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Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court

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Abstract

Climate change litigation is a rapidly growing field in many countries and human rights obligations are increasingly an integral part of the equation. The Irish Supreme Court's 2020 judgment invalidating Ireland's National Mitigation Plan for transitioning to a low carbon, climate resilient and environmentally sustainable economy by 2050 has been widely praised by commentators. But the case warrants far more critical scrutiny. The Court's findings on standing to sue, the relevance of human rights provisions in this context, and the existence of a derived right to a healthy environment, are all retrogressive and augur badly for the future of rights-based climate change litigation in Ireland.

Keywords: climate change; human rights; Ireland; litigation

1. Introduction

For decades, most human rights practitioners were content to be concerned but passive bystanders as the threat of perilous global warming accelerated. Climate activists and the scientific community more or less reciprocated by treating the human rights dimensions of climate change as little more than a sideshow.

Today, as the world experiences unprecedentedly frequent, powerful and destructive hurricanes, wildfires, floods and droughts, along with the imminent extinction of a great many species, many human rights proponents have moved beyond rhetorical statements and box-ticking to acknowledging the tragic human rights impacts of global warming and exploring the potential contributions of national and international human rights frameworks. As a result, courts around the world are also playing a more central role in efforts to

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compel governments and corporations to take action. At the international level, the European Court of Human Rights is (belatedly) exploring its potential role, various UN human rights treaty bodies are taking action, and the Human Rights Council's special procedures have started to mobilize.

At the national level, litigation is only one element in the human rights community's response, but it is of critical importance. Outside the United States, at least 34 national climate cases with significant human rights dimensions are proceeding in 28 countries (Rodríguez-Garavito 2020a; Setzer and Benjamin 2020). One of the most prominent of these was decided in July 2020 by the Irish Supreme Court, which invalidated Ireland's strategy for transitioning to a low carbon, climate resilient and environmentally sustainable economy by 2050 (the National Mitigation Plan). The outcome was hailed by many commentators as a 'landmark decision', setting 'a precedent for courts around the world' (see e.g. Boyd quoted in Montague 2020). The case—*Friends of the Irish Environment v. Government of Ireland, Ireland and the Attorney General* (hereafter *FIE*)¹—is certainly significant in the overall global context insofar as it served to highlight the patent inadequacy of the Irish government's response to climate change and required the adoption of a new strategy.

But it is also important for the international community to take note of the negative lessons that should be drawn from a deeply disappointing judgment. Those bringing the case had hoped that it would be a model of how international and constitutional human rights provisions could reinforce and give greater depth to arguments designed to compel governmental action to halt or at least reduce global warming. But the approach ultimately adopted by Ireland's highest court stands in marked contrast to, for example, the 2019 *Urgenda* case in which the Netherlands Supreme Court directed the state to reduce greenhouse gas emissions by at least 25 per cent by the end of 2020 compared to 1990, and the 2018 Colombian Supreme Court judgment requiring negotiation of a plan to reduce deforestation to zero.

The case revolved around a request brought by Friends of the Irish Environment (FIE) for judicial review of the 2017 National Mitigation Plan on the grounds that it was inadequate to reduce emissions in accordance with the requirements of the Climate Action and Low Carbon Development Act 2015. The Plan was argued to be ultra vires the Act, inconsistent with Ireland's international commitments, and in breach of the rights provisions of the Irish Constitution and the European Convention on Human Rights (ECHR). Although the challenge had failed in the High Court, the Supreme Court authorized a direct appeal, established a full bench for the occasion, and released its judgment within weeks of the hearing.

The case was potentially of major importance for several reasons. First, despite Ireland's population of under five million, it is the third-highest per capita greenhouse gas emitter in the European Union. Second, as an influential player in Europe and in 2021–22 a UN Security Council member, Ireland's domestic policy response to climate change matters. Third, despite the traditional reluctance of the Irish judiciary to innovate or hold the government to account in relation to broad 'policy' matters, the earlier High Court judgment was very progressive in relation to standing to bring constitutional proceedings and some human rights aspects of the challenge.

1 Details of cases mentioned in this article are listed at the end, after the References list.

The unanimous Supreme Court judgment, delivered by Chief Justice Frank Clarke, found that the Plan was ultra vires the Act and should therefore be quashed. But this was achieved through a straightforward application of long-standing administrative law principles. The Court missed important opportunities by not responding to some of the human rights arguments, and when it did engage with rights, its findings were retrograde and introduced additional obstacles for future litigants. From a human rights perspective and for those who believe that courts cannot remain oblivious to the existential threat posed by climate change, *FIE* should be seen more as a setback than as a helpful precedent. Ideally, it will generate new resolve to persuade the Irish courts to take climate change seriously.

2. The justiciability of climate mitigation measures

FIE's major positive contribution concerns justiciability. Climate change, as a polycentric, complex issue, has been said to require '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 (Fisher et al. 2017). Emissions reduction targets cut across many sectors and require comprehensive regulation, raising significant policy issues. This has left some courts hesitant to intervene (Peel and Osofsky 2015). Thus in the *FIE* judgment in the High Court, MacGrath J emphasized the 'significant policy content' of the Plan and refrained from explicitly concluding that it was justiciable (*FIE* 2019: 112).

But there is a growing consensus across jurisdictions that, while governments have considerable latitude in setting climate policy, their discretion has limits. The Supreme Court's *FIE* judgment took such an approach, and rejected several of the non-justiciability arguments frequently invoked by governments.

The first such argument relies on the broad political and economic policy implications of mitigation plans, policies and targets. For example, in New Zealand the government characterized its 2030 target decision as involving 'questions of socio-economic and financial policy . . . not susceptible of determination by any legal yardstick' (*Thomson v. Minister for Climate Change Issues*: 102), while the UK government asserted that climate cases raise 'serious political and economic questions which are not for [courts]' (*R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*: 15). These arguments were rejected by the respective courts, and the Supreme Court in *FIE* also rejected the Irish government's characterization of its Plan as 'a non-justiciable statement of government policy'.

A second argument is that climate mitigation is a matter for governments to decide in light of economic circumstances. The Irish Plan invokes such circumstances to justify its lack of ambition and the High Court was especially cognisant of the fallout from the 2008 recession (*FIE* 2019: 105). Seen in that light, the COVID-19-driven downturn might have provided an even stronger argument to preclude judicial review in 2020, given a predicted 8.3 per cent decline in Ireland's gross domestic product (GDP) (Central Bank of Ireland 2020: 5).

But the Supreme Court preferred the plaintiff's argument that there is an 'economic imperative for early and cost effective reduction'. This is in line with Joseph Stiglitz's warning that 'the more time that passes, the more expensive it becomes to address climate change' (2019: 35) and the Intergovernmental Panel on Climate Change's statement that delayed action leads to cost escalation (IPCC 2018: D.1.3). The Court thus rejected economically

and scientifically flawed arguments designed to justify a strategy of procrastination with no necessary end date.

