to justify a strategy of postponing emissions reductions to a future date.

But when the Supreme Court turns to consider comparable arguments in June 2020, the context will have changed significantly for the worse. In April 2020, the Central Bank of Ireland estimated that, as a result of COVID-19, Gross Domestic Product could decline by 8.3 percent in 2020, and more recent estimates are even less encouraging. The dire economic outlook thus sets the scene for the Irish Government to argue strongly that climate change is essentially a matter of economic policy, one that requires the even more difficult balancing of priorities in response to the pandemic, and is thus an exercise solely for the executive. In the meantime, it could point to recent actions such as the Climate Action (Amendment) Bill to demonstrate that it is taking action and to underscore that the Plan should not be viewed in isolation. If 'reduced investment capacity' was felt to justify creating a Plan which would lead to *increased* emissions in 2017, it is likely that the 'economic downturn' will be especially invoked in the summer of 2020 to attempt to preclude judicial review.[33]

But there are strong arguments to suggest that these arguments should not be considered to justify a finding of non-justiciability. Firstly, as noted by Friends of the Irish Environment in the High Court, this is not a request for 'the court to accept a particular policy', rather, the court's role is to review whether the approval of the Plan was *intra vires*, constitutional, and in line with the State's obligations under the European Convention on Human Rights.[34] Irish law is clear that courts may not 'second-guess' the government, nor may they engage in policy-making, but it is vital that legitimate concerns about inappropriate intrusion into policy matters should not lead the courts to

[28] *FIE* (n1), at 94.
[29] *Ibid*, at 38; *Thomson* (n24), at 102; *R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs* [2011] EWHC 3623 (Admin) at [15] (overturned on appeal by the Supreme Court, see footnote 26).
[30] *FIE* (n1), at 103.
[31] Department of Communications, Climate Action & Environment, *National Mitigation Plan*, July 2017, at 31, 19.
[32] Climate Action and Low Carbon Development Act 2015, 4(7)(d)
[33] *FIE* (n1), at 105.
[34] *FIE* (n1), at 65.

abdicate their constitutional *duty* to uphold rights.[35] Not only is the determination of the compatibility of executive action with the Constitution and rights provisions a normal function of the courts, it is indeed 'the solemn duty of [the] Court.'[36] Thus, as MacGrath J correctly noted in the High Court, though courts cannot 'adjudicate as to what is the best method by which the State may carry out one of its Constitutional duties', reviewing the method chosen as against the Constitution, rights provisions and other obligations does not amount to 'deciding policy.'[37] The court is constitutionally required to review the impact on individuals' rights, even where the Plan has significant policy implications.

In response to the argument concerning economic resources and the view of the Plan as a 'living document', the fact that more recent action and future mitigation plans may achieve the set targets and be more in line with human rights obligations does not render the current Plan non-justiciable. It has long been argued by widely-respected experts that delaying emissions reductions is both economically and scientifically unsound. Nobel Economics Prize Laureate, Professor Joseph Stiglitz, has stated that 'the more time that passes, the more expensive it becomes to address climate change.' And the authoritative Intergovernmental Panel on Climate Change (IPCC) noted in 2018 that '[t]he challenges from delayed actions to reduce greenhouse gas emissions include the risk of cost escalation, lock-in in carbon-emitting infrastructure, stranded assets, and reduced flexibility in future response options in the medium to long term (*high confidence*).'[38] Ireland's Climate Change Advisory Council (CCAC) has also warned that Ireland is *already* 'unlikely to deliver' a transition to a low-carbon economy and society and considered that it is 'urgent that additional and enhanced policies and measures be identified in the Plan', thus suggesting that any additional delay further decreases the likelihood of reaching the targets.[39]

Indeed it may be argued that the constellation of different factors points strongly to the need not for a strategy of procrastination which would have no necessary end date, especially given the uncertain economic forecasts for the years ahead, but one which requires the government to act in real time to take its international obligations and its domestic commitments seriously.[40] Both the Irish Government and Friends of the Irish Environment agree that 'there exists a degree of urgency' to counter global warming and that there is 'no dispute between the parties as to… the likely effects of climate change'. Under these circumstances, a finding of non-justiciability would effectively endorse the government's approval of a plan that is certain to miss its own target, accord no weight to the strong recommendations of the statutorily-established advisory body, and would allow emissions to continue to rise in spite of their highly detrimental effects on a broad range of rights.

The Irish Government has argued on appeal that MacGrath J was right to conclude that 'fundamental rights grounds of objection [could not be raised] to the adoption of the Plan in circumstances where the Learned Trial Judge had concluded that the Plan was *intra vires* the Act and the Appellant had not challenged the constitutionality of the Act.'[41] MacGrath J acknowledged that his analysis was based on 'a matter of logic' rather than on any legal authority.[42] But acceptance of this proposition would have far-reaching consequences for Irish law since legislation is clearly capable of according decision-making powers to the executive which could be broad enough to permit action which infringes rights. Executive compliance with legislation is necessary but *not sufficient*. If MacGrath J's conclusion were accepted, areas of law which rely heavily on executive decision-making, such as immigration policy, would be immune from constitutional rights challenges where the government's action did not transgress the bounds of discretion but nonetheless infringed rights. As Biehler has noted, 'courts must be careful not to abdicate

[35] *Ibid,* at 97; see especially *T.D. v. Minister for Education* [2001] 4 I.R. 259.
[36] *Efe v. Minister for Justice, Equality and Law Reform* [2011] 2 IR 798, at 813.
[37] *FIE* (n1), at 89.
[38] Expert Report of Joseph Stiglitz, *Juliana v. United States*, in the District Court of Oregon (Case No.: 6:15-cv-01517-TC), at 35; Intergovernmental Panel on Climate Change, *Summary for Policymakers: Global Warming of 1.5°C* (2018), at D.1.3.
[39] *FIE* (n1), at 14, 24; Climate Change Advisory Council, *Annual Review 2019* (July 2019), at 26.
[40] Katharine Young, 'Waiting for Rights: Progressive Realization and Lost Time' in Katharine G. Young (ed.) *The Future of Economic and Social Rights* (Cambridge University Press: 2019) 654 (arguing that a delay in implementing rights is akin to denying them and that 'waiting [runs] counter to the promise of rights.').
[41] Respondent's Notice, 9 December 2019, 4th ground for opposing an appeal.
[42] *FIE* (n1), at 121-2.

too readily the role which they are required to play in upholding rights'.[43] MacGrath J's argument that executive action cannot be challenged on constitutional rights grounds where the constitutionality of the underlying legislation is not in question would lead to an extraordinary abdication on the part of the judiciary. Brady has rightly observed that 'violations of fundamental rights can be expected to arise just as often in cases involving administrative decisions as in cases involving legislation; arguably even more often.'[44] Contrary to MacGrath J's contention, executive action can breach fundamental rights even where it is *intra vires*. Thus, although the Plan cannot reasonably be held to be *intra vires* the Act because it allows emissions to increase, executive action can be *intra vires* the established statutory framework and nonetheless breach fundamental rights, even where the statutory framework is constitutional.

4. Standard of Review

Although MacGrath J considered the possibility that the court might conclude that the Plan was justiciable, he nonetheless afforded an extraordinary measure of latitude to the executive. The standard of review to be applied in such cases is not only a major issue on appeal in the *FIE* case but it has also been a central question in many recent European climate-related cases. This goes to the perennial question of how intensively courts should scrutinise administrative decisions and taps into the more recent issue with which common law courts have been grappling, namely, whether and when more intensive review or indeed new substantive grounds of review should be applied. In Ireland, much like in England and Wales, courts have increasingly begun to engage with the principle of proportionality and questions as to the appropriate standard of review of executive action which engages fundamental rights. The challenge is to balance their constitutional role as protectors of rights with the legitimate need for appropriate deference to policy-makers.

In the context of climate change, this balance becomes especially complex. This is because of the unique regulatory challenges that arise and the number of different policy areas implicated. But it is also clear that climate change poses severe – indeed, unprecedented – threats to fundamental rights. The disastrous effects on lives, health, livelihoods and food security, among many other indicators, are backed by overwhelming scientific consensus and evidence.[45] Governments around the world, including the Irish Government, are in agreement as to the severity of these impacts on human lives. As stated in the Plan, climate change is 'already having diverse and wide-ranging impacts', including in Ireland, and future effects 'are predicted to include sea level rise; more intense storms and rainfall; increased likelihood and magnitude of river and coastal flooding; water shortages in summer; increased risk of new pests and diseases; adverse impacts on water quality; and changes in the distribution and time of lifecycle events of plant and animal species on land and in the oceans', and there is 'a limited window for real action to ensure that current and future generations can live sustainably in a low carbon and climate resilient world.'[46]

Common law courts are increasingly moving towards more *contextual* judicial review, explicitly varying the intensity of scrutiny where the context requires, and adopting a more searching standard where fundamental rights are at issue. In the English Supreme Court, Lord Mance has stated that 'The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. … The nature of judicial review in every case depends on the context.'[47] Irish courts have perhaps been less explicit, with some judges critical of 'the English "sliding scale" of review', but have nonetheless affirmed that 'what is

[43] Hilary Biehler, *Judicial Review of Administrative Action: A Comparative Analysis* (Round Hall, 3rd ed. 2013)
[44] Alan Brady, 'Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of Meadows' (2010) *32 DULJ 136*, 138.
[45] See, e.g. David Boyd, Expert Statement for *Friends of the Irish Environment CLG v. Government of Ireland and Attorney General*, 25 October 2018. See also A/HRC/10/61; Human Rights Council resolution 18/22; Statement of the UN Special Procedures Mandate Holders on the occasion of Human Rights Day (10 December 2014); Special Procedures of the United Nations Human Rights Council, 'The Effects of Climate Change on the Full Enjoyment of Human Rights,' 30 April 2015
[46] National Mitigation Plan (n31), at 7.
[47] *Kennedy v. Charity Commission* [2014] UKSC 20, at 51.

irrational or unreasonable depends on the subject-matter and the context'.[48] The context here, as is undisputed, is disastrous environmental and human harm.

a. The Proportionality Test

In appealing the High Court judgment, Friends of the Irish Environment argued that MacGrath J was wrong to construe the appropriate level of review as *O'Keeffe* reasonableness 'viewed through the prism of a *Meadows* type proportionality analysis', and that a proportionality test should be applied in assessing the respondents' approval of the Plan. This seems to be correct, but it is also important to note that MacGrath J did *not* apply the standard of review he purported to apply. Instead, he *short-circuited* the analysis by noting immediately that 'given the wide discretion which is available to the Executive, particularly in the context of the wording of the Act, it is difficult to conclude that it has been established by the applicant that the State has acted in a disproportionate manner.'[49] No element of the proportionality principle is in evidence within the judgment. MacGrath J did not use the word 'proportional'; he did not consider the Plan's effects on rights; and he did not consider the legitimacy of the government's objective. There was no consideration of whether the means were rationally connected to the objective of the legislation, whether the means were based on arbitrary considerations, whether rights were impaired as little as possible, or whether the effect on rights was proportional to the objective, as is required by the principle as per Denham J's explanation thereof in *Meadows*.[50] Fennelly J had endorsed Denham J's explanation of the principle, and Murray CJ argued that proportionality required that the 'effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision' and that it is 'inherent in the principle of proportionality that where there are grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it.'[51] Proportionality, even when simply *informing* a reasonableness test, requires attention to these questions. Though this sub-section will argue for proportionality as a free-standing ground of review, we argue that even where a free-standing proportionality test is deemed inappropriate, it is insufficient to simply state that the government has discretion and thus that the measure is not disproportionate. The principle, whether free-standing or a 'prism' for reasonableness review, must direct judges' attention to the *effects* of the measures and the connection of the measures with the object and purpose.

Proportionality has been discussed by the Irish Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform* and subsequent cases, as well as by the English courts in recent years.[52] In England and Wales, the Supreme Court has now explicitly endorsed proportionality review, whether the case concerns EU law, Convention rights, or the common law. The English case law is useful in demonstrating the benefits of the proportionality principle. Lord Mance in *Kennedy v. Charity Commission* stated that 'The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages.'[53] In *Youssef v. Secretary of State for Foreign and Commonwealth Affairs*, Lord Carnwath argued that proportionality review might provide 'rather more structured guidance for the lower courts than such imprecise concepts as 'anxious scrutiny' and 'sliding scales''.[54] Thus, the English Supreme Court has explicitly and repeatedly held that a proportionality test can offer more 'structured' review than reasonableness review and can be used as a stand-alone ground of review outside of the Convention rights context.

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[48] *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, Opinion of Fennelly J.
[49] *FIE* (n1), at 145.
[50] *Meadows* (n48), Opinion of Denham J.
[51] *Meadows* (n48), Opinion of Murray CJ.
[52] *Meadows* (n48); *Kennedy* (n47); *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3
[53] *Kennedy* (n47), at 54.
[54] *Youssef* (n52); Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press: 2015), at 245.

