ENVIRONMENTAL CONSTITUTIONALISM: A TRANSFORMATIVE LEGAL DISCOURSE?

Abstract: Environmental constitutionalism – acknowledging that the environment and/or climate system are suitable subjects for recognition and protection within constitutional texts and for vindication by national courts – is increasingly seen as an idea ripe for development in Ireland. Momentum around environmental constitutionalism reached a peak in March 2023 when the Citizens' Assembly on Biodiversity Loss recommended a referendum on inserting environmental and nature rights into Bunreacht na hÉireann. This article explores whether constitutionalising express environmental rights and/or duties could provide a transformative legal discourse for tackling the twin climate and biodiversity crises in Ireland.

Author: Dr Orla Kelleher BL, BCL Law and French (UCC), LLM (College of Europe), BL (King's Inns), PhD (UCD), assistant professor at Maynooth University School of Law and Criminology [*]

Introduction

In April 2019, *Dáil Eireann* declared a climate and biodiversity emergency.[1] In the four years since, these twin planetary emergencies have continued to worsen, and worsen at pace. The Intergovernmental Panel on Climate Change's 2022 'Sixth Assessment Report' warned that any further delay in climate action 'will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all'.[2] The 2019 'Global Assessment Report' published by the Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services (IPBES) paints a similarly bleak picture of biodiversity loss. It documents how over the past 50 years nature has declined globally at a rate and scale 'unprecedented in human history'.[3] The IPBES states that 'nature can be conserved, restored and used sustainably … through urgent and concerted efforts fostering *transformative* change'.[4]

This article will evaluate whether enshrining a constitutional right to a minimum level of environmental quality/constitutional duty of environmental protection as well as flanking procedural rights could provide a transformative legal discourse in Ireland to tackle these

[*] This article is a revised and updated version of the second chapter ('Rights-based approaches') of the author's doctoral thesis entitled Orla Kelleher, 'Rethinking legal and procedural rules in rights-based systemic climate change litigation: a comparative study of European countries' (PhD thesis, University College Dublin 2022). The thesis is available open access here: < https://researchrepository.ucd.ie/entities/publication/c8b644c4-50c4-4b0c-aa0c-1bf7c168221e/details > accessed 7 November 2023

[1] Paul Cunningham, 'Ireland becomes second country to declare climate emergency' RTÉ (Dublin, 10 May 2019) <https://www.rte.ie/news/environment/2019/0509/1048525-climate-emergency/> accessed 12 December 2022.

[2] IPCC, *Assessment Report 6 Climate Change 2022: Impacts, Adaptation and Vulnerability Summary for Policymakers* (2022) 33.

[3] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019) 12.

[4] ibid 16 (emphasis added).

twin crises. Whereas other scholarly contributions have focused on the possibility of 'greening' existing constitutional rights[5] and constitutionalising rights of nature[6], the present article sets out to examine