3. Standing

Standing to sue—the rules determining who is permitted to bring claims to court and the circumstances in which they can do so—is often a critical threshold issue in environmental litigation. In public law, standing rules generally require plaintiffs to demonstrate that they have suffered a particularized, concrete injury that is not hypothetical as a result of the law or government action that is being challenged. These rules frequently pose obstacles in climate litigation, and indeed the Irish Supreme Court denied FIE standing to bring rights-based claims. Its reasoning was problematic and the consequences retrogressive. It warrants critical scrutiny.

3.1 The Court's approach—a missed opportunity

The traditional test for standing in Irish constitutional cases requires plaintiffs to show that the impugned law has caused or threatened to cause them injury or prejudice (*Cabill v. Sutton*: 284). Corporate entities, including NGOs, have been permitted to maintain standing where they can demonstrate that their rights are adversely affected (*Digital Rights Ireland*: 62). The general rule may be relaxed where plaintiffs can show a 'transcendent need' for standing, for example because they would otherwise be unable to challenge infringements of their constitutional rights (*Cabill*: 282). The two principal exceptions cover plaintiffs challenging legislation that impacts 'the whole constitutional and political structure' but who are unable to demonstrate they are affected in a unique or special way (*Crotty v. An Taoiseach*: 732), and plaintiffs seeking to advance the rights of persons who are otherwise unable to adequately assert their constitutional rights. The nature of the constitutional right sought to be protected and the 'bona fide concern or interest' of the plaintiff are also important considerations in this analysis (*Society for the Protection of Unborn Life v. Coogan*: 742).

The trial judge thus assessed FIE's standing to bring its rights-based claims by reference to the impact on its interests and the nature of the rights in question (*FIE* 2019: 128). Although he noted that an organization cannot be said to enjoy the rights to life, bodily integrity and a healthy environment, he nonetheless found that FIE had standing because of the significance of the environmental and constitutional issues raised, and the fact that these affected both FIE's members and the public at large (*ibid*: 131).

On appeal, while the Supreme Court acknowledged 'the undoubted entitlement of the courts to relax the general rule' regarding standing, it emphasized judicial self-restraint and warned of the dangers of 'an over-liberal use of' such exceptions (*FIE* 2020: 7.12). Two justifications were provided. First, by ensuring that the case before the court reflects facts specific to a particular challenger, 'abstract or hypothetical legal argument' is avoided. Second, upholding the separation of powers requires courts to maintain a 'threshold qualification' for challenging legislative action. The actions of the legislature should not be thwarted 'by litigation which could be brought at the whim of every or any citizen, whether or not he has a personal interest in the outcome' (*Cabill*: 282–5, cited in *FIE* 2020: 7.9–7.11). While these caveats were the starting point in *Cabill*, they were to become the bottom line in the highly conservative approach adopted in *FIE*.

Before reaching that point, the Court reviewed two important cases in which plaintiffs had sought to enforce the rights of others. In *Coogan*, the Court held that an NGO was entitled to assert the rights of unborn children since the latter would never be able to litigate on their own behalf and because the NGO demonstrated a bona fide concern and interest in the matter. In *Irish Penal Reform Trust*, an NGO and two former prisoners challenged the treatment of prisoners with psychiatric conditions. The NGO was granted standing to argue the case on behalf of prisoners who were not parties to the litigation because the latter were not in a position to assert their constitutional rights, and because demonstrating the systemic nature of the deficiencies required consideration of the experience of other prisoners. The Court also briefly considered *Digital Rights Ireland*, in which an NGO was granted standing to assert the rights of a significant portion of the Irish population. But the Court distinguished that precedent by noting that Digital Rights Ireland, as a company, personally enjoyed the rights it sought to uphold while FIE did not itself hold the rights at issue.

Clarke CJ, without explaining his objection, then went even further by casting doubt more broadly on the validity of the reasoning in *Digital Rights Ireland*. The result was to limit the scope of the *Cabill* exception to situations ‘where there would be a real risk that important rights would not be vindicated unless a more relaxed approach to standing were adopted’ (*FIE* 2020: 7.21). The Court did not explore the implications of this approach for FIE’s claim to standing, but instead rejected its entitlement to bring rights claims in its own name, insisting individual applicants could instead have brought the case. During oral argument counsel had provided a number of reasons why it was too costly, complex, or fraught for individuals to commence such proceedings, but the Court dismissed these by simply stating that ‘no real explanation was given’ (*ibid*: 7.22). According to Clarke CJ, granting FIE standing in this case would have led to a situation where ‘the absence of standing would largely be confined to cases involving persons who simply maintain proceedings on a meddlesome basis’ (*ibid*.).

Given the Court’s apparent willingness to accord standing to virtually any individual alleging that their rights to life and bodily integrity were violated, the decision to shut the door on FIE may have been driven by other considerations. The Irish government has long been dismissive of, or even hostile to, environmental NGOs and the Court’s approach appears to be cut from the same cloth. It is also noteworthy that the Court paid no heed whatsoever to the immense stakes involved in climate change for the public at large nor to the specialist expertise possessed by FIE.

Although the Court in *FIE* initially noted that *Coogan* and *Irish Penal Reform Trust* were ‘appropriate relaxations of the general rule in accordance with the overall approach identified in *Cabill*’ (*FIE* 2020: 7.12), its subsequent observation that the *Cabill* exception is limited to situations where there is a real risk that rights will not be vindicated, combined with the statement that FIE’s circumstances were a ‘far cry’ from those in *Coogan* and *Irish Penal Reform Trust* (*ibid*: 7.22), suggests that the Court treated these cases as narrow precedents rather than as illustrations of a more general rule. Under the doctrine of precedent a case will not serve as precedent for another if their facts differ materially. The facts in *FIE* are materially different from those in *Coogan* and *Irish Penal Reform Trust*: the former concerned the rights of a specific class, namely unborn children, and the class in the latter was even narrower: prisoners with psychiatric conditions. Conversely, in *FIE* the affected class was as broad as it could possibly be, comprising the entire population of Ireland. On one view, this alone would be enough to warrant distinguishing *FIE* from both

Coogan and Irish Penal Reform Trust. In addition, FIE asserted several rights which were not the subject of the earlier cases, including rights to a healthy environment, to respect for family and private life, and to property (*FIE* 2019: 26). Different considerations should surely apply when determining who has standing to defend these rights.