But the English approach has not resolved a question arising in the Irish courts which will likely be revisited in *FIE*: questions remain as to how proportionality interacts with reasonableness review. Endorsing Paul Craig's approach,[55] Lord Mance in *Kennedy* argued that 'both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context', while in *Youssef*, Lord Carnwath questioned whether there is a clear distinction between the two approaches in light of the courts' gradual move away from the more rigid *Wednesbury* test. As deference and respect 'modulate' the application of both proportionality and reasonableness, he suggested that similar results may be reached in the application of either test.[56] In *Pham v. Secretary of State for the Home Department*, Lord Sumption emphasised this further. He noted that the House of Lords had acknowledged already in 1987 in *Bugdaycay* that the standard of review must vary depending on the subject matter and that certain affected interests will call for 'anxious scrutiny'. He explained that '[t]he solution adopted, albeit sometimes without acknowledgment, was to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality.'[57]

This latter conception of the relationship appears to reflect the Irish courts' approach following *Meadows*. The majority in *Meadows* was in general agreement that proportionality had a role to play as an *element* of reasonableness review. Murray CJ noted the 'illuminating' discussion of proportionality which had been occurring in the English courts and saw 'no reason why the Court should not have recourse to the principle of proportionality in determining' whether a decision 'properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense.' The application of proportionality was 'a means of examining whether the decision meets the test of reasonableness', and neither the *Keegan* nor *O'Keeffe* judgments would exclude the Court from applying a proportionality analysis.[58] Fennelly J agreed that proportionality may be relevant to reasonableness: a decision may 'affect fundamental rights to such a disproportionate degree, having regard to the public objectives it seeks to achieve, as to cross a threshold, and to be justifiably labelled as so unreasonable that no reasonable decision-maker could justifiably have made it.' He further stated that the principle of proportionality as incorporated into the single standard of review laid down in *Keegan* and *O'Keeffe* 'can provide a sufficient and more consistent standard of review, without resort to vaguer notions of anxious scrutiny'.[59]

Subsequent Irish case law appears to have confirmed that proportionality is not separate from reasonableness. In *H.U. v. Minister for Justice, Equality and Law Reform*, Clark J noted that '*Meadows* did not change the law of reasonableness; it simply affirmed the role played by proportionality', and as noted by Cooke J in *Afolabi*, proportionality has been seen as 'a facet of unreasonableness.'[60] In *AAA v. Minister for Justice,* Charleton J cited Denham J in *Meadows*, who had set out a structured and clear proportionality test – a measure 'must be rationally connected to the objective' – but Charleton J then argued that, following *Meadows*, proportionality 'operate[s] within the confines of the irrationality test'.[61] Biehler has suggested that such formulations are resulting in proportionality 'effectively being re-defined in Keegan/O'Keeffe terms' rather than 'being applied in the structured manner envisaged by Denham J in *Meadows* or in the way in which the concept of proportionality is properly understood.'[62] Charleton J in *AAA*, however, noted that 'the full extent of the interaction of proportionality in decision making with the duty to act reasonably… should await scrutiny in an appropriate case'.[63]

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[55] Paul Craig, 'The Nature of Reasonableness', (2013) 66 CLP 131.
[56] *Youssef* (n52); Craig, *UK, EU and Global Administrative Law* (n54), at 245.
[57] *Pham v. Secretary of State for the Home Department* [2015] UKSC 19, at 105 (emphasis added); see *Bugdaycay v. Secretary of State for the Home Department* [1987] AC 514
[58] *Meadows* (n48), Opinion of Murray CJ.
[59] *Ibid*, Opinion of Fennelly J, at 68, 70.
[60] *H.U. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 371 at 36; and *Afolabi v. Minister for Justice and Equality* [2012] IEHC 192 at 19.
[61] *Meadows* (n48), Opinion of Denham J, at 22; *AAA & ors v. Minister for Justice and Equality* [2017] IESC 80, at 22.
[62] Biehler (n43).
[63] *AAA & ors* (n61), at 26.

This question is particularly acute with regard to fundamental rights. Biehler argues that it is 'difficult to understand the hesitation on the part of the Supreme Court to move to a freestanding form of proportionality review for fundamental rights issues, given that this is already required in the context of review of legislation for compatibility with constitutional rights and challenges involving the ECHR. It is not at all clear why the court should regard as 'revolutionary' a move to protect constitutional rights from administrative interference to the same standard.'[64] Similarly, Delany and Donnelly have argued that '*Meadows* creates an anomalous distinction between protection of constitutional rights from legislative interference and protection of constitutional rights from administrative interference.'[65] Daly has commented that less rigorous standards of review for administrative action as opposed to legislation 'would lead to the perverse conclusion that what could not be accomplished by the democratically-elected Oireachtas could nevertheless be done by an unelected administrative official', while Brady rightly notes that 'violations of fundamental rights can be expected to arise just as often in cases involving administrative decisions as in cases involving legislation; arguably even more often.'[66] There are thus loud calls from Irish scholars to reconcile inconsistencies in the applicable standard of review and to bring judicial review of administrative action engaging fundamental rights more in line with the review of legislation. There are also strong arguments, emphasised in the following section, concerning the constitutional *duty* of courts in safeguarding rights and the inappropriateness of the extreme deference seen in the High Court in *FIE* where government policy infringes constitutional or Convention rights.

The Supreme Court will have the opportunity to further explore the relation between reasonableness and proportionality in the *FIE* appeal. Justices Fennelly, Hardiman and Chief Justice Murray had in *Meadows* looked to the English jurisprudence and, though Hardiman J rejected notions of 'anxious scrutiny', he noted that the English approach could provide a 'template for reflection on possible developments here'.[67] *Meadows* was decided in 2010, before the above-described suite of cases from the English Supreme Court which have appraised the more 'structured guidance' offered by proportionality. Perhaps this structure, Irish scholars' calls for increased consistency, and the fact that the principle serves to bring courts more in line with Craig's plea that courts 'say what they do and do what they say', may prompt a renewed discussion in the Irish Supreme Court in the *FIE* appeal.[68]

b. Fundamental Rights and the Margin of Appreciation

Putting aside the question of proportionality analysis, the standard of review to be applied *cannot* be as deferential as that applied by MacGrath J in the High Court due to the fundamental rights at stake. Friends of the Irish Environment have argued that the court was 'wrong to fail to examine in any detail the alleged violation of Convention rights' and 'wrong to conclude, without analysis, that the making and approval of the Plan' did not infringe constitutional rights.[69] Although MacGrath J emphasised that determining whether policy is compatible with the constitution and other obligations 'is not deciding policy', his conclusion that 'the sections of the Act under consideration are couched in terms of policy measures' led him to find that 'a considerable margin of discretion is conferred on the Government as to how it should achieve the National Transition Objective' and it is 'not part of the function of the court to second-guess the opinion of Government on such issues.'[70] This approach is misguided. Analysing the impacts of a policy on fundamental rights is part of the function of the court.

[64] The word 'revolutionary' was used by Hardiman J in *Meadows* (n48), at 785
[65] Hilary Delany and Catherine Donnelly, 'The Irish Supreme Court Inches Towards Proportionality Review' [2011] *Public Law* 19, 16
[66] Paul Daly, 'Standards of Review in Irish Administrative Law After Meadows v Minister for Justice' (2010) 32 DULJ 379, 391-392; Brady (n44), at 138.
[67] *Meadows* (n48), Opinion of Hardiman J.
[68] Craig, *UK, EU and Global Administrative Law* (n54), at 257.
[69] Supreme Court, Application for Leave to Appeal, Record No: 2017/793 JR (15 November 2019)
[70] *FIE* (n1), at 89, 97.

In *Efe v. Minister for Justice, Equality and Law Reform,* Hogan J noted that the decisions at issue 'engage fundamental rights under Article 41 of the Constitution, the protection of which is the solemn duty of this Court.'[71] And Biehler cautions that 'the courts must be careful not to abdicate too readily the role which they are required to play in upholding rights.'[72] The 'considerable degree of latitude' afforded to the executive by MacGrath J in the High Court appears to be such an abdication.

Across common law jurisdictions, courts use a more exacting standard of review in cases where fundamental rights are at issue. In the English courts, it has been clear since *Bugdaycay* in 1987 that a hands-off approach is inappropriate when the decision of a public authority interferes with a fundamental right, particularly where the decision in question may put the applicant's life at risk. In *Smith* in 1996, Bingham MR stated 'The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable' and '[w]hile the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right for all manner of people'.[73] Despite this heightened level of review, the European Court of Human Rights held in *Smith and Grady v. United Kingdom* that the test applied by the English courts was still insufficient to protect human rights.[74] Since the coming into force of the Human Rights Act, proportionality review has been used in cases concerning Convention rights as well as EU Law; and, as above, since *Kennedy*, this has been expanded to 'review even outside the scope of the Convention and EU law'. In *Pham*, Lord Sumption noted that the use of proportionality in cases involving human rights and EU law but not domestic law would produce 'some rather arbitrary distinctions between essentially similar issues.'[75]

But regardless of the approaches adopted in other jurisdictions, Irish law clearly accepts that particular scrutiny is required where fundamental rights are at issue.[76] Fennelly J in *Meadows*, for example, noted that 'Where decisions encroach upon fundamental rights guaranteed by the Constitution, it is the duty of the decision-maker to take account of and to give due consideration to those rights. There is nothing new about this... Where a right is not considered at all or is misdescribed or misunderstood by the decision-maker, the decision will be vulnerable to attack on the grounds of a mistake of law or failure to respect the rules of natural justice.'[77] Even using the *O'Keeffe* test, the court would be required to consider whether the decision-maker had considered or misunderstood the rights at issue. It bears stating that the National Mitigation Plan makes *no mention* of fundamental rights whatsoever.

In *FIE*, MacGrath J accepted that the rights to life, bodily integrity and the right to an environment consistent with human dignity were 'in some way engaged' but nonetheless afforded a 'considerable degree of latitude' to the Government. There appeared to be no variation in the standard of review applied to the question of whether the Plan was *ultra vires* the powers of the Minister under the Act and to the questions of constitutional and Convention rights. Having found that the Plan was *intra vires* the Act, MacGrath J turned to the 'secondary point' of the Constitutional and Convention rights at issue.[78] We contest that fundamental rights can be 'secondary.' After a discussion of the *Urgenda* case MacGrath J noted that it was not for the domestic courts to declare rights under the Convention and cited two European Court of Human Rights cases to support an undeveloped assertion that the Plan falls within the State's margin of appreciation.[79] Beyond outlining the Parties' arguments at the outset of the judgment, there was very little discussion of the applicants' claims about the *impacts* on fundamental rights, nor any exploration of how the decision to adopt the Plan affected these rights. It is to be hoped that on appeal the Supreme Court will engage with these issues as other courts have done.

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[71] *Efe* (n36), at 813
[72] Biehler (n43).
[73] *R v. Ministry of Defence, ex p. Smith* [1996] Q.B. 517 at 556, 554.
[74] *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493
[75] *Pham* (n57), at 104.
[76] See Gerard Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country' in Anneli Albi and Samo Bardutzky (eds.) *National Constitutions in European and Global Governance: Democracy, Rights and the Rule of Law* (Springer: 2019), at 1362; *Meadows* (n48); *Efe* (n36).
[77] *Meadows* (n48), at 68.
[78] *FIE* (n1), at 119.
[79] *Ibid,* at 135-146.

As outlined in Section 3, the reason for the 'considerable degree of latitude' afforded to the government in the High Court relates to the fact that the impugned actions relate to *policy*. MacGrath J stated that 'the court should avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. Courts are and should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference, the latter being identifiable by the fact that they are not capable of being impugned by objective criteria that a court could apply'. As above, he argued that the court must not 'second-guess the opinion of the Government', because 'a range of factors and competing interests have to be taken into account' with regard to an issue such as climate mitigation.[80] Again, these arguments will be especially salient in the appeal hearing in light of the Covid-19 crisis. Several key arguments emphasise the inappropriateness of such a wide margin of discretion here, even in the Covid-19 context.

Firstly, as Fennelly J noted in *Meadows*, 'The modern state confers an enormous range of decision-making powers on a variety of bodies. Such bodies carry out and supervise vast areas of the work of government and of economic and social life. The powers they exercise in many cases affect the fundamental and constitutional rights of individuals'.[81] Thus, decisions touching upon a range of factors and competing interests can breach fundamental rights, and the complexity or wide-reaching nature of a decision may indeed modulate deference but this deference should also be modulated as against the seriousness and scale of the rights infringements at issue. Administrative decision-making over increasingly broad areas of economic and social life is especially salient with regard to climate change: if courts grant the level of latitude to executive decisions regarding climate change that MacGrath J had granted, then they will be evading engagement with the most salient challenge to rights protection for generations, and a matter which should be the subject of legislative and executive action for the rest of the century.

The High Court's suggestion that this is an area 'not capable of being impugned by objective criteria' also demands closer scrutiny. Again, 'There is no dispute between the parties as to… the likely increase in greenhouse gas emissions over the lifetime of the Plan' and undisputed scientific information points to 'risk of death, of injury and health … [and] reported risks of mortality and morbidity during periods of extreme heat. Food systems may be at risk and there is a risk of loss of rural livelihoods and income.'[82] The wealth of scientific evidence before the court constitutes objective criteria. It is also an accepted objective fact that the Plan fails to reduce emissions and fails to meet Ireland's 2020 target. It simply does not hold that there are no objective criteria by which climate policy can be judged.

MacGrath J had emphasised the need for broad discretion on the part of the executive, noting that 'finding the appropriate and most equitable manner to address this issue will not be easy, *particularly given the economic circumstances of recent times* and where finances are still continuing to stabilise and recover.'[83] This becomes especially salient in the context of the current Covid-19 crisis and the consequent recession. The economic impacts of States' measures to address the novel coronavirus are severe, with the euro area economy projected to contract by a record 7.7 percent in 2020.[84] The government can be expected to argue that the 'considerable latitude' afforded in the High Court in 2019 is especially warranted now. But it is important to distinguish between allowing the executive discretion in determining the content of the Plan and determining whether the Plan was adopted pursuant to the executive's obligations and *vires*. The court is not being asked to direct the executive to allocate a percentage increase in resources to climate mitigation, nor to direct the executive to adopt specific policies, but rather to adjudicate within the framework of the Act, the constitution and the ECHR on whether the government could adopt a Plan under which emissions increased. The economic crisis does not change that *legal* question.

The recession may be invoked to argue that the government must rightly prioritise 'getting the economy back on its feet' before pursuing more ambitious climate action. This raises the points made in Section 3 as to the financial cost

[80] *FIE* (n1), at 92-3.
[81] *Meadows* (n48), Opinion of Fennelly J at 38.
[82] Supreme Court Determination, *FIE* (n23), at 8.
[83] *FIE* (n1), at 105 (emphasis added).
[84] See European Commission, European Economic Forecast, Spring 2020*, Institutional Paper 125* (May 2020).

of delay. As noted there, economic and climate experts are near-unanimous in stating that inaction now entails *more* cost to the treasury in the near future. The OECD has explained in detail that climate-related investments will in many cases offer the best prospects for economic growth and jobs, and as the UN Secretary General emphasised at a summit on climate change in the midst of the Covid-19 crisis, 'the highest cost is the cost of doing nothing.'[85] Arguments that the economic crisis should allow the government to miss climate targets and permit increased emissions, despite the acknowledged impacts, are thus flawed, economically and scientifically.

In addition, the argument that economic recovery should be prioritised relies on a false assumption that ambitious measures towards a low-carbon transition and economic growth are mutually exclusive. Again, the OECD emphasises that implementing climate measures produces *more* economic growth. In addition, the Act *and* An Taoiseach's Foreword to the Plan both seem to suggest that economic growth and a low-carbon transition are not in opposition: An Taoiseach noted 'we must embrace the economic opportunities decarbonisation presents'; and section 4(7)(c) of the Act requires the minister to take into account 'the need to take advantage of environmentally sustainable economic opportunities'.[86] With renewable energy prices dropping while fossil fuel companies struggle financially, the crisis is indeed widely deemed 'an opportunity for nations to green their recovery package' and the Vice-President of the European Commission has emphasised that all Covid-19 recovery investment should go towards commerce that either helps reduce carbon emissions or promotes digital business.[87] He argues that the EU can get 'out of this crisis [and] make sure that we recover quickly from the COVID-crisis… in two ways. We can repeat what we did before and throw a lot of money to the old economy; or we can be smart and combine this with the necessity to move to a green economy. I think this is a huge opportunity.'[88] As sustainable finance experts warn, after the global financial crisis of 2008, only 16 percent of global stimulus plans were green and 'If we have any hope of combating climate change, we must make absolutely sure we do it better this time.'[89]

Thirdly, looking at the rights impacts of climate change and missed targets demonstrates that overly-broad discretion is still inappropriate within a recession. The Supreme Court has previously found in a case concerning family reunification that, though '[s]carce state resources have to be applied carefully not least in times when those same resources are stretched', it could not reasonably be held that financial consequences outweigh 'in a proportionate fashion, the … other rights which must be balanced on the other side.'[90] The Government in that case invoked only the financial consequences of a refugee's dependents being supported by the State rather than macroeconomic consequences more generally – and indeed, 'in order for the Minister to have regard to such broader [economic] circumstances it would be necessary that there would be materials available analysing what the relevant costs would be.'[91] But despite the narrower economic considerations at issue in that case, the point still holds that fundamental rights weigh heavily even as against the State's legitimate economic interests. This argument applies at scale with regard to climate change. The argument that climate mitigation measures are costly weigh against severe fundamental rights implications. The scientific evidence overwhelmingly points to the loss of life and livelihoods, and disruptions to food security: the human rights implications of not addressing climate change are extreme. Again, the parties agree as to 'the likely effects of climate change' and that 'there exists a degree of urgency' and 'a limited window for real action to ensure that current and future generations can live sustainably in a low carbon and climate resilient world.'[92] We thus argue that a high degree of deference to the executive, to the extent that proper inquiry into the

[85] OECD, *Investing in Climate, Investing in Growth* (2018); Antonio Guterres, speaking at the Petersberg Climate Dialogue, Berlin, April 2020, available here: https://news.un.org/en/story/2020/04/1062752
[86] Foreword, National Mitigation Plan (n31); Climate Action and Low Carbon Development Act 2015, at 4(7)(c).
[87] Megan Rowling, 'Governments urged not to shirk climate action after summit delay,' *Reuters*, 2 April 2020; Ivan Penn, 'Oil Companies Are Collapsing, but Wind and Solar Energy Keep Growing', *New York Times*, 7 April 2020.
[88] European Commission, Frans Timmermans' opening remarks at the Petersberg Climate Dialogue, 2 April 2020.
[89] Nick Robins (Grantham Research Institute), quoted in Roger Harrabin, 'Climate change: Could the coronavirus crisis spur a green recovery?' *BBC News,* 6 May 2020.
[90] *A.M.S. v. Minister for Justice and Equality* [2014] IESC 65, at 7.15.
[91] *Ibid*, at 7.4.
[92] National Mitigation Plan (n31), at 7.

effects of the executive decision is foregone, is inappropriate in a case such as *FIE,* even where the economic implications of Covid-19 are invoked.

Two more general points relating to deference arise. The first concerns the 'margin of appreciation', a concept on which MacGrath J placed crucial reliance. This is a doctrine created by the European Court of Human Rights to allow for account to be taken of cultural and political differences among States. It is geared towards ensuring a limited degree of deference to the sovereignty of States within the ECHR system and has nothing to say about the relationship between domestic courts and their own executive authorities. It originated in *Handyside v. UK*, in which the UK courts rather than the European courts were held to be best placed to decide. It is only applied in situations where there is a strong absence of consensus among Contracting States. In *Handyside*, the European Court deemed that there was no 'uniform European conception of morals' and thus granted a wider margin, whereas in *Dudgeon v. UK* it found that there was a general 'European consensus', such that the margin of appreciation was 'not an unlimited one' and the restrictions on Dudgeon's rights were disproportionate. In other words, the margin of appreciation is not a general purpose flexibility or deference mechanism and it was not designed to permit domestic courts to accord discretion to the executive within States.

The second concerns the extent to which the courts should defer to the views of those with technical expertise. As Fennelly J observed in *Meadows,* Irish courts have acted 'with particular caution before interfering in the case of routine administrative decisions or decisions made by persons with particular technical expertise', such as planning decisions. He noted that *O'Keeffe* concerned a planning decision and that neither *O'Keeffe* nor *Wednesbury* involved the court being 'confronted with a significant incursion into the fundamental human rights of affected persons. The courts are by tradition and instinct very slow to interfere with decisions regarding technical or administrative matter applied curial deference.'[93] But *FIE* is a case in which incursions into fundamental rights are 'confronting' the court. Moreover, those with the 'particular technical expertise' have counselled against, and indeed criticised, the executive's decision. The CCAC, which was established with the specific aim of advising the executive on its climate-related plans, had already in 2016 and 2017 been critical of the Plan and had observed that Ireland would likely miss by a substantial margin its 2020 emissions reductions targets. As MacGrath J acknowledged, the Council 'considered it urgent that additional and enhanced policies and measures be identified in the Plan' in order to address 'the gap in emissions reductions required to meet the 2020 targets.'[94]

By the time of the High Court hearing, the Council had called Ireland's projected greenhouse gas emissions up to 2035 'disturbing' and had reported that Ireland was 'completely off target'. It observed that 'Irish greenhouse gas emissions [were] rising rather than falling' and that existing policies were 'unlikely to deliver' a transition to a low-carbon economy and society.[95] It is thus difficult to understand how the Plan can consequently be deemed *intra vires* and rational. Moreover, it is especially inappropriate to afford the executive a 'considerable degree of latitude' in light of the fact that the policy goes *against* the advice of the specifically established body with superior technical expertise. Its expert advice should serve to constrain the level of deference afforded and to inform the review of the reasonableness of the Plan.[96]

c. Insights from the Heathrow Case

These comments relating to the CCAC have further relevance when considered in light of the recent English case concerning the proposed third runway at Heathrow airport. At issue was the 'entirely legal question' of whether 'the Government's policy in favour of the development of a third runway at Heathrow was produced lawfully.'[97] The

[93] *Meadows* (n48), Opinion of Fennelly J, at 64.
[94] *FIE* (n1), at 14, 24.
[95] Climate Change Advisory Council, *Annual Review 2019* (n39).
[96] *FIE* (n1), at 115.
[97] *Plan B* (n27), at 2.

ratio related to a relatively narrow issue, namely whether the policy was lawfully produced where the minister had not taken into account the Paris Agreement.[98] Despite refusing to depart from the conventional *Wednesbury* standard of review under the Planning Act, and taking care to respect the minister's 'breadth of discretion,' the Court of Appeal nonetheless found that the preparation and designation of the relevant policy was unlawful. This case is particularly relevant in showing that, even where a less stringent standard of review is adopted and fundamental rights are not at issue, the findings of specially-established independent climate advisory committees should weigh heavily.

The Court examined in detail a report by the UK's Committee on Climate Change and, although the committee had specifically advised the government *not* to set new emissions reductions targets, the Court significantly pushed back on the government's arguments as to the Committee's conclusions. The Court gave significant weight to the Committee's view that 'the UK's current emissions targets are not aimed at limiting global temperature to as low a level as in the [Paris] Agreement' – that is, 'well below 2°C' and 'pursuing efforts to limit the temperature increase to 1.5°C'.[99] This contrasts with MacGrath J's approach to the CCAC in *FIE*. Although the CCAC had raised concerns on several occasions, the judge dealt with its critiques and advice rather peremptorily by concluding that its recommendations did not impose a legal obligation and that this is a policy matter such that the government enjoys a 'considerable discretion'.[100] The Court's discussion of the statutory obligation to take into account 'any recommendations or advice' of the CCAC was somewhat dismissive and it is to be hoped that the Supreme Court will on appeal take the CCAC's views more seriously in informing its review.

The English Court of Appeal's approach is also important in terms of the argument that the Plan is *ultra vires* the Act. In the *Heathrow* case, the court emphasised that this exercise is simply one of '[requiring] the executive to take account of its own policy commitments' and that requiring the executive 'to comply with what has been enacted by Parliament... is an entirely conventional exercise in public law.'[101] Crucially, this case did *not* concern an obligation of outcome; the minister was not obliged to *comply* with the Paris Agreement, merely to take it into account. In Ireland's Climate Action and Low Carbon Development Act 2015, section 4(7) similarly imposes an obligation on the minister and government to take into account 'relevant scientific or technical advice', 'the findings of any research on the effectiveness of mitigation measures and adaptation measures' and 'any recommendations or advice of the Advisory Council', among other information – but does not impose a legal obligation to *follow* such advice.[102] Not only did the CCAC raise concerns about its own ability 'to provide meaningful advice' to the Government in light of shifting timeframes, its first report and periodic review in 2016 and 2017 had urged that additional and enhanced measures be identified in the Plan to meet the 2020 target and subsequent targets.[103] We would argue that the Plan likely did not take into account this advice, since it did not take additional measures and allowed emissions to rise. The 2017 Plan does not explain the advice received nor what the report had recommended, but simply states that the first report was published in 2016. This is a mere mention of the Council, rather than indicating that *regard* has been taken of its recommendations. In addition, the 'relevant scientific or technical advice' and research on the effectiveness of mitigation and adaptation measures – such as the IPCC and EPA reports brought before the High Court and accepted by the Irish government – also pointed to the fact that the trajectory of emissions arising from the National Mitigation Plan would see Ireland 'way off target' to achieve the reductions required by the Climate Action and Low Carbon Development Act.[104] Again, the Government was not obliged to *follow* the relevant

[98] *Plan B* (n27), at 277.
[99] Paris Agreement, Article 2(1)(a).
[100] *FIE* (n1), at 115, 112.
[101] *Plan B* (n27), at 230.
[102] Climate Action and Low Carbon Development Act 2015, 4(7)(e), 4(7)(f) and 4(7)(i).
[103] Letter from Climate Change Advisory Council to Minister Denis Naughten, available at: http://www.climatecouncil.ie/media/WEB%20VERSION%20Letter%20to%20Minister%20Naughten%20March%202017.pdf, see also CCAC, *First Report* (November 2016) and CCAC, *Periodic Review Report 2017* (July 2017)
[104] *FIE* (n1), at 24.

recommendations. Rather, the question is whether it could *reasonably* adopt a Plan which flies in the face of overwhelming scientific evidence and expert advice.