Unlike the relevant government actions in *Coogan and Irish Penal Reform Trust*, climate change is an existential problem that threatens the future of global society and the rights of millions of people. The Intergovernmental Panel on Climate Change has estimated that limiting global warming to a 1.5°C increase above pre-industrial levels by 2100 could result in 190 million fewer premature deaths than an increase of 2°C (UN Human Rights Council 2019). Despite the magnitude of this threat, the Court in *FIE* gave no consideration to either the nature of the claimed rights or the danger of climate change when analyzing FIE's standing. Remarkably, the phrase 'climate change' is not mentioned at all in the relevant part of the Court's judgment. This stands in stark contrast with both *Coogan and Irish Penal Reform Trust*, where the nature of the threatened rights and the surrounding circumstances were important considerations in the decisions to grant standing to NGOs asserting the rights of others. The Court's refusal to consider climate change in determining whether FIE had standing is difficult to justify, given that the overarching concern when deciding this issue is whether the particular circumstances of the case give rise to weighty countervailing considerations (*Cabill*: 282–5). This is especially so in light of the observation in *Cabill* that cases in which it is difficult to distinguish between those affected and those who are not, and where the plaintiff has a common interest with those affected, provide an illustration of circumstances where the exception could be applied (*ibid.*). *FIE* is arguably an archetypal example of such a case, given climate change will ultimately affect nearly everyone and FIE's status as a leading environmental NGO.

Both *Coogan and Irish Penal Reform Trust* are examples of a settled test of general application being applied to particular facts. Each decision concerned idiosyncratic factual scenarios that are unlikely to be repeated, and these scenarios were determinative of the outcome in both cases. It seems questionable to have used them as authority for the proposition that the *Cabill* exception will only apply to rights-based claims in which there is a real risk that important rights will not be vindicated.

The Supreme Court's approach to standing and its application of the *Cabill* test are therefore deeply problematic. Rather than considering all the particular circumstances of the case, the Court focused solely on the fact that individuals could have brought FIE's rights-based claims in its stead. It did not consider the nature of the rights at issue, nor did it consider the magnitude of climate change and the danger that it poses to those rights. At a minimum, correct application of the *Cabill* test would require some consideration of these issues. Further, the Court gave undue weight to the decisions in *Coogan and Irish Penal Reform Trust* by failing to distinguish their facts and by implicitly treating them as authority for the proposition that the *Cabill* exception can only apply to rights-based claims in narrow circumstances.

3.2 Standing in climate change litigation

In contrast to *FIE*, there are strong reasons why courts should adopt a more progressive approach to standing in climate change cases. There are several traditional justifications for standing rules, including maintaining the separation of powers, guaranteeing predictability by preventing challenges to every legislative or executive action, precluding courts from

dealing with a flood of frivolous lawsuits, and ensuring that only those with a genuine interest in a matter that is recognized by the law can commence litigation.

While these are legitimate concerns, many scholars have questioned whether existing rules are the most effective means of achieving the relevant goals. Sunstein has argued that the injury, causation and redressability requirements that dominate standing jurisprudence in US federal courts are relatively recent inventions that are inconsistent with early English common law and the way in which it was initially transposed to the United States (1992: 168–70). Particularized injury requirements are also said to divert attention away from a measure's lawfulness to its effect, potentially allowing an unlawful measure to remain in place if it does not have a deleterious impact (Groves 2016: 168). Further, inquiring into whether a plaintiff has suffered a particular injury is not necessarily the best way to evaluate the merits of a claim, and may simply reflect a 'failure to file the correct affidavits or to identify and to enlist unconventional plaintiffs' (Farber 2008: 1540). Others have pointed to inconsistencies and incoherence in rules that have emerged in jurisdictions like England and Australia such that, according to an English judge, 'the courts are now unclear as to what purposes the locus standi requirement is to serve' (see Fisher and Kirk 1997: 373).

Existing approaches to standing are particularly ill-suited for responding to harms caused by climate change (Kellman 2016: 10117). Despite the high likelihood that these harms will materialize in the near future if adequate mitigation measures are not implemented, those likely to be most affected might not yet have suffered any particular harm or loss. Even if they are able to establish loss, the necessary causal linkages can be difficult to prove due to the multiplicity of actors responsible for causing climate change. In these circumstances, traditional doctrines of standing, causation and redressability often preclude climate litigants from obtaining adequate remedies. Thus, the 'indirect, intergenerational and community-wide nature of climate change means that the standing of litigants where they are raising climate change issues does not easily sit with many forms of standing doctrine' (Fisher et al. 2017: 185). Courts must therefore recraft the law of standing, particularly now that myriad vitally important cases related to climate change are beginning to arise. Failure to do so will leave a great many who have suffered harm without a remedy until it is too late to be meaningful. As Limon notes, legal quibbling over the nature of the links between global warming and irreparable harm are unlikely to convince 'the Inuit of North America who every year see their lands eroding, their houses subsiding, their food sources disappearing' (2009: 468).

The necessary response is to consider ways in which standing rules can be liberalized and made more conducive to promoting environmental justice in the context of the single most important challenge confronted by societies for the remainder of the twenty-first century. Many jurisdictions have been moving towards more open rules of standing. Almost half a century ago, one of us argued that environmental concerns warranted such an approach (Alston 1973). In 1996 the Australian Law Reform Commission recommended open standing be introduced for all public law proceedings (1996: 57). Other jurisdictions have introduced different forms of third party or public interest standing which have greatly facilitated access to justice. In Canada, plaintiffs enjoy the benefit of rules that permit public interest standing (McKee 2011: 129). UK courts take a more flexible approach to standing that is heavily predicated on the particular context of each case and reflects the assumption that courts have a specific responsibility to develop standing principles that meet the needs of modern society (*AXA General Insurance Ltd v. HM Advocate*: 171). The Philippines Supreme Court has authorized citizen suits brought by 'any Filipino citizen in

representation of others, including minors or generations yet unborn' (Daly and May 2014: 131). Similar approaches have been adopted in Latin America where 'constitutional and statutory provisions have encouraged courts to expand standing for environmental cases even to those who cannot show a direct and individual injury' (ibid.). The Indian experience, however, reveals the advantages of open standing rules but also the need for a carefully structured and systematically applied set of criteria (Khaitan 2020).

The case for a more liberal standing regime in climate change cases rests on several arguments. First, such a regime helps maintain the rule of law by ensuring that those most affected have the opportunity to challenge inadequate governmental action that results in violation of their rights (Fisher and Kirk 1997: 374). As Lord Diplock famously observed: 'it would . . . be a grave lacuna in our system of public law if a pressure group . . . or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped' (*R (NFSE) v. IRC*: 644).