Section 3(2)(c) of the Act also requires that the Government have regard to 'climate justice', the ultimate objective of the UNFCCC and existing obligations under international agreements. The National Mitigation Plan makes *no mention* of climate justice nor any of the considerations that flow from such a concept, with the sole exception of a reference to the principle of common but differentiated responsibilities. Nor does it mention the need for Ireland, as an Annex I country, to take a lead. The legislation explicitly outlined the policy and principles which must guide the creation and adoption of the Plan; cursory mentions or indeed no mention at all makes it difficult to conclude that the government took these elements into account as statutorily required.

Lastly, and more broadly, the purpose of the Climate Action and Low Carbon Development Act and the driving motivation of the adoption of mitigation plans by government was to pursue 'the transition to a low carbon, climate resilient and environmentally sustainable economy'. In obliging the Minister to make and submit a national mitigation plan, the section was entitled 'low carbon transition.'[105] Though the executive is clearly given discretion as to which measures it may adopt, the reduction of greenhouse gases over time is clearly a central purpose of the Act. It is difficult to see how a Plan under which emissions increase, targets are missed and future targets are compromised, is *intra vires* the Act.

Thus, putting questions of proportionality and fundamental rights aside, aspects of Friends of the Irish Environment's challenge mirror the 'entirely legal question' in the *Heathrow* case. Neither case involves the courts requiring specific measures or decisions, but both highlight the issue as to whether the ministerial decision-making was *rational*. As argued above, there are compelling reasons favouring a more intense standard of review given the fundamental rights implications and the inappropriateness of the level of discretion granted in the High Court. But even with 'light touch' rationality review as in the *Heathrow* case, the National Mitigation Plan is not in line with the statutory obligations of the government and the minister.

5. Derived Right to a Healthy Environment

In reaching its decision, the High Court recognised that the right to a healthy environment is part of Irish law, but without going into any detail as to the foundations of the right. MacGrath J simply observed that:

> The constitutional rights which are stated to be infringed are the rights to life, the right to bodily integrity *and the right to an environment consistent with human dignity*… Accepting for the purposes of this case, that there is an unenumerated right to an environment consistent with human dignity……[106]

Although the recognition of this right is not an indispensable element in a successful appeal by Friends of the Irish Environment, the Supreme Court will nevertheless have the opportunity to reflect on the nature of the right and its vital significance for Ireland in the twenty-first century. This section will note the extent to which most other jurisdictions around the world have already recognized this right, and will outline the arguments in favour of the Irish Supreme Court affirming its own positive steps in this direction.

a. Beginnings

Article 40 of the Constitution sets out the personal rights that citizens of Ireland enjoy, including the right to equality before the law,[107] the right not to be deprived of liberty except in accordance with law[108] and the right to freedom of expression.[109] In *Ryan v. Attorney General*, Kenny J famously recognised that Article 40.3, which guarantees the personal rights of Irish citizens, protects rights that are not explicitly mentioned in Article 40. Article 40.3 provides:

[105] Climate Action and Low Carbon Development Act 2015, 4(2)(d)(i).
[106] *FIE* (n1), at 133 (emphasis added).
[107] Constitution of Ireland, Article 40.1.
[108] Constitution of Ireland, Article 40.4.1.
[109] Constitution of Ireland, Article 40.6.1(i).

> 1° The state guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the *personal rights* of the citizen.
>
> 2° The state shall, *in particular*, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.[110]
>
> …

Kenny J based his approach on two arguments. First, the words 'in particular' indicate that the rights referred to in Article 40.3.2 are a non-exhaustive list of the personal rights that are guaranteed by Article 40.3.1.[111] Second, because many rights which arise from the 'Christian and democratic nature' of the Irish state are not referred to Article 40, such as the right to marry and the right to move freely, it follows that the general guarantee in Article 40.3.1 extends to rights that are not expressly identified in the other provisions of Article 40.[112] In making this determination, Kenny J also held that the High Court and the Supreme Court have the 'difficult and responsible duty' to determine what these personal rights are.[113] He then went on to recognise that the right to bodily integrity is one of the rights that can be derived from the reference to personal rights in Article 40.3.1, before explaining the scope of this right in the following terms:

> I understand the right to bodily integrity to mean that no mutilation of the body or any of its members may be carried out on any citizen under authority of the law except for the good of the whole body and that *no process which is or may, as a matter of probability, be dangerous or harmful to the life or health of the citizens or any of them may be imposed (in the sense of being made compulsory) by an Act of the Oireachtas.*[114]

Notably, Kenny J relied on the following passage from a papal encyclical to support his conclusion regarding the right to bodily integrity:

> Beginning our discussion of the rights of man, we see that every man has the right to life, to bodily integrity and to the means which are necessary and suitable for the proper development of life.[115]

An appeal from the High Court's judgment was later dismissed by the Supreme Court. In the course of outlining his reasons for dismissing the appeal, Ó Dálaigh CJ did not take issue with Kenny J's reasoning. He confirmed that the personal rights referred to in Article 40.3 were non-exhaustive, as well as analysing the obligations of the state in more secular terms:

> The State is organised for the common welfare of all its citizens and is a society *arising from man's nature*. Apart from particular expressed limitations contained in the Constitution, the Oireachtas may not enact legislation depriving citizens of their essential rights as human persons or as members of the family. The State *has the duty of protecting the citizens from dangers to health* in a manner not incompatible or inconsistent with the rights of those citizens as human persons.[116]

Before moving on to consider the subsequent development of Irish constitutional doctrine regarding the rights recognised in *Ryan*, it is worth pausing here to analyse the relevant terminology. Although the term 'unenumerated rights' is not mentioned in *Ryan* or in several other important cases exploring the doctrine, including *The State (Nicolaou) v. An Bord Uchtála*[117] and *McGee v. Attorney General*,[118] it is now widely used when referring to the rights first recognised by Kenny J. It may, however, be questioned whether this is the best way to describe the origins of the

[110] *Ryan v. Attorney General* [1965] IR 294 (emphasis added).
[111] *Ibid*, at 313.
[112] *Ibid*, at 313.
[113] *Ibid*, at 313.
[114] *Ibid*, at 314.
[115] *Ibid*, at 314.
[116] *Ibid*, at 348 (emphasis added).
[117] *The State (Nicolaou) v. An Bord Uchtála* [1966] IR 567.
[118] *McGee v. Attorney General* [1974] IR 284.

relevant rights given that the main characteristic it attributes to them is simply that they are not listed. That is a potentially open-ended and wide-ranging category, and the term 'unenumerated' neither suggests any particular limit to the number of rights nor any particular necessary relationship to the rights that are explicitly mentioned in the constitution.

Given the approach that the Supreme Court has evolved in this regard, a more appropriate term, and one that has occasionally been used in its judgments, is 'derived rights'. This reflects the fact that they are not just unlisted or unenumerated, but that they are explicitly derived from the constitution. In other words, their nature and scope are determined by reference to the text and structure of the Constitution, as well as the values that underpin it. In *Simpson v. Governor of Mountjoy Prison*, the Court referred to the right to privacy as being 'derived from the protection of the *person* to be found in the words of Article 40.3 of the Constitution and from the ethos of the Constitution as a whole, in particular the value of dignity of the person expressed in the Preamble.'[119] The term 'derived rights' will therefore be used to describe the rights first recognised in *Ryan* in the remainder of this article.

b. Uncertainty

In the aftermath of *Ryan*, there was significant uncertainty regarding the scope of the derived rights doctrine. Although Kenny J had indicated that derived rights arise from the Christian and democratic nature of the Irish state, there was little doctrinal clarity in relation to their precise source or the means by which they should be ascertained.[120]

In one of the first Supreme Court decisions to consider derived rights after *Ryan*, *The State (Nicolaou) v. An Bord Uchtála*, Walsh J turned to natural law to determine whether the rights of the father of a child born outside marriage were protected by Article 40.3:

> It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights, to either the custody or society of that child and *the Court has not been satisfied that any such right has ever been recognised as part of the natural law*…The appellant has therefore failed to establish that any personal right he may have guaranteed to him by Article 40, section 3, of the Constitution has been in any way violated…[121]

At other times, derived rights were recognised by reference to the Christian and democratic nature of the Irish state with very little further justification or accompanying analysis. In *State (C.) v. Frawley*, for example, the High Court concluded that the right to be free from torture and other forms of inhuman or degrading punishment was protected by Article 40.3 in the following terms:

> *If the unspecified personal rights guaranteed by Article 40 follow in part or in whole from the Christian and democratic nature of the State, it is surely beyond argument that they include freedom from torture, and from inhuman or degrading treatment and punishment*. Such a conclusion would appear to me to be inescapable even if there had never been a European Convention on Human Rights, or if Ireland had never been a party to it.[122]

Although the bottom line is clearly warranted, the Court did not outline any particular reasoning that might delimit the range of rights so identified.

Other judgments that were delivered during the same period focused more closely on the theological conception of natural law when identifying the source of derived rights. In *McGee v. Attorney General*, a seminal Supreme Court decision that recognised the right to privacy in marriage, Walsh J set out this view in the course of analysing the source of the rights protected by the Constitution:

> The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law. There are many to argue that natural law may be regarded only as an ethical concept

[119] *Simpson v. Governor of Mountjoy Prison* [2019] IESC 81, at [88]
[120] Gerard Hogan, 'Unenumerated Personal Rights: Ryan's Case Re-Evaluated' 25-27 *Irish Jurist* N.S. 95 (1990 – 1992), at 104.
[121] *The State (Nicolaou)* (n117), at 643 (emphasis added).
[122] *State (C.) v. Frawley* [1976] IR 365, at 374.

> and as such is a re-affirmation of the ethical content of the law in its ideal of justice. *The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men*. In view of the acknowledgement of Christianity in the preamble and in view of the reference to God in Article 6 of Constitution, *it must be accepted that the Constitution intended the natural and human rights I have mentioned as being in the latter category* rather than simply an acknowledgment of the ethnical content of the law in its ideal of justice.[123]

Despite the strong language used by Walsh J, other members of the bench took a different approach. In the same case Henchy J concluded that derived rights are founded on the secular notion of human personality as well as the structure of the Constitution, rather than a theological conception of natural law:

> It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. *To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality*. The lack of precision in this test is reduced when sub-s.1 of s. 3 of Article 40 is read (as it must be) in the light of the Constitution as a whole and, *in particular in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution*.[124]

The doctrinal uncertainty that is evident from these decisions continued throughout the 1980s. In *G v. An Bord Uchtála*, a case that recognised the custodial rights of the mother of a child born outside marriage, Walsh J reiterated his view that derived rights are grounded in natural law while simultaneously citing Henchy J's above quoted passage from *McGee* without expressly disapproving it.[125] Henchy J later restated his support for the human personality test in his dissenting judgment in *Norris v. The Attorney General*, a case concerning the constitutionality of laws that criminalised homosexuality:

> Having regard to the [Constitution], there is necessarily given to the citizen, within the required social, political and moral framework, *such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen* in his capacity as a vital human component of the social, political and moral order posited by the constitution.[126]

McCarthy J also expressed his support for the human personality test in *Norris*, observing that:

> *I would uphold the view that the unenumerated rights derive from the human personality* and that the actions of the state in respect of such rights must be informed by the proud objective of the people as declared in the preamble 'seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations.'[127]

The lack of certainty is exemplified by the subsequent decision in *Kennedy v. Ireland*, where Hamilton P recognised the right to individual privacy outside a marital context on the basis that it arises from the Christian and democratic nature of the Irish state, while also citing the passages from *Norris* where Henchy J and McCarthy J approved the human personality test.[128]

This situation came to a head without being definitively resolved in 1995, when the Supreme Court decided *Information (Termination of Pregnancies) Bill 1995*. In the course of doing so it emphatically rejected the notion that

[123] *McGee* (n118), at 318 (emphasis added).
[124] *McGee* (n118), at 325.
[125] *G v. An Bord Uchtála* [1980] IR 32, at 68-9.
[126] *Norris v. Attorney General* [1984] IR 36, at 71 (emphasis added).
[127] *Ibid*, at 99-100.
[128] *Kennedy v. Ireland* [1987] IR 587, at 590-593.

natural law was superior to the constitution,[129] an idea that some argued Walsh J had put forward in *McGee* when analysing the provenance of derived rights.[130] Prior to this decision derived rights jurisprudence had been a vibrant part of Irish law. Seventeen different derived rights were recognised by Irish courts between 1964 and 1995, including the right to work, the right to have access to the courts and the right to independent domicile.[131] Since it was handed down, however, the Supreme Court has not recognised any new derived rights.[132]

Although the relative dearth of activity has led some Irish jurists to pronounce the demise of the derived rights doctrine,[133] recent developments suggest that this may be premature. In 2014 the High Court recognised a derived right to freedom of individual conscience, largely by reference to the democratic values and fundamental rights embodied in the Constitution.[134] In an important decision, discussed below, the High Court has also recognised the existence of a derived right to a healthy environment. Perhaps the most significant development, however, is the decision in *NHV v. Minister for Justice*, where the Supreme Court considered whether an asylum seeker was entitled to the benefits of the derived right to work. O'Donnell J analysed the nature of this right, which had previously been recognised in a series of cases. He made a number of references to both human personality and human dignity:[135]

> …it must be recognised that work is *connected to the dignity and freedom of the individual* which the Preamble tells us the Constitution seeks to promote. *It can be said of the Constitution*, if anything more aptly than of the European Convention on Human Rights, that in its fundamental rights provisions, *it is intended to permit, and perhaps encourage, without outside interference, the development of the human personality*…[136]

O'Donnell J then referred to a passage from a General Comment of the U.N. Committee on Economic, Social, and Cultural Rights (CESCR) regarding the right to work which provides that 'the right to work is essential for realising other human rights and forms an inseparable and inherent part of human dignity.'[137] He noted that this is 'broadly consistent with that which was the background to the constitution,'[138] and concluded that:

> …a right to work at least in the sense of a freedom to work or seek employment *is a part of the human personality* and accordingly the Article 40.1 requirement that individuals as human persons are required to be held equal before the law, means that those aspects of the right which are part of the human personality cannot be withheld absolutely from non-citizens.[139]

O'Donnell J's strong reliance on the concepts of the human personality and human dignity suggests that these concepts might have an important role to play in the future development of the derived rights doctrine, both in identifying the relevant rights and in determining their nature and scope.[140]

c. The road ahead

The foregoing account of the twists and turns of Irish legal doctrine in relation to derived rights might suggest a degree of unpredictability and inconsistency. Commentators have almost despaired of finding any strong or

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[129] *Information (Termination of Pregnancies) Bill, 1995* [1995] 1 IR 1, 38-43.
[130] See argument of counsel for the appellant in *Information (Termination of Pregnancies) Bill, 1995* at 8 – 9.
[131] Report of the Constitution Review Group, 1996, at PDF 222.
[132] Conor O'Mahony, 'Unenumerated Rights: Possible Future Directions after NHV?', Dublin University Law Journal, Forthcoming, at 1. Accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084619
[133] O'Mahony (n132), at 5; citing Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus 2008), at 108; and David Kenny, 'Recent Developments in the Right of the Person in Article 40.3: Fleming v Ireland and the Spectre of Unenumerated Rights' 36 *DULJ* 322 (2016), at 341.
[134] *AM v. Refugee Appeals Tribunal* [2014] IEHC 388, at [33]; cited in Finn Keyes, 'Our Herculean Judiciary?: Interpretivism And The Unenumerated Rights Doctrine', 4(1) *Irish Judicial Studies Journal* 45 (2020), at 59.
[135] For further discussion, see O'Mahony, (n132), at 10.
[136] *N.v.H v. Minister for Justice & Equality* [2017] IESC 35, at 15.
[137] *Ibid*, at 16.
[138] *Ibid*, at 16.
[139] *Ibid*, at 17.
[140] O'Mahony, (n132), at 13–14.

consistent threads running through the key judgments and there is considerable scepticism as to whether the High Court and the Supreme Court have developed a jurisprudence that provides clear guidance for the future development of this dimension of Irish law.[141] But with the benefit of hindsight, and the ability to locate the various cases in their overall historical context, it is not difficult to discern a much more consistent evolution of the law and to suggest what the next logical steps should be.

This is not the place to engage in a broad historical or sociological overview, but suffice it to note that between the *Ryan* case in 1965 and today, both Ireland and the world have changed significantly. The country has moved from an era in which an appeal to a papal encyclical and Catholic doctrine would be the natural first port of call in responding to complex moral, political, and even legal issues, to one in which both the precepts of European Union law and of the international human rights system are important reference points. While most of the key provisions of the Constitution have remained stable throughout this period, the background values and factors against which it must be interpreted by the courts have changed significantly. In the 2016 census, 10.1 percent of respondents indicated that they have no religion, an increase of 73.6 percent from the previous census.[142] The referenda results in recent years in relation to civil marriage, abortion, and blasphemy also suggest a strong evolution in the moral sensibilities of the Irish populace. And whereas both European and international human rights law were in their infancy in 1965, both have since evolved dramatically and have come to exert a strong influence on the way in which rights in general are perceived, including in Ireland. Similarly, in contrast to 1965 when international human rights concerns arose only in relation to a handful of specific situations, the Irish Government today takes a strong and consistent position in support of other countries adopting human rights provisions in their domestic legal frameworks. It also engages actively with a wide range of international accountability mechanisms designed to monitor its own respect for its many human rights obligations.

Viewed against this evolving domestic and international legal and political landscape, Ireland's constitutional jurisprudence in relation to derived rights might be understood as having evolved predictably and even consistently from its initial emphasis on the Christian and democratic nature of the Irish state, to the invocation of closely related principles of natural law, to a reliance upon the inherent nature of human personality. While there are obvious differences among each of these approaches, there is also a Rawlsian overlapping consensus. For example, the rights to bodily integrity and the means necessary for the proper development of life are defensible whether on the basis of Catholic doctrine, natural rights theory, the Constitution, or human rights notions relating to human personality. Moreover, while some philosophers might insist that these are very different conceptions of rights, the reality is that today's international human rights law inevitably draws significantly on natural law and natural rights theory in terms of its origins and assumptions and religious and cultural traditions play some role in informing the interpretation and application of human rights in every country.

It is against this background that the Supreme Court will be called upon to take the next step on this evolutionary path. Three readily available options present themselves. The first would be to revert to the other half of the Christian values test and rely on the 'democratic nature of the state'. But apart from the absence of clear definitions of democracy, the rights that can reasonably be derived from this criterion are somewhat limited such that it would be a real stretch to envisage a right to a healthy environment, to take one of many potential examples.

The second alternative is to build upon the 'human personality' test propounded by Henchy J in *McGee*. This would involve considering whether a particular right can be said to 'inhere in an Irish citizen by virtue of [their] human personality' by reference to what the 'Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution.'[143] This approach has several advantages. First, it now has a reasonable pedigree in Irish constitutional

[141] Hogan, 'Unenumerated Personal Rights' (n120), at 111.
[142] Census 2016 Religion and Ethnicity in Ireland, accessed at: https://www.cso.ie/en/media/csoie/visualisationtools/infographics/census/2016/Profile_8_ReligionAndEthnicityInfographic_-_900x525-06.png
[143] *McGee* (n118), at 325.

law. Second, it is a potentially broad-ranging humanistic benchmark. Third, it is more consistent than the Christian values approach with Article 44 of the Constitution, which provides that the state 'guarantees not to endow any religion.'[144] And fourth, it actually provides a potential bridge to the body of international human rights norms, since various treaties use the phrase, albeit almost always in relation to the goals of the right to education. Thus, for example, Article 13 of the International Covenant on Economic, Social and Cultural Rights emphasizes the importance of the 'full development of the human personality and the sense of its dignity'.[145]

The third approach builds directly on that phrase and combines different foundations to be found in Irish law by focusing on respect for the human personality as well as on human dignity. Both the second and third options have the distinct advantage of linking the derived rights doctrine to an existing body of jurisprudence – international human rights law – that can be referred to by Irish judges in making constitutional determinations as to whether a particular right is inherent in the human personality. Various Irish scholars have linked the concept of human personality to that of human dignity.[146] And dignity, in turn, underpins much of international human rights law.[147] This is not to suggest that international human rights law would or could thereby be imported whole into Irish law, but rather to confirm the importance and relevance of existing precedents.

In *NHV*, for example, O'Donnell J expressly referred to jurisprudence of the CESCR linking the right to work to human dignity in the course of determining whether the right to work is an inherent part of the human personality.[148] The relationship was also recognised by Henchy J when he rearticulated the human personality test in *Norris*, and observed that the Constitution endows Irish citizens with 'such a range of personal freedoms or immunities as are necessary to ensure [their] dignity and freedom…the essence of those rights is that they inhere in the individual personality of the citizen…'. Adopting the human personality test, while explicitly acknowledging the close relationship between the human personality and human dignity, could therefore open up an avenue that permits Irish judges to take account of international human rights jurisprudence when deciding cases that relate to derived rights. This approach is also consistent with the Supreme Court's recent decision in *Simpson v. Governor of Mountjoy Prison*, where MacMenamin J directly acknowledged that human dignity underpins all fundamental rights.[149]

Although the human personality test could create room for Irish judges to have recourse to international human rights law when considering derived rights, it nonetheless remains anchored in the Constitution, as it specifically acknowledges that courts must determine whether a right is inherent in the human personality in light of the Constitution and the society that it governs. Adopting this test would therefore allow the courts to determine whether international human rights jurisprudence is appropriate in the Irish context before deciding whether to follow it. International human rights law would serve primarily as an interpretive aid that does not bind Irish judges, and the Constitution would remain the primary means for determining whether Irish citizens enjoy the benefit of a particular derived right.

In summary, the human personality test is already relatively well established, having been formulated in the 1970s and referred to in a number of cases thereafter. It has the potential to provide a doctrinally coherent link to an existing body of rights jurisprudence, while simultaneously respecting the primacy of the Constitution and avoiding a radical departure from earlier precedent. In light of each of these factors, the Supreme Court should consider adopting it as the preferred means for recognising derived rights.

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[144] See Report of the Constitution Review Group (n131), at PDF 222.

[145] Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (2014), at 1084.

[146] O'Mahony (n132), at 10; citing Doyle (133); see also Elaine Dewhurst, 'Human Dignity in Ireland', in Paolo Becchi and Klaus Mathis (eds.), *Handbook of Human Dignity in Europe* (2019) 431.

[147] For example, dignity is expressly mentioned in Article 1 of the Universal Declaration of Human Rights, which provides: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' For further discussion see Oscar Schachter, 'Human Dignity as a Normative Concept' 77(4) *AJIL* 848 (1983), at 848.

[148] *N.v.H.* (n136) at 17.

[149] *Simpson* (n119), at 88 - 93.

d. A Derived Right to a Healthy Environment

In *Merriman*, the High Court recognised the derived right to a healthy environment largely by reference to the concept of human dignity and existing rights in the Constitution.[150] This analysis is broadly similar to that required by the human personality test. We turn now to consider the application of that test in the context of the Supreme Court's consideration of the appeal from MacGrath J's judgment in *FIE*. To begin with, this requires consideration of whether the right to a healthy environment is inherent in the human personality.

The human personality is inextricably linked to the environment in which we live. Without a healthy environment, individuals cannot fulfil their basic needs. The relationship between the environment, human wellbeing and human dignity has been recognised in a number of international instruments, including the landmark 1972 Stockholm Declaration, which provides that people have 'the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing.'[151] It has also been acknowledged by the UN Special Rapporteur on human rights and the environment, who has observed that 'without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.'[152] The link is well captured by Daly and May who note that:

> dignity defines who we are as individuals and, simultaneously, how we shape and are shaped by the natural environment. We thrive in the most complete sense, not merely physically, when we breathe clean air, swim in clear waters, fish in plentiful streams, and eat the fruits of fertile soils…to the extent that dignity refers to a kind of integrity or intactness, human dignity can be impaired when the surrounding natural environment is compromised. Toxic rivers and polluted air diminish dignity not just because of the threat to life or to health, but also because they challenge the ability of people fully to develop their personalities in relation to their surroundings. Reduced resources exacerbate poverty, making it harder for people to live in dignity.[153]

Given the clear linkages between a healthy environment, human dignity and the human personality, the right to a healthy environment is likely to satisfy the first limb of the Court's human personality test.

The second limb calls for the Court to consider whether the right should be deemed fundamental to the individual's personal standing in the social order. This may be done by the Constitution either expressly or by plain implication. While there is no express recognition, there is a strong case to be made for implicit recognition. It is important to recall Walsh J's observation in *McGee* that 'no interpretation of the Constitution is intended to be final for all time' and that the Constitution should always be interpreted 'in light of prevailing ideas and concepts.'[154] There are a number of fundamental characteristics of the social order envisaged by the Constitution which suggest that it impliedly recognises the right to a healthy environment. The preamble, which sets out the aims the Irish people were seeking to achieve by adopting the Constitution, expressly states that its purpose is 'to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured.' For the reasons outlined above, a healthy environment is essential to creating the conditions necessary for people to live a life with dignity. The language in the preamble therefore militates in favour of the proposition that the Constitution implicitly recognises the right to a healthy environment.