Second, outdated standing rules exacerbate the situation of those most likely to be affected by climate change, who will often already be poorly placed to assert their rights because they lack the time, resources or expertise necessary to commence litigation (Fisher and Kirk 1997: 375). Children, for example, are particularly vulnerable to the environmental harms caused by climate change (UN Human Rights Council 2018a: 4–5). A more open standing regime would reduce the barriers to NGOs litigating on behalf of those not well placed to do so themselves; organizations may be better able to present and frame the relevant arguments to a court, be better resourced, have important litigation experience, and easier access to scientific evidence. A more liberal regime could also allow citizens of the global South to advance claims arising from climate harms in courts in the global North (Rodríguez-Garavito 2020b: 43).

Third, open standing may improve the quality of governmental decision-making in relation to climate change, as well as the breadth and effectiveness of the measures that states adopt to mitigate and adapt to climate change (Fisher and Kirk 1997: 375). If members of the legislature and the executive know that courts will scrutinize their emissions-related decisions, this should motivate them to take more effective action.

Fourth, open standing can enhance rather than diminish the democratic legitimacy of judicial oversight of executive and legislative action in relation to climate change. However democracy is defined, democratic governance is predicated on the notion that people have the right to participate in public life and have a say in how society is governed (Fisher and Kirk 1997: 381). Granting standing in climate cases therefore facilitates citizens' participation in important decisions regarding a unique challenge that poses an existential threat to society. It increases the range of inputs into democratic decision-making processes and, consequently, even if certain issues are 'repeatedly tabled and ignored in parliament, once preliminary admissibility standards are met, they must be heard in the courts' (Polavarapu 2016: 153). This point is particularly pertinent in the context of modern democracies, as arguments in favour of limited judicial review tend to assume the existence of a functioning and responsive legislature, but the traditional assumption that legislative bodies are truly representative is arguably undermined by the pervasive influence of lobbyists and other interest groups (ibid: 139).

Arguments in favour of restrictive standing, such as those articulated in *Cabill* and *FIE*, are even less convincing in the context of climate change. The suggestion that, in the absence of a plaintiff who has suffered a particularized injury, a court may have to consider

hypothetical legal arguments rather than grappling with concrete facts seems misguided. Courts are well capable of requiring parties to file evidence providing a factual underpinning for their legal arguments. Indeed, as a consequence of the rise of class action regimes in many jurisdictions, there is a growing body of jurisprudence that analyzes how to make use of common evidence to prove harm to a wider group of people.

Further, the notion that open standing would, on its own, be contrary to separation of powers principles overstates the problem. Various legal mechanisms remain available to courts to prevent this, including the political question doctrine (Polavarapu 2016: 140), adverse costs orders, and the use of courts' powers to dismiss claims that are vexatious or an abuse of process (Groves 2016: 168). Courts can also develop criteria for assessing the bona fides of NGOs relying on open standing rules, including by evaluating their qualifications and track record, and requiring them to file evidence showing that they have a mandate from those they claim to represent (Cane 1999: 44). Finally, while it is true that more flexible standing might undermine the predictability of regulatory responses to climate change, such concerns could be ameliorated by introducing short and strict deadlines for filing challenges to climate measures (Douglas 2006: 26), and by fast-tracking these challenges when they are filed on time with the use of concerted judicial case management and specialized judicial lists.

Strict standing rules are, in many respects, a relic of an earlier era. Climate change clearly challenges the very basis of some of these rules, and undoubtedly requires new and more responsive approaches from courts. The High Court in *FIE* had taken some promising steps in this regard. But, in refusing to grant FIE standing for its rights-based claims, and in taking a narrow approach to exceptions carved out in previous cases, the Irish Supreme Court missed a crucial opportunity.

4. Sidestepping human rights

Rights-based arguments are increasingly prominent in climate litigation around the world, with the notable exception of the United States (Peel and Osofsky 2020: 30). But that exception is hardly surprising given the limited range of rights recognized in US constitutional law, and the country's long-standing resistance to ratifying international human rights treaties.

In *FIE*, the rights-based content became more important over time 'as the case evolved', and by the time the case reached the Supreme Court, claims based on rights in the Irish Constitution and the European Convention were arguably central to the case (*FIE* 2020: 5.60). But the Court sidestepped most of these issues by choosing not to grant FIE standing to pursue their rights claims.

Moreover, in deciding to deal first with the question of whether the Plan complied with the Act and finding that the Plan was ultra vires and should be quashed on substantive grounds, the Court stated that 'any consideration of the further rights based issues which arise on this appeal would be purely theoretical' (*FIE* 2020: 6.49). Nevertheless, it still chose to comment by way of *obiter* on two aspects of the rights arguments: first, the above-described question of FIE's standing in respect of the rights claims, and second, as discussed in Section 6 below, Clarke CJ chose to comment on whether a right to a healthy environment exists under the Irish Constitution. Thus, choices were made to discuss certain rights-based issues despite their 'purely theoretical' nature. And choices were made not to comment on other aspects of the rights-based arguments. The Court declined to take an

important opportunity to reflect on how climate policies might impact human rights, which human rights are violated, and the appropriate margin of discretion in such a case of executive-made climate policy. Given the likelihood that a new National Mitigation Plan or other key climate change policies will be challenged in the Irish courts, this is regrettable.

4.1 Unresolved questions of deference

Climate change poses unprecedented threats to fundamental rights. An overwhelming scientific consensus points to catastrophic effects on lives, health, livelihoods and food security (Boyd 2018a, 2018b; UN Human Rights Council 2009). The National Mitigation Plan itself acknowledged future effects in Ireland including ‘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’ among other concerns, and concluded that there is ‘a limited window for real action’. But climate litigation raises tensions ‘between the protection of rights and deference for governmental policy discretion, and between the duty of courts to provide remedies for rights violations and the principle of separation of powers’ (Rodríguez-Garavito 2020a: 26). Thus, despite these severe and obvious impacts, courts in climate cases often reaffirm governments’ discretion.

In the High Court, MacGrath J held that it is not ‘the function of the court to second-guess the opinion of Government on such issues’, as he deemed the impugned actions to involve policy (FIE 2019: 97). Courts should, he argued, ‘avoid interfering with the exercise of discretion by the . . . executive when its aim is the pursuit of policy’ and ‘should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference’ (ibid: 92–3). Though he accepted that the rights to life, bodily integrity and to an environment consistent with human dignity were ‘in some way engaged’ (ibid: 119), he afforded the government a ‘considerable degree of latitude’. He dismissed the rights claims peremptorily, devoting little attention to claims about emissions’ impacts on fundamental rights or to the Plan’s consequences.

As argued in more detail in an analysis published before the Supreme Court’s hearing, such a level of deference was wholly unjustified (Alston et al. 2020). While striking a careful balance between competing considerations is inevitably challenging, deference should be weighed against the seriousness and scale of the rights infringements at issue, which in this case were immense. The High Court’s sweeping deference to executive decisions relating to climate change comes close to removing the courts entirely from deliberations on the most threatening challenge to rights protection for generations, and in relation to a matter likely to be the subject of legislative and executive action for the rest of the century. Determining the compatibility of executive action with rights provisions is a normal function of the courts; it is indeed their ‘solemn duty’ (*Efe v. Minister for Justice, Equality and Law Reform*: 813). Irish courts are constitutionally required to review impacts on individuals’ rights, even where there are significant policy implications; MacGrath J’s unlimited deference amounted to an abdication of this ‘solemn duty’ to protect fundamental rights.

The Supreme Court’s judgment provided helpful clarifications on this issue, rejecting the government’s argument that the Plan ‘simply involves the adoption of policy’, because ‘the position here is that there is legislation’ (FIE 2020: 6.23–24). The Court found that the question of whether such a plan complies with the statute requiring it ‘is a matter of law rather than a matter of policy . . . because the [legislature] has chosen to legislate for at least some aspects of a compliant plan while leaving other elements up to policy decisions by the

government of the day' (FIE 2020: 6.27). This determination facilitated the Court's ultra vires finding. The legislature had set out specificity requirements in section 4 of the Act and the executive breached these in failing to adequately specify how the National Transition Objective would be achieved.

In affirming that this case concerned 'a matter of law rather than a matter of policy', the Court seems to suggest that it was inappropriate for MacGrath J in the High Court to adopt a hands-off approach to the Plan on the grounds that it was 'simply' policy. However, no such finding is explicitly made. The judgment makes no comment about MacGrath J's overly-broad deference. It describes several times the 'wide margin of appreciation' granted in the lower court but fails to engage with or evaluate it. Even within the narrow confines of the approach chosen, the Supreme Court could have stated that, in light of the severity of the climate impacts and the Plan's acknowledgement of the 'limited window for real action', the High Court's suggested level of deference cannot be justified in future cases.

This would also be consistent with the particular scrutiny required under Irish law where fundamental rights are at issue (Hogan 2019: 1362; *Efe*). '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 . . . Where a right is not considered at all or is misdescribed or misunderstood by the decision-maker, the decision will be vulnerable to attack' (*Meadows v. Minister for Justice, Equality and Law Reform*: 68). The National Mitigation Plan, which made no mention of fundamental rights, was certainly 'vulnerable to attack' on these grounds.

The judgment was thus a missed opportunity to signal that there are definite limits to governmental discretion in relation to climate policies that raise human rights issues.

4.2 Avoiding discussion of the proportionality principle

Relatedly, FIE argued in the High Court that the proportionality test should be applied, and argued on appeal that MacGrath J wrongly construed the appropriate test for review of the state's creation and adoption of the Plan. The proportionality test is a mechanism through which courts assess whether a decision's effects on a right are proportional to the legitimate objective or purpose of that decision.

The status accorded to the proportionality principle in Irish law is significant given its bearing on executive action breaching fundamental rights: it shapes the process by which the executive may be held to account and can guide courts' scrutiny. Proportionality is an important mechanism in that it directs judges' attention to the *effects* of impugned measures and the connection of those measures to their stated object and purpose. As Murray CJ argued in *Meadows*, it is 'inherent in the principle of proportionality that where there are grave or serious limitations on . . . the fundamental rights of individuals . . . the more substantial must be the countervailing considerations that justify it'. Proportionality requires analysis of the implications on plaintiffs' rights and proper engagement with effects and justifications. But, though MacGrath J purported to take proportionality seriously, no element of the principle was visible in his reasoning. He did not at all consider whether rights were impaired as little as possible nor whether the effects on rights were proportional to the objective, as is required by the principle.

In England and Wales, the Supreme Court now applies a freestanding proportionality test whether the case concerns EU law, Convention rights, or the common law (see *Kennedy v. Charity Commission*; *Pham v. Secretary of State for the Home Department*;

Youssef v. Secretary of State for Foreign and Commonwealth Affairs). The test is argued to introduce ‘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’ (*Kennedy v. Charity Commission*: 54).

In contrast, Irish law currently appears to accord proportionality a role within reasonableness review rather than comprising a separate ground of review. In *Meadows*, Murray CJ saw ‘no reason why the Court should not have recourse to the principle of proportionality in determining’ whether a decision ‘meets the test of reasonableness’ (701). Proportionality has since been seen as ‘a facet of unreasonableness’ (*Afolabi v. Minister for Justice and Equality*: 19) and has been held to ‘operate within the confines of the irrationality test’ (*AAA and Others v. Minister for Justice and Equality*: 22).

Biehler (2013) argues that such unhelpful formulations effectively redefine proportionality as reasonableness review, rather than applying it in the ‘structured manner . . . in which the concept of proportionality is properly understood’. Many Irish scholars have long advocated for the adoption of a free-standing proportionality test in order 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. As Biehler (2013) observes, it is ‘difficult to understand the hesitation on the part of the Supreme Court to move to a free-standing 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’. Delany and Donnelly (2011) argue that there is ‘an anomalous distinction between protection of constitutional rights from legislative interference’ and from administrative interference, while Daly (2010) argues that less rigorous standards of review for administrative action as opposed to legislation ‘lead to the perverse conclusion that what could not be accomplished by the democratically-elected [legislature] could nevertheless be done by an unelected administrative official’.

Judges have also recognized the need to clarify the status of the principle. Charleton J noted in 2017 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’ (*AAA*: 26). The *FIE* appeal, heard by seven Supreme Court justices, and in which the application of the proportionality test was a ground of appeal, was an important opportunity to provide guidance on this issue and to resolve existing inconsistencies.

But the Supreme Court did not address proportionality. It acknowledged that, had *FIE* been entitled to assert rights, consideration of the appropriate standard of review would have been required (*FIE* 2020: 5.53). And, in relation to proportionality in judicial review, it made the strongly qualified statement that: ‘To an extent [the reasonableness] test *may* have been modified, at least in certain circumstances, by the introduction of a consideration of proportionality as identified by this Court in *Meadows*’ (ibid: 5.54, emphasis added). But it went no further. In choosing to determine the matter on the basis of the *vires* argument and cutting short any further analysis, the Court decided not to discuss proportionality, thereby leaving intact uncertainty and inconsistencies over how courts should review fundamental rights infringements by different branches of government.

4.3 Narrow statutory bases

The Supreme Court based its decision on the fact that, in describing the measures to be taken over a five-year period rather than over the 33 years up to 2050, the Plan fell short of

the statutory requirement to ‘specify’ how Ireland would meet the National Transition Objective by 2050. In grounding its judgment upon statutory interpretation of the level of ‘specificity’ required from the Plan in light of the purpose of the Act, this mirrored in some respects an English Court of Appeal decision regarding the construction of a third runway at Heathrow airport decided only a few months before *FIE*.