The same is true of a number of the rights that are either listed expressly in the Constitution or recognised as derived rights by Irish courts. The right to life, referred to in Article 40.3.2 of the Constitution, is one such example. Failure to prevent environmental harms is often characterized as a violation of the right to life, leading courts around the world, including from common law systems, to conclude that the right to a healthy environment is a corollary of

[150] *Merriman v. Fingal County Council* [2017] IEHC 695, 242 – 264.
[151] Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1 (1973), Principle 1.
[152] See: http://www.srenvironment.org/
[153] Erin Daly & James R. May, 'Bridging Constitutional Dignity and Environmental Rights Jurisprudence', 7 *J. Hum. Rts. & Env't.* 218 (2016), 232.
[154] *McGee* (n118), 319.

the right to life. In *Subhash Kumar v. State of Bihar*, for example, the Supreme Court of India recognised that 'the right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full enjoyment of life.'[155] This decision was subsequently reinforced by *Charan Lal Sahu v. Union of India*, where the Court held that the right to life incorporated the right to a healthy environment.[156] The connection between the right to life and environmental harms has also been recognised by United Nations human rights treaty bodies. In a recent General Comment on the right to life, the Human Rights Committee expressed the following view:

> The duty to protect life also implies that states parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their *right to life with dignity*. These general conditions may include…degradation of the environment…
>
> …
>
> Environmental degradation, climate change and unsustainable development constitute some of the *most pressing and serious threats to the ability of present and future generations to enjoy the right to life*.[157]

This was reinforced in *Portillo Cáceres v. Paraguay*, where the Human Rights Committee found that Paraguay's failure to protect a family of rural workers from environmental contamination constituted a violation of their right to life.[158] Importantly, the Irish Supreme Court has demonstrated a willingness to recognise rights that are a logical extension of the right to life. In *Re a Ward of the Court*, for instance, the Court determined that 'the right to life necessarily implies the right to have nature take its course and to die a natural death.'[159] In *G v. An Bord Uchtála*, Walsh J also took an expansive view of the scope of this right, observing that:

> The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience. *The right to life necessarily implies the right* to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and *habitation*.[160]

Following a comparable approach to that adopted in each of these cases, there are strong grounds to conclude that the express recognition of the right to life in the Constitution necessarily implies recognition of the right to a healthy environment. This is especially so since the ability of individuals to realise the other rights referred to by Walsh J would be severely curtailed in the absence of a healthy environment.

A similar argument arises in relation to the rights of children. By Article 42A of the Constitution, which came into force in 2015, the Irish state acknowledges and undertakes to protect the 'natural and imprescriptible' rights of all children. The precise rights that this provision protects are not set out, and a booklet that was distributed at the time of the referendum regarding Article 42A indicated that their identification is a 'matter for the courts.'[161] Children rank highly among the groups that are most vulnerable to environmental degradation. The UN Human Rights Council and the Special Rapporteur on human rights and the environment have both recognised that children are especially vulnerable to environmental harms, particularly those caused by climate change.[162] The protection offered by the right to a healthy environment is therefore especially important for children and, without it, they may

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[155] *Subhash Kumar v. State of Bihar*, No. 1991 A.I.R. 420; cited by Daly and May (n17), at 119.
[156] *Charan Lal Sahu v. Union of India.* A.I.R. 1990 S.C 1480; cited by Daly and May (n17), at 119.
[157] Human Rights Committee, General Comment No. 36 on Article 6 of The International Covenant on Civil And Political Rights, on the Right to Life, 30 October 2018, UN Doc. CCPR/C/GC/36, at 26 and 62 (emphasis added).
[158] *Portillo Cáceres v. Paraguay*, 20 September 2019, UN Doc. CCPR/C/126/D/2751/2016, at 7.4 – 7.7.
[159] *Re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79, at 124.
[160] *G* (n125), at 69.
[161] Cited in Alan Brady, 'Children's Constitutional Rights: Past, Present and Yet to Come', presented at Catherine McGuinness Fellowship Seminar: Children and Article 42A of the Irish Constitution, 6 December 2018, at 9.
[162] Report of The Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 24 January 2018, UN Doc. A/HRC/37/58, at 4 – 5.

be unable to fully enjoy the natural and imprescriptible rights guaranteed by Article 42A. It can thus be concluded that the right to a healthy environment falls within the ambit of Article 42A which, in turn, supports the proposition that the Constitution deems the right to be fundamental by way of necessary implication.

As discussed above, Irish courts have also recognised that the right to bodily integrity is among the rights protected by Article 40.3. In *Ryan*, the High Court concluded that this right prohibits the state from embarking on a course of action that may, as a matter of probability, endanger the health of Irish citizens.[163] This was reinforced by the decision in *State (C.) v. Frawley*, where Finlay P held that this general principle prevents the Executive from exposing the health of a person to risk or danger.[164] The willingness of the courts to recognise this derived right, which is not mentioned in the Constitution, is an acknowledgment that the Constitution and the social order that is created by it impliedly deems the health of Irish citizens to be a matter of paramount importance. In light of this, and given the health risks posed by the extreme weather events that have become increasingly prevalent in Ireland in recent times,[165] it seems clear that the Constitution also implicitly recognises that a healthy environment is fundamentally important to the people of Ireland.

As this analysis demonstrates, the proposition that the Constitution deems the right to a healthy environment to be fundamental to Irish citizens is supported by the text in the preamble, the express references to the right to life and the rights of children in the Constitution and the fact that Irish courts have recognised the right to bodily integrity as a derived right. Indeed, each of these rights are among those referred to when Barrett J recognised the right to a healthy environment in *Merriman*. The right is also an inherent part of the human personality, primarily because humans are so deeply rooted within the environment in which they live and because a healthy environment is a prerequisite to the full enjoyment of other human rights.[166] As such the right satisfies both limbs of the human personality test and should therefore be recognised as part of Irish law.

e. The Right to a healthy Environment Internationally

The right to a healthy environment has rapidly risen to prominence since the 1960s. Whereas only 1 percent of national constitutions incorporated such a right in 1966, by 2006 this figure had risen to 63 percent.[167] At present, the right to a healthy environment has been incorporated in the constitutions of more than a hundred states.[168] For example, Article 66 of the Portuguese Constitution provides that 'everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it.' And in countries where there is no such explicit constitutional recognition, courts have nonetheless demonstrated a willingness to recognise a derived right to a healthy environment based on other constitutional provisions. To date courts in at least twelve different states have made such a finding, including in Bangladesh, Estonia, Guatemala, India, Israel, Italy, Malaysia, Nigeria, Pakistan, Sri Lanka, Tanzania and Uruguay.[169] These courts have generally derived the right to a healthy environment from constitutional guarantees of other fundamental rights, particularly the right to life.[170] As noted above, the Supreme Court of India has been a notable leader in this regard. Similarly, the Supreme Court of Pakistan found that the rights to life and dignity in the Constitution of Pakistan included the right to enjoy a clean atmosphere and unpolluted environment.[171] While the right to life has provided the basis for recognising a derived right to a healthy environment in a majority of cases, other rights have also led courts to reach the same conclusion. In Italy, for

[163] *Ryan* (n110), at 314.
[164] *State (C.)* (n122), at 372.
[165] Orla Kelleher, 'The Revival of the Unenumerated Rights Doctrine: A Right to an Environment and its Implications for Future Climate Change Litigation in Ireland' 25(3) *Irish Planning and Environmental Law* 97 (2018), at 102.
[166] A/HRC/37/58, (n162), at 7.
[167] John Knox, 'Constructing the Human Right to a Healthy Environment', *Annual Review of Law and Social Science*, Forthcoming, accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542591; citing Law DS, Versteeg M. 'The Evolution and Ideology of Global Constitutionalism' 99(5) *Cal. Law Rev.* 1163, at 1201.
[168] Report of The Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 19 July 2018, UN Doc. A/73/188, at 11.
[169] David R. Boyd, The Implicit Constitutional Right to Live in a Healthy Environment, 20 *Rev. Eur. Comp. & Int'l Envtl. L.* 171 (2011), at 172.
[170] Daly and May (n17), at 70.
[171] *Shehla Zia v. WAPDA*, cited in Boyd (n169), at 176.

example, the Constitutional Court has decided a series of cases in which it held that the right to live in a healthy environment was incorporated in the right to health in Article 32 of the Italian constitution.[172]

The right to a healthy environment has also been recognised in domestic legislation in more than a hundred states.[173] In France, for example, the Environmental Code refers to 'the individual's right to a healthy environment' and 'the recognised right of all to breathe air which is not harmful to health.'[174] A number of regional human rights instruments specifically mention the right, including the African Charter on Human and Peoples' Rights, the 2004 Arab Charter on Human Rights, the 2012 Human Rights Declaration of the ASEAN countries, the Protocol of San Salvador, the Escazú Agreement and the Aarhus Convention.[175] More than 130 states have ratified one or more of these treaties.[176]

While the right to a healthy environment is not mentioned in the European Convention on Human Rights, it has been referred to in decisions of the European Court of Human Rights. In *Tatar v. Romania*, for example, the Court concluded that the state's failure to take positive measures to prevent an environmental disaster caused by mining operations violated not only the applicants' right to private and family life, but also their enjoyment of a healthy and protected environment.[177] Although the Court reached its conclusion regarding the right to a healthy environment because the right is recognised in the Romanian constitution, and therefore did not make a finding that the right is incorporated in the Convention, the case nonetheless highlights the link between the right to a healthy environment and the enjoyment of other rights. The same is true of the decision in *López Ostra v. Spain*, in which the Court held that pollution that made its way into the applicant's home violated her right to private and family life, as well as the decision in *Öneryildiz v. Turkey* , in which the Court held that states must establish legal frameworks to deter, investigate and punish violations in order to protect the right to life from environmental harm.[178]

A total of 155 states have introduced a binding legal obligation to uphold the right to a healthy environment in their domestic legal systems, while another 36 have signed non-binding international declarations that refer to the right.[179] Of the 193 member states of the United Nations, only North Korea and Oman have failed to recognise it in some way.[180] The proliferation of domestic legislation and international human rights instruments recognising the right, combined with its recognition in more than a hundred different national constitutions, has led Knox to suggest that 'it is well on its way to joining the list of generic rights.'[181] Recognition of the right to a healthy environment as a derived right under the Irish Constitution would thus be in line with the approach adopted in the vast majority of jurisdictions around the world.

6. Directive Principles of Social Policy

We have argued in Section 5 that the derived constitutional right to the environment recognised in *Merriman*, and accepted by MacGrath J in the High Court in *FIE*, should be affirmed by the Supreme Court. In addition to being grounded in Article 40, we argue that the much-neglected Directive Principles of Social Policy under Article 45 of the Constitution are also implicated.

Although Éamon de Valera, in drafting the Constitution, had envisioned the Directive Principles 'as a constant headline', the Constitution provided that these 'shall not be cognisable by any Court' and are intended to guide the

[172] Boyd (n169), at 175.
[173] A/73/188, (n168), at 11.
[174] *Ibid*, at 11.
[175] *Ibid*, at 12.
[176] *Ibid*, at 12.
[177] *Tatar v. Romania*, Application No. 67021/01, at 107 and 112. Cited in A/73/188 (n168), at 12.
[178] Knox (n167), at 8.
[179] A/73/188, (n168), at 13.
[180] A/73/188, (n168), at 13.
[181] Knox, (n167), at 8.

legislature, and there have been very few mentions of Article 45 by the courts.[182] Indeed, Fitzgerald CJ in *McGee v. Attorney General* noted that:

> 'Article 45 refers to principles of social policy which are intended for the general guidance of the Oireachtas in its making of laws and which are declared to be exclusively its province and not cognisable by any Court. In my opinion, the intervention by this, or any other Court, with the function of the Oireachtas is expressly prohibited under this article. To hold otherwise would be an invalid usurpation of legislative authority.'[183]

But there have been numerous judicial dicta suggesting that these principles are neither untouchable nor irrelevant. Firstly, Fitzgerald CJ in *McGee* made the above-quoted statement in relation to a claim that an Act of the Oireachtas (the legislature) violated Article 45. In the lower court, O'Keeffe P had noted that the Irish text of Article 45 makes it plain that the principles may be cognisable by courts where the validity of a statute is not in question; the Supreme Court did not address this more specific question. Indeed, in framing Article 45, de Valera argued that '[i]t would be clearly absurd that a court should come in and say: "The Dáil has not done this which it might do; it has not gone as far as it could go"', suggesting that it is the use of Article 45 for the assessment of actions of the *legislature* which was to be avoided.[184] The Irish text seems to support such a distinction, as O'Keeffe P had noted, and if there is a conflict between the English and the Irish texts, Article 25.4.6 provides that the Irish text shall prevail.[185] The Supreme Court might therefore explore whether, in this case in which legislative action is not challenged, and indeed executive action is argued to be *ultra vires* and in breach of constitutional rights, the Directive Principles might have contextual relevance in judging the executive's actions.