At issue in the Heathrow case was the ‘entirely legal question’ of whether the government’s policy of developing a third runway at Heathrow was lawfully produced under the Planning Act (*Plan B Earth v. Secretary of State for Transport and Others*: 2). The court repeatedly emphasized that it was merely ‘[requiring] the executive to . . . comply with what has been enacted by Parliament [which] is an entirely conventional exercise in public law’. The political debate and controversy surrounding the third runway was ‘none of the court’s business’ (ibid: 230, 281). Human rights arguments featured centrally in the plaintiffs’ initial submissions but were cursorily dismissed in the High Court on the grounds that: the claimed European Convention rights were not absolute, a ‘substantial public interest’ and economic factors weighed against those rights, and it was ‘well-established that the state has a wide margin of discretion’ (*R (Spurrier and Others) v. Secretary of State for Transport*: 663–4). These arguments were not revisited in the Court of Appeal judgment. The case thus did not engage with fundamental rights and applied conventional *Wednesbury* (reasonableness) review with a great breadth of discretion accorded to the executive.

The Court of Appeal nonetheless noted that ‘climate change is a matter of profound national and international importance of great concern to the public’ and that the ‘legal issues are of the highest importance’ (*Plan B Earth*: 2, 277). Climate change constituted an important backdrop to the case, but the finding that the preparation and designation of the relevant policy was unlawful was based on the narrow ground that the minister had not taken into account the Paris Agreement. The Irish Supreme Court’s *FIE* judgment, similarly, combined a strong recognition of the significance and severity of climate change with an insistence that the Court was concerned only with ‘the lawfulness or otherwise of the Plan’ and that ‘the role of the courts generally, and of this Court in particular, is confined to identifying the true legal position’ (*FIE* 2020: 3.7, 1.1). Both courts opted to recognize very clearly the seriousness of the climate change challenge and explicitly outline the risks, while avoiding any response that would have demonstrated a preparedness to confront the particular circumstances of the climate challenge. Instead, both took narrow and traditional statutory interpretation-based approaches, determined to avoid engaging in any possible human rights dimensions of the challenges.

But in December 2020, the UK Supreme Court overturned the decision and took a further step backwards. In deciding this ‘entirely legal question’ of whether the policy was lawfully produced, it disagreed with the Court of Appeal that the Paris Agreement constituted ‘government policy’ under the Planning Act and emphasized the executive’s discretion in deciding whether to take the Agreement into account. The narrow statutory basis on which the case had proceeded allowed for an analysis entirely divorced from the realities of climate impacts. Whereas the Court of Appeal acknowledged the severity of the crisis, the Supreme Court justices chose not to engage with this context. Further, although human rights arguments were not the subject of the appeal to the Supreme Court, much like in *FIE* the Court chose to make additional comments. It added: even if human rights arguments were ‘within the scope of the appeal . . . any effect on the lives and family life of those affected by the climate change consequences of the [runway] would result not from the

[policy] but from the [planning application]’ (*R (on the application of Friends of the Earth Ltd and Others) v. Heathrow Airport Ltd*: 113.)

Decisions based upon narrow questions of statutory interpretation while dismissing human rights represent vital missed opportunities, just as the ‘window for real action’ is closing. Though *FIE* is of course more of a victory than the Heathrow case, its outcome can similarly be confined to a narrow statutory basis. It may therefore not have the broader ripple effects it could have had, had human rights arguments been taken into account. The Irish government is now required to publish a new Plan which outlines mitigation measures leading up to 2050. The Plan must be more specific, but not necessarily more immediately ambitious. In principle, a Plan under which emissions continue to rise for five years before later decreasing would be in line with the *FIE* judgment.

Judgments predicated upon a finding of non-compliance with human rights obligations would be far more consequential. Firstly, a finding that rights had been violated would warrant not just the adoption of a new, more specific policy but measures to actively reduce emissions. It is now clear from the outcome of the *Urgenda* case in the Dutch Supreme Court, as well as more generally, that the protection of human rights requires emissions reductions in order to mitigate the climate crisis (UN Human Rights Council 2018b, 2019; OHCHR 2015; Potsdam Institute 2014).

Secondly, taking a human rights approach in climate cases brings to the fore the unequal impacts on disadvantaged groups (Amnesty International 2019; UNEP 2015). Much like the Plan, the Supreme Court’s judgment made no mention of the particular ways in which those living in poverty, children, women, elderly people, minority ethnic groups, and people with disabilities are impacted differently by climate change. The judgment failed to acknowledge the government’s existing obligations to address the differentiated impacts of climate change and to encourage the government to take seriously its obligations to protect the vulnerable. Not only has it long been clear that ‘shocks and stresses related to climate change [will] push new groups into poverty’ (Potsdam Institute 2014) and that particular groups are more affected by climate change; a rights-based approach hones in on these differential impacts and requires attention to states’ obligations to protect the disadvantaged.

Thirdly, human rights-based findings would likely be more consequential and less ‘reversible’. Whereas the provisions upon which the *FIE* and Heathrow judgments were decided were ordinary statutes, human rights have a deeper and special status in many jurisdictions. In Ireland, as in many states, rights are constitutionally entrenched, such that rights provisions are less easily repealed than climate laws. Where courts are increasingly basing decisions on climate laws and policies, some governments may find they have an incentive to decrease their commitments, produce vaguer policies, or repeal climate statutes. Cases such as *FIE* or the English Court of Appeal’s Heathrow decision may incentivize states to stop making climate laws and disengage from climate agreements (Rodríguez-Garavito 2020a: 34).

Lastly, a human rights approach serves to define the issue as one causing devastation to human lives. Human rights arguments take proper account of the tangible impacts felt by those affected. Thus *FIE*’s rights-based submissions focused centrally on how climate change impacts livelihoods, health, access to food and water, and will soon lead to increased premature deaths in Ireland. The concern here is how people are affected; whereas in the Supreme Court’s *FIE* judgment, as in both Heathrow judgments, the concern is instead whether the policy documents comply with the appropriate process.

4.4 Broader human rights trends

In a global setting in which human rights-based analysis is increasingly common in climate-related judgments, the *FIE* case leaves open the likelihood that the Irish Supreme Court will soon be the outlier in refusing to come to grips with the key legal challenges that are unavoidably linked to national and international commitments to reduce global warming. The 2019 *Urgenda* case requiring the Dutch government to reduce emissions and the 2018 Colombian Supreme Court judgment regarding deforestation are indications of promising trends in rights-based litigation. And, also promisingly, in many of the countries where courts are engaging constructively with climate change there is a growing tendency to look for inspiration to peer-level courts. The New Zealand High Court, for example, in reviewing the government's climate commitments, examined related cases from the United States, Canada, England and elsewhere (*Thomson*: 133). *Urgenda* has been widely cited in other jurisdictions, indeed including by the High Court in *FIE*.