Secondly, there have been dicta that the principles might legitimately guide the interpretation of rights. In *Murtagh Properties Ltd v. Cleary*, for example, Kenny J held that courts may take Article 45 'into consideration when deciding whether a claimed constitutional right exists' – and considered the principles when adjudicating on whether a right was protected by Article 40.3.1°.[186] In *Landers v. Attorney General*, Finlay J sought guidance from Article 45 not only as to the existence of the right to work but also as to the scope of legitimate restrictions on that right; he could look at Article 45.4.2° for the purpose of 'reaching a general conclusion as to what may fairly be embraced by the expression "the exigencies of the common good"' – a phrase used in Article 43 in connection with the State's power to delimit the exercise of private property rights.[187] In *Attorney General v. Paperlink Ltd*, Costello J considered he was 'not precluded by the introductory words of [Article 45] from considering the principles of social policy set out in it for a limited purpose, namely, for assisting the court in ascertaining what personal rights are included in the guarantees contained in Article 40.3.1° and what legitimate limitations in the interests of the common good the State may impose on such rights.'[188]

Though the derived rights whose scope had been informed by courts looking to Article 45 are now somewhat established, in more recent cases in which claimants have invoked Article 45 as an interpretive aid, courts have been less engaged and the Supreme Court 'has yet to give a definitive ruling on this point.'[189] In *Re Article 26 and Part V of the Planning and Development Bill 1999,* Keane J held that:

> 'it is not necessary to express any opinion on the submission advanced by the Attorney General that the court, in deciding this Reference, should have regard to the Directive Principles of Social Policy set out in Article 45 of the Constitution. The court notes that, in the High Court judgments where account was taken of the Directive Principles, no question appears to have arisen of their application in the making of laws by

[182] Eamon de Valera, Constitution of Ireland (Draft) Second Stage, Dáil Éireann debate, Tuesday 11 May 1937.
[183] *McGee* (n118), at 290.
[184] Dáil Éireann debate (n182).
[185] Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration, 2015) at 54-55.
[186] *Murtagh Properties Limited v. Cleary* [1972] I.R. 330, at 335-36.
[187] *Landers v. Attorney General* [1975] 109 ILTR 16.
[188] *Attorney General v. Paperlink Ltd* [1983] IEHC 1, at 46.
[189] See *N.H.V. v. Minister for Justice* [2016] IECA 86; Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution', *Irish Jurist, Vol 36* (2001) 174.

> the Oireachtas. The question as to whether those High Court decisions were correctly decided and, if so, whether they should be followed in a case such as the present must await resolution in another case.'[190]

Despite this more conservative holding, the distinction between the use of Article 45 to question legislative Acts and for other claims thus remained intact.

In *T.D. v. Minister of Education*, Murphy J noted that the non-justiciability clause in Article 45 might be seen as 'an ingenious method of ensuring that social justice should be achieved while excluding the judiciary from any role in the attainment of that objective.'[191] In 2016, Hogan J in the Court of Appeal argued that 'one might question the extent to which it is legitimate to have regard to Article 45 in assessing whether the right to earn a livelihood is constitutionally protected as an unenumerated personal right for the purposes of Article 40.3.1 of the Constitution'; he had suggested in academic work in 2001 that this might be 'doing through the backdoor that which is expressly forbidden'.[192] Courts may therefore be moving back in the direction of the complete 'legal irrelevance' of the principles.[193]

The *FIE* case may present an opportunity for the Supreme Court to clarify whether the Directive Principles can aid courts' interpretation of rights where the validity of a statute is not in question. Hogan had argued that 'if a Constitution cannot ensure a framework whereby the basic rights of the disadvantaged, the poor, the socially excluded and others for whom the democratic process seems unresponsive are protected, it may be said that constitutional law is not fulfilling one of its fundamental purposes in modern society' and that de Valera and his team had 'identified this problem in 1937 and made a valiant attempt to square this particular legal circle. Article 45 was their much admired (and much copied) compromise' but has travelled the 'road to obscurity'.[194] This sentiment is especially relevant in the context of climate change. If there is *one* issue affecting 'the welfare of the whole people', 'adequate means of livelihood', 'economic security' and 'the economic interests of the weaker sections of the community' including 'the infirm, the widow, the orphan, and the aged' within Article 45, it is surely climate change. As we have noted, the changing climate is already having direct impacts in Ireland, and there is considerable scientific evidence that it will have a major negative impact on the most vulnerable first, and that livelihoods and economic security will be affected.

Friends of the Irish Environment have made claims relating to the rights to life, bodily integrity and the environment under the Constitution. These are, as we have argued above, strong claims and clearly deserving of the careful consideration that they did not receive in the High Court. Arguably, the Directive Principles might play a role, given the extreme importance of the issue, through informing how the Supreme Court interprets these rights in relation to climate change. As Barrett J noted in *Merriman v. Fingal County Council*, '[i]t is difficult to see how the dignity and freedom of individuals is being assured if the natural environment on which their respective well-being is concerned is being progressively diminished'.[195] It is to be hoped that the Supreme Court will acknowledge the weight of that argument and recognize the centrality of climate change in determining whether the rights recognized in the Constitution and the rights derived therefrom are to be given the protection that is warranted. Article 45 will be consigned to definitive irrelevance if it is considered to have nothing at all to add to a case such as this. To adjudicate a case concerning Ireland's greenhouse gas emissions reductions, which have such clear proven negative effects on the environment and consequently on the lives of Irish citizens present and future, without mentioning the ways in which the State's obligation to 'strive to promote the welfare of the whole people' is engaged here, is to abandon Article 45 entirely.

This is, of course, not a call for the Irish Supreme Court to do what is 'expressly prohibited' in invalidating legislation, neither is it a call to begin treating Article 45 as containing justiciable rights. Rather, *if* there is a situation in which

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[190] *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 I.R 321, at 98.
[191] *T.D. v. Minister for Education* (n35), at 169.
[192] *N.H.V* (n189), at 56; see Hogan, 'Directive Principles' (n189).
[193] Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press: 2008), 238.
[194] Hogan, 'Directive Principles' (n189).
[195] *Merriman* (n150).

the Directive Principles might have some role, it is that of the rapidly changing climate and the disastrous effects on Irish land and people. This is an extreme case, and it may be the case to save the principles from constitutional irrelevance.

7. Conclusion

The *FIE* case is of major significance in terms of the continuing evolution of Irish constitutional law as well as of efforts to address the existential challenge represented by global warming and the reluctance of governments to live up to their domestic and international obligations.[196] While the actual steps that the government would be required to take in the event that the appeal is upheld are modest, the importance of the principles involved cannot be overstated.

ANNEX – Rights-based Climate Change Cases, 2015-2020

Source: César Rodríguez-Garavito, 'International Human Rights and Climate Governance: Origins, Norms, and Implications of the "Rights Turn" in Climate Litigation', (forthcoming, 2020)

[196] Climate Change and Poverty, Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, UN Doc. A/HRC/41/39 (2019).

Table 1.

Rights-Based Climate Change Cases (2015-2020)

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2005	Granted	*Nigeria* Federal High Court of Nigeria	Gbemre v. Shell Petroleum Development Company of Nigeria [*FHC/B/CS/53/05*]	Adult male	Challenging the practice by the Nigerian government and Shell Oil of gas flaring in the Niger Delta. Based on rights to life and dignity of human persons; health; healthy environment; and environment favorable to their development.	Nigerian Constitution; African Charter on Human and Peoples Rights.
2005	Denied (in 2006)	Inter-American Commission of Human Rights (IACHR) (defendant: U.S.)	Petition to the IACHR Seeking Relief from Violations Resulting from Global Warming Caused By Acts and Omissions of the United States	Inuit woman (on her own behalf and on behalf of other Inuit in the Arctic)	Seeking relief from human rights violations resulting from global warming caused by acts and omissions of the U.S. Based on rights to traditionally occupied land; life; physical integrity and security; culture; property; health; their own means of sustenance; residence and movement; and inviolability of the home.	American Convention on Human Rights
2013	Pending	IACHR (defendant: Canada)	Petition to the IACHR Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada	Arctic Athabaskan Council (on behalf of the Arctic Athabaskan peoples of Canada and the U.S.)	Challenging Canada's failure to implement measures to reduce black carbon emissions as violations of Athabaskan people's human rights as a result of the arctic warming produced from black carbon emissions. Based on the rights to enjoy the benefits of culture; to property; to the preservation of health; and to their own means of subsistence.	American Convention on Human Rights; American Declaration of the Rights and Duties of Man.
2013	Granted	*Netherlands* Hague District Court (2015)	Urgenda Foundation v. Netherlands	NGO (Urgenda Foundation) & hundreds of Dutch citizens	Seeking declaratory judgment and injunction to compel the Dutch government to do more to reduce GHG emissions. Alleged violations of rights to life and to private and family life.	Dutch Constitution; ECHR
	Affirmed	Hague Court of Appeal (Civil Law Division) (2018)				
	Affirmed	Supreme Court of the Netherlands (Hoge Raad) (2020)				
2014	Granted	*New Zealand* Immigration & Protection Tribunal	In re: AD (Tuvalu) [*[2014] Cases 501370-371*]	Family (Tuvalu)	Seeking resident visas for a family displaced from Tuvalu, based on rights to family unity; life; be free of cruel, inhuman or degrading treatment; water; and asylum.	New Zealand Immigration Act 2009; Refugee Convention; ICCPR
2015	Denied	*New Zealand* Supreme Court	Ioane Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment [*[2015] NZSC 107*]	Adult male (from Kiribati)	Seeking refugee status for Kiribati citizen, based on the risks generated by the effects of climate change on his right to life.	New Zealand Immigration Act 2009; UN Refugee Convention; ICCPR
2015	Denied (2019)	UN Human Rights Committee (defendant: New Zealand)	Views Adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning [the Teitiota Communication] [*CCPR/C/127/D/2728/2016*]	Family (Kiribati)	Arguing that New Zealand's denial of refugee status to displaced family from Kiribati violated international human rights law, based on the right to life and the risk the plaintiff faced of the arbitrary deprivation of life.	International Covenant on Civil and Political Rights (ICCPR)
2015	Granted	*Pakistan* Lahore High Court (2015)	Leghari v. Pakistan [(2015) W.P. No. 25501/201]	Adult male	Challenging the Pakistani government for their failure to carry out core provisions of 2012 climate law, based on rights to life; dignity; water; to a healthy environment; and the principle of intergenerational equity.	Constitution; National Climate Policy and Framework of 2012

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2015	Pending	*Belgium* Judicial District (Brussels)	VZW Klimaatzaak v. Belgium	NGO and class (35,000+ citizens)	Compelling federal and regional governments to reduce greenhouse gas emissions, based on right to life and private and family life and the principle of intergenerational justice.	International human rights law
2015	Allowed to Proceed (Motion to Dismiss Denied)	*United States of America* United States District Court of Oregon (Eugene Division) (2016)	Juliana v. United States [*18-36082*]	21 youth; a representative of "future generations;" NGO (OCT)	Asserting that the federal government violated the constitutional rights of youth citizens by causing dangerous carbon dioxide concentrations, based on rights to life, liberty, and property, and equal protection.	U.S. Constitution; public trust doctrine
	Denied	9th Circuit Court of Appeals (2020)				
2015	Investigation Concluded in Favor of the Plaintiffs (2019)	*Philippines* Commission on Human Rights	Carbon Majors Inquiry	Greenpeace Philippines and Filipino NGOs and citizens	Asserting that 'carbon majors' are responsible for climate-induced violations of rights to life, food, health, water, sanitation, adequate housing, and self-determination	International human rights treaties ratified by the Philippines; Philippines Constitution
2016	Denied	*Norway* Oslo District Court (2018)	Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy [*16-166674TVI-OTIR/06*]	NGOs	Challenging the constitutionality of the Norwegian government's decision to license new blocks of Barents Sea for development of deep-sea oil and gas extraction. Based on the rights to life; private and family life; health; an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained; and the no harm principle.	Norwegian Constitution; European Convention on Human Rights; International Covenant on Economic Social and Cultural Rights
	Denied	Borgarting Court of Appeal (2020)				
	On Appeal	Supreme Court of Norway				
2016	Denied	*Switzerland* Federal Administrative Court of Switzerland (2018)	Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others [*No. A-2992/2017*]	Senior citizen women	Challenging the adequacy of the government's climate change mitigation targets and implementation measures and possible infringement on human rights. Based on the rights to life and private and family life.	Swiss Constitution; European Convention on Human Rights
	On Appeal (2019)	*Switzerland* Federal Supreme Court of Switzerland				
2016	Pending	*Pakistan* Pakistan Supreme Court	Ali v. Pakistan [*Constitutional Petition No. ___ /I of 2016*]	Child	Challenging various actions and inactions by the federal and provincial government, including plans to develop the Thar Coalfield. Based on the rights to life; dignity; property; equality; and the principles of sustainable development and inter-generational equality.	Pakistani Constitution; Pakistani National Climate Policy and Framework of 2012; Public Trust Doctrine; Paris Agreement
2016	Denied	*Sweden* Stockholm District Court	PUSH et al. v. Sweden	NGOs, youth, and individuals	Challenging the sale of coal-fired plants in Germany by Swedish state-owned energy firm, allegedly in violation of the government's duty of care and plaintiffs' rights to life, health, private and family life, and a non-harmful climate. (Plants were sold to Czech firm with poor climate record).	European Convention of Human Rights; Swedish Constitution
2016	Granted	*South Africa* High Court of South Africa (Gauteng Division) (2017)	EarthLife Africa Johannesburg v. Minister of Environmental Affairs [65662/16]	NGO	Challenging the government's failure to adequately consider climate change-related impacts in development of coal-fired power plant, based on the right to healthy environment.	South African Constitution; National Environmental Management Act