But, again, the picture is mixed here. Though *FIE* was hailed as a victory in certain respects, it made unhelpful findings which will set back future litigants. The UK Supreme Court similarly took a step backwards in the Heathrow case. In another 2020 case in which the French government was called upon to take stronger measures to respect its obligations to reduce greenhouse gas emissions, the Conseil d'Etat showed some of the reluctance of the Irish Supreme Court, but also suggested that it might end up taking a much more demanding approach to the government's obligations. Effectively reversing the approach in *FIE*, the French court rejected the standing of an individual mayor to challenge government policies but concluded that the municipality itself, along with other affected municipalities, had standing because of their 'direct and certain' exposure to climate change. It rejected the plaintiff's suggestion that addressing climate change must be seen as 'a binding priority' for the government and refrained from relying upon obligations derived from the European Convention on Human Rights and from recognizing a separate enforceable right to protection from climate change. But, based on France's national and international commitments, it held that required emissions reductions are potentially judicially enforceable, pending a further opportunity for the government to demonstrate the adequacy of the measures taken (*Commune de Grande Synthe I*).

5. 'Derived' rights and the directive principles of social policy

The *FIE* case contained discussion of the distinctively Irish version of 'unenumerated rights' that led a commentator to praise the judgment as '[o]ne of the most important statements on rights in a generation' (*Kenny 2020*). These rights, not expressly referred to in the Constitution, played a vibrant role in Irish law in the second half of the twentieth century. Seventeen different unenumerated rights were recognized between 1964 and 1995, including the right to work, the right to access the courts and the right to independent domicile (*Constitution Review Group 1996*: 222). But not since 1995 has the Supreme Court recognized any such new rights, leading some jurists to pronounce the doctrine's demise (*Doyle 2008*; *Kenny 2013*). In 2017, however, the unenumerated right to work received renewed attention from the Supreme Court in *N.V.H. v. Minister for Justice and Equality*. In considering whether an asylum seeker was entitled to the benefits of the right to work, the Court held that they could not be denied the right because it is an inherent part of the human personality.

The Supreme Court had thus recently acted to '[buck] the recent trend of judicial disengagement from unenumerated rights' (O'Mahony 2017) and in *FIE*, Clarke CJ revisited the doctrine. He observed that the term 'derived rights' was more accurate than 'unenumerated', since the latter gives a 'misimpression' 'that judges simply identify rights of which they approve and deem them to be part of the Constitution'. In contrast, the term 'derived rights' better conveys that 'there must be some root of title in the text or structure of the Constitution from which the right in question can be derived'. He rejected 'a narrow textualist approach' and argued that derived rights may stem from 'a constitutional value such as dignity when taken in conjunction with other express rights or obligations', from 'the democratic nature of the State', or from 'a combination of rights, values and structure'. Such rights 'must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole' (*FIE* 2020: 8.5–8.6). These statements provide much-needed clarity on the status of derived rights and will likely serve to reinvigorate the doctrine.

Another area of Irish constitutional law that should be considered in future litigation around climate change involves the much-neglected Directive Principles of Social Policy contained in Article 45 of the Constitution. These lay down aims towards which the 'State shall strive', including promoting 'the welfare of the whole people' and safeguarding 'with especial care the economic interests of the weaker sections of the community'. Neither party in *FIE* had raised the Directive Principles, and these may be continuing on 'the road to legal obscurity' (Hogan 2001: 197). This is regrettable: because the state's responsibility to limit greenhouse gas emissions is directly relevant to the state's Article 45 obligation to 'strive to promote the welfare of the whole people', the case would have been an ideal context in which to save the principles from constitutional irrelevance.

Discussion of the principles has otherwise been consistently avoided by courts. Although the principal drafter of the Constitution, Éamon de Valera, envisioned the Directive Principles 'as a constant headline', the text provided that they 'shall not be cognisable by any Court' and are intended to guide the Oireachtas (legislature) (de Valera 1937). Indeed, Fitzgerald CJ in *McGee v. Attorney General* went so far as to suggest that 'the intervention by this, or any other Court, with the function of the Oireachtas is expressly prohibited under [Article 45]. To hold otherwise would be an invalid usurpation of legislative authority.' But numerous judicial dicta have suggested that these principles are neither un-touchable nor irrelevant.

Firstly, the statement in *McGee* was made in relation to a claim that a legislative act violated Article 45. The lower court had argued that, according to the Irish-language text, the principles *can* be cognisable by courts where the validity of a statute is not in question. 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"'. This may suggest that it is the use of Article 45 for the assessment of actions of the legislature which is prohibited.

Secondly, there have been dicta that the principles might legitimately be taken 'into consideration when deciding whether a claimed constitutional right exists' (*Murtagh Properties Limited v. Cleary*: 335–6). In a series of cases in the 1970s, one judge considered the principles when adjudicating on whether a claimed right was protected by Article 40.3.1 (guaranteeing respect for the personal rights of the citizen), another sought guidance from Article 45 to ascertain the scope of legitimate restrictions on the right to work, and another considered himself 'not precluded by the introductory words of [Article 45] from considering the principles [for the limited purpose of] 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' (ibid; *Landers v. Attorney General*; *Attorney General v. Paperlink Ltd*).

Some doubt has been cast on these earlier dicta. Courts have noted that Article 45's non-justiciability clause 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' (*T. D. v. Minister for Education*: 169). And in 2016, Hogan J questioned whether it was 'legitimate to have regard to Article 45 in assessing whether the right to earn a livelihood is constitutionally protected' (*N.H.V.*: 56), after having suggested in academic work in 2001 that this might be 'doing through the backdoor . . . that which is expressly forbidden' (Hogan 2001: 180). But there remains a question as to whether courts may look to Article 45 to determine the scope of rights in cases where the validity of a statute is not in question.

Since *FIE* involved claims relating to a new derived right to a healthy environment and did not involve challenging legislation, it provided an ideal opportunity to clarify unresolved issues as well as to reanimate Article 45. Indeed, the Constitutional Review Group (1996) favoured including in the Constitution a duty on the state and public authorities to protect the environment; and government lawyers during the *FIE* hearing had described this recommendation as a 'directive principles-type right'.

In his scholarly capacity, Hogan has argued, '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'. He added that Article 45 was explicitly intended as a 'compromise' to address this concern (Hogan 2001: 198). This is especially relevant in the context of 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'. If the principles are not raised even in the context of climate change, it can be assumed that they have now definitively been consigned to judicial irrelevance.

6. The right to a healthy environment

FIE sought to assert a right to a healthy environment, which is not expressly mentioned in the Constitution. The Court was thus asked to consider recognizing it as a derived right. Although this right has been recognized in a number of international instruments and the domestic legal systems of a majority of states (UN Human Rights Council 2018b: 13), the Court concluded that its content and scope are too vague to warrant recognition (*FIE* 2020: 8.11).

6.1 A derived right?

Perhaps the most retrogressive aspect of the *FIE* judgment is the Court's somewhat gratuitous and certainly unconvincing reasoning that led it to reach this conclusion. The relevant analysis is gratuitous in the sense that the Court had already denied *FIE* standing to raise human rights claims, but nonetheless proceeded to undertake a detailed rebuttal of suggestions by the High Court in two separate cases that there is a derived right to a healthy environment. Again, it chose to discuss this after having stated: 'any consideration of the

further rights based issues which arise on this appeal would be purely theoretical'. In seeking to refute criticism of its engagement with an issue that it had rendered moot, the Court argued that it was justified in doing so 'lest by not commenting on those matters it might in the future be argued that this Court had implicitly accepted' the existence of such a right (*FIE* 2020: 7.25). Rather than noting that no such implication should be drawn, the Court engaged in a lengthy analysis.

It confirmed that the test for recognition of derived rights requires consideration of whether the right inheres in an individual by virtue of their human personality, construed in light of what the Constitution expressly or impliedly deems fundamental to their standing in Irish society (*FIE* 2020: 8.7). The High Court had previously recognized the right to a healthy environment in *Merriman* and in *FIE*, in which MacGrath J accepted 'for the purposes of [the] case, that there is an unenumerated right to an environment consistent with human dignity' (*FIE* 2019: 133). In stark contrast, Clarke CJ reached an unqualified conclusion that such a right cannot be derived (*FIE* 2020: 8.17).

The Supreme Court's reasoning rested on four separate strands of argument. The first was that a right to a healthy environment 'would not add anything to the analysis in these proceedings'. It attributed this view to a response made by counsel for FIE during questioning from the Court, from which it drew the conclusion that the scope and content of the rights to life and to bodily integrity would not be extended by adding a right to a healthy environment.

Several responses are warranted. First, even if true in this particular case, it is not an appropriate basis on which the Court could or should have drawn more far-reaching general conclusions. There are strong strategic reasons why counsel might have opted to rely on accepted rights rather than needing to persuade the Court that a new right existed. Second, a great deal depends on how broadly or narrowly the rights to life and bodily integrity are construed in assessing how much the recognition of a third right would add. Given the narrowness of the Irish Supreme Court's approach in that regard, it seems inconceivable that interpreting them in light of an additional right to a healthy environment would not have significantly extended their scope. Third, there is a significant literature on the ways in which such a right has effects that go far beyond existing rights to life and bodily integrity. It would be odd for over a hundred countries to have recognized this right if doing so was entirely superfluous, as the Irish Supreme Court suggested.

The Court's second strand of argument was to challenge the degree of international recognition that a right to a healthy environment has achieved. Surprisingly, given how rapid and recent the evolution of the law has been in this area, the sole reference it cited in this part of its judgment is a 2011 textbook, the information in which is over a decade old. Many more recent analyses would have been readily available to the Court, showing that the right enjoys direct constitutional protection in over a hundred countries (*Boyd* 2018b: 18). The Court's first line of attack was to note that in many of those countries recognition has come through constitutional amendment. This led it to extol the virtues of public 'debate and democratic approval', a preference which had not prevented it in previous cases from finding a large number of derived rights which had not been subject to that process. The second was to note that common law countries have generally not recognized such a right, but this proposition would have warranted much more careful scrutiny. The fact that many of Ireland's peers in the European Union have done so was apparently an irrelevant comparison.

The third set of arguments suggested that the right to a healthy environment was impermissibly vague because there is no ‘general clarity about the nature of the right’. But courts in many countries have attributed very specific content to the right. On the basis of such jurisprudence, the UN Special Rapporteur on human rights and the environment identified, in a series of analytical reports presented between 2013 and 2020, 16 framework principles regarding states’ human rights obligations in relation to the environment. These are explicitly designed to give precise and empirically grounded content to the right to a healthy environment (UN Human Rights Council 2018c: 19). But the Irish Supreme Court reached its sweeping conclusions about the right without reference to these or any other of the many detailed published analyses on the issue (Orellana 2018: 176).

The fourth strand sought to rebut any argument that the failure to recognize a derived environmental right will have problematic consequences or leave some sort of vacuum. The Court used several different formulations to insist that, despite its negative findings about a derived right, ‘it may well be that constitutional rights might play a role in environmental proceedings’ (FIE 2020: 8.17). Beyond stating the obvious, such assertions would seem only to confirm just how far Ireland’s courts are behind most of the rest of the world on these issues.

7. Conclusion

The FIE case yields important lessons in terms of the role of rights-based litigation to combat climate change. The case achieved its principal objective of compelling the Irish government to revise the National Mitigation Plan and, ideally, to take seriously its obligations to reduce greenhouse gas emissions. But in most other respects it fell well short of expectations. The Irish Supreme Court’s narrow and exclusionary approach to standing to challenge climate change, its rejection of the relevance of human rights in such a context, and its dismissive response to claims for a derived or unenumerated right to a healthy environment were all retrogressive. In the short term, FIE represents a major setback for the prospects for successful rights-based climate change litigation in Ireland.

Strategic litigation of this sort always runs the risk of retrogression if it provides a conservative court with the opportunity to put on record its opposition to progressive claims. Even where, as in FIE, the relevant statements can be classified as *obiter dicta* since they were superfluous to the narrow grounds on which the actual decision was based, the resulting setback can be costly because they will have persuasive effect on lower courts and in future Supreme Court decisions. But before concluding that such risks are not worth taking, other considerations should be weighed.

In this case, the particularities of the Irish context are especially relevant. Irish courts are traditionally conservative, reflecting the problematically political character of the appointments process (Council of Europe 2020), and judges are reluctant to depart from traditional approaches, apparently even in the face of the existential threat of global warming. The courts are reliably deferential to governments, as demonstrated by the High Court’s approach in FIE, and they have been notably reticent when it comes to human rights.

In addition, the neoliberal economic approach of successive governments has marginalized environmental concerns. There is a strong basis for the comment by a prominent Irish judge about Ireland’s ‘astonishing reluctance’ in environmental matters and his claim that ‘were it not for the [European Union], Ireland would have no effective [environmental legislation]’ (O’Doherty 2021).

Given this context, there may be powerful reasons to make use of the opportunities afforded by litigation to promote greater awareness of human rights and environmental values, and to shine the spotlight on the government's international obligations. Even if the Irish courts are reluctant to move into the twenty-first century, European institutions and courts, as well as UN human rights bodies, have a crucial role to play in insisting that rights be respected and that the Irish courts engage seriously with relevant claims brought before them.

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