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2017	Denied	*Ireland* High Court of Ireland (2019)	Friends of the Irish Environment v. Ireland [*2017 No. 793 JR*]	NGO	Alleging Ireland's National Mitigation Plan is in violation of international and national law because it is not designed to reduce greenhouse gas emissions sufficiently in the near-term. Based on the rights to life; liberty and security; integrity of the person; respect for family and private life; property; and the rights of the child; the rights of the elderly; equality between men and women; environmental protection; principles of intergenerational solidarity and vigilant and effective protection of the environment.	European Convention on Human Rights; Irish Constitution; Irish Climate Action and Low Carbon Development Act 2015;
	On Appeal	Supreme Court of Ireland (Leave for Appeal Granted in 2020)				
2017	Pending	*India* National Green Tribunal	Pandey v. India	Child	Challenging the failure of the Indian government to take greater action to mitigate climate change by implementing its environmental laws and satisfying its obligations under the Paris Agreement, given the particularly adverse impact of nonaction on children and future generations. Based on violation of children's rights to life and a healthy environment.	Indian Constitution; National Green Tribunal Act; Public Trust Doctrine; Forest (Conservation) Act; Air (Prevention and Control of Pollution) Act; Environment (Protection) Act; and Environmental Impact Assessment Notification
2017	Denied	*United Kingdom* High Court of Justice, Queen's Bench Division (Administrative Court) (Feb. 14, 2018)	Plan B Earth v. The Secretary of State for Business, Energy, and Industrial Strategy [Claim No. CO/16/2018]	NGO & 11 citizens (including the elderly and children)	Challenging the Secretary of State's failure to revise the U.K.'s 2050 carbon emissions reduction target in light of the U.K.'s international obligations under the Paris Agreement and the international scientific consensus on climate change.	UK Climate Change Act 2008; UK Human Rights Act 1998; UK Equality Act 2010.
	Denied	High Court of Justice, Queen's Bench Division (Administrative Court) (July 20, 2018)				
	Appeal Request Denied	Court of Appeal (Civil Division) (Jan. 25, 2019)				
2019	Pending	*Pakistan* Lahore High Court	Maria Khan et al. v. Pakistan [*No. 8960 of 2019*]	Adult women	Challenging government inaction on climate change based on the rights of women and future generations to a healthy environment and a climate capable of supporting human life and on equal protection for women.	Pakistani Constitution; Pakistani Renewable Energy Policy 2006; *Asghar Leghari v. Federation of Pakistan* 2018 CLD 424
2018	Pending	*France* Administrative Court of Paris (complaint submitted in 2019)	Notre Affaire à Tous v. France	NGOs (Fondation pour la Nature et l'Homme; Greenpeace France; Notre Affaire à Tous; Oxfam France)	Challenging the government's failure to take further action on climate change based on the rights to life; health; private and family life; and the right of every person to live in a healthy and ecologically balanced environment.	European Convention for the Protection of Human Rights and Fundamental Freedoms; French Constitution; French Environmental Code; French Environmental Charter
2018	Pending	*Germany* Federal Constitutional Court	Friends of the Earth Germany v. Germany	NGOs & single claimants.	Challenging the government's failure to meet greenhouse gas emission reduction goals, based on citizens' rights to life; health; occupational freedom; and property.	German Constitution; EU Sharing Decision (406/2009/EC)

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2018	Denied	*Canada* Superior Court of Québec (2019)	ENVironnement JEUnesse v. Canada [*500-06*]	Class (Québec citizens aged 35 and under)	Challenging the government's failure to set an adequate greenhouse gas emission reduction target and develop a sufficient plan to avoid dangerous climate change impacts, based on rights of youngest generations to life; inviolability; security of the person; and equality.	Canadian Charter of Rights and Freedoms; Québec Charter of Rights and Freedoms; UNFCCC Paris Agreement
	Appealed (2019)	Filed in the Québec Court of Appeals				
2018	Denied	*Germany* Administrative Court (Berlin) (2019)	Family Farmers and Greenpeace Germany v. Germany [*00271/17/R /SP*]	Three German families & NGO	Challenging insufficient action by the government to meet its 2020 greenhouse gas emissions reduction target, based on rights to life and health; occupational freedom; and property.	German Constitution; EU Effort Sharing Decision
2018	Denied	*United Kingdom* High Court of Justice, Queen's Bench Division, (Planning Court, Divisional Court) (2019)	Plan B Earth v. Secretary of State for Transport [*[2019] EWHC 1070 (Admin)*]	NGO	Challenging government approval of expansion to the Heathrow International Airport as failing to adequately consider the U.K.'s climate change commitments. Based on rights to life; property; private and family life; and nondiscrimination (for those with certain protected characteristics, in particular the poor).	UK Human Rights Act 1998; UK Climate Change Act 2008; UK Planning Act 2008; UNFCCC Paris Agreement.
	Granted	Court of Appeal (Civil Division) (2020)				
2018	Denied	*European Union* EU General Court (Second Chamber) (2019)	Armando Ferrão Carvalho v. European Parliament [*Case no. T-330/18*]	10 families, including children (Portugal, Germany, France, Italy, Romania, Kenya, Fiji, & Swedish Sami Youth Association Sáminuorra)	Seeking an injunction to order the EU to enact more stringent greenhouse gas emissions reduction targets through existing programs. Based on rights to life; health; occupation; property; and equal treatment (based on age and geographic place of birth); and the rights of children.	EU Charter of Fundamental Rights; Treaty on the Functioning of the European Union; UNFCCC Paris Agreement.
	Appealed	Appeal Filed with the Court of Justice of the European Union (2019)				
2018	Granted	*Colombia* Supreme Court (2018)	Future Generations v. Ministry of the Environment [*11001 22 03 000 2018 00319 00*]	25 youth	Seeking to enforce fundamental rights to a healthy environment in face of threats from climate change and deforestation. Based on rights to life and human dignity; health; food; water; and the enjoyment of healthy environment.	International human rights treaties; Colombian Constitution
2019	Pending	UN Committee on the Rights of the Child (defendants: Argentina, Brazil, France, Germany and Turkey)	Sacchi v. Argentina	16 children from Argentina, Brazil, France, Germany, Turkey, India, Nigeria, Palau, South Africa, Sweden, the Marshall Islands, Tunisia, and USA	Alleging insufficient cuts to greenhouse gas emissions and failure to use available tools to protect children from carbon pollution by the world's major emitters. Based on the rights under the CRC, including the rights to non-discrimination; prioritization of the best interests of the child; culture; life; and health; and the principle of intergenerational justice.	UNFCCC Paris Agreement; Convention on the Rights of the Child; ICCPR.
2019	Pending	*France* Council of State (Conseil d'Etat)	Commune de Grande-Synthe v. France	Municipality of Grande-Synthe	Challenging the French government's failure to take further action to reduce greenhouse gas emissions, based on the rights to life and private life.	European Convention on Human Rights; UNFCCC Paris Agreement; French Environmental Code; French Environmental Charter.

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2019	Pending	EU General Court (defendant: EU)	EU Biomass Plaintiffs v. European Union	Individuals and NGOs from Estonia, Ireland, France, Romania, Slovakia & U.S.	Challenging the treatment of forest biomass as a renewable fuel in the European Union's 2018 revised Renewable Energy Directive. Based on the rights to property, health, private and family life.	EU Charter on Human Rights; 2018 Revised Renewable Energy Directive
2019	Granted	*Mexico* Supreme Court	Ruling on Modification to Ethanol Fuel Rule [*610/2019*]		Challenging the government's increase in the permissible maximum ethanol fuel content, based on the rights to a healthy environment; life; health; food; and water.	Mexican Constitution
2019	Pending	*Netherlands* Hague District Court	Milieudefensie et al. v. Royal Dutch Shell plc.	NGOs and class of 170,000+ citizens	Alleging a private oil company failed to take adequate action to curb contributions to climate change in violation of duty of care and human rights obligations under national and international law. Based on the rights to life, private life, family life, home, and correspondence.	European Convention on Human Rights; Dutch Civil Code
2019	Denied	*France* Nanterre High Court of Justice (2020)	Friends of the Earth v. Total	14 French municipalities ; NGOs (Friends of the Earth France, Survie; AFIEGO; CRED; NAPE/ Friends of the Earth Uganda; NAVODA)	Suit over an oil project in Uganda and Tanzania, alleging that Total failed to properly assess the risks to the environment and to human rights as required by law.	French Law of Vigilance (Due Diligence)
2019	Pending	*France* Nanterre High Court of Justice	Notre Affaire à Tous v. Total	French NGOs & French local governments	Alleging that a French oil company failed to adequately report climate risks and their human rights impacts associated with its activities and take action to mitigate those risks in line with the goals of the Paris Agreement.	French Environmental Charter; French Commercial Code; UNFCCC Paris Agreement.
2019	Pending	*Canada* Federal Court of Canada	La Rose v. Her Majesty the Queen	15 Canadian youth; NGOs (David Suzuki Foundation, CELL, OCT)	Demanding that the government prepare a plan for reducing GHG emissions; alleging that the Canadian government's policies contributes to high emissions that infringe on plaintiffs' right to life, liberty, security, and equal protection.	Canadian Charter of Rights and Freedoms; public trust doctrine
2019	Pending	*Peru* Superior Court of Lima	Álvarez v. Peru	7 children	Seeking a judgment by the court to require net zero deforestation of the Amazon by year 2025 because of the environmental and climate consequences of the government's failure to adequately halt deforestation, based on the rights to dignity; life; health; water; conservation of biological diversity; sustainable use of natural resources; best interests of the child; solidarity and intergenerational justice.	Peruvian Constitution; ICCPR; Additional Protocol of the American Convention on Human Rights; Peruvian Code of Children and Adolescents; Peruvian General Law of the Environment; Inter-American Democratic Charter.

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2019	Granted	*Austria* Federal Administrative Court (Feb. 2, 2017)	*In re* Vienna-Schwechat Airport Expansion	NGOs and several adult individuals	Challenging the government's approval of the construction of a third runway at Vienna's main airport, based on rights to environmental protection.	European Convention on Human Rights; Charter of Fundamental Rights of the European Union Austrian Climate Protection Act; Austrian Constitution; UNFCCC Paris Agreement;
	Repealed (Lower Court's decision is overturned)	Austrian Constitutional Court (June 2017)				
2019	Denied	*Luxembourg* Luxembourg Administrative Tribunal (2019)	Greenpeace Luxembourg v. Luxembourg's Minister of Social Affairs	NGO	Claimant sought information on Luxembourg's national pension fund's investment in fossil fuel industries, based on right to access to information. (Tribunal concludes that the organization that manages the investment fund is not a "public authority" subject to access-to-information duties).	Luxembourg law on access to information (2005); European Community laws
2019	Pending	UN Human Rights Committee (defendant: Australia)	Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change	Eight Torres Strait Islanders	Whether Australia violated the human rights of low-lying islanders through its failure to act on climate change, based on the rights to culture, life, and the right to be free from arbitrary interference with privacy, family, and home.	International Covenant on Civil and Political Rights
2019	Granted	*South Africa* High Court (2020)	Philippi Horticultural Area Food & Farming Campaign, et al. v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape, et al.	Voluntary association and adult individuals	Challenging an administrative decision allowing an urban development that would threaten a local aquifer. Based on the rights to healthy environment, water, and food.	South African Constitution; Promotion of Administrative Justice Act 3 of 2000
2020	Pending	United Nations (10 Special Rapporteurs) (defendant: U.S.)	Rights of Indigenous People in Addressing Climate-Forced Displacement	Five U.S. Indian tribes; NGO (Alaska Institute for Justice)	Alleging the U.S. government has failed to address climate-caused displacement, based on rights to self-determination, life, health, housing, water, sanitation, a healthy environment, and food.	Guiding Principles on Internal Displacement; Pinheiro Principles on Housing and Property Restitution; Peninsula Principles on human rights
2020	Pending	*Canada* Federal Court	Wet'suwet'en Nation hereditary chiefs v. Ottawa	Two native chiefs (Wet'suwet'en)	Challenging the Canadian government to adhere to its emissions reduction targets under the Paris Agreement, based on the rights to life; liberty; security of the person; and equal protection for future generations.	Canada's Charter of Rights and Freedoms
2020	Pending	*Austria* Constitutional Court	Zoubek et al. v. Austria	NGO (Greenpeace) and class of 8,000 citizens	Challenging two laws that give tax credits for air travel but not rail transportation, arguing that GHGs pose a threat to the rights to life and liberty.	European Convention on Human Rights; Austrian Constitution
2020	Pending	*South Korea* Constitutional Court	Kim Yujin et al. v. South Korea	19 child members of the Korea Youth Climate Action Group	Arguing that the South Korean government's current GHG emissions targets are unconstitutional as they fail to protect guaranteed rights to life, health, pursuit of happiness, and the environment	South Korean Constitution

Filing Date	Status	*Country* Court	Case Name [*Reporter Info, if available*]	Plaintiff	Issue & Alleged HR Violations	Legal Basis
2020	Pending	*Australia* Queensland Land Court	*Youth Verdict v. Watah Coal*	Environmental NGO Youth Verdict	Arguing that the proposed coal mine infringes upon the plaintiff's human rights – including their rights to life, the rights of children, and the right to culture as guaranteed under the Human Rights Act – by contributing to climate change.	Australian Human Rights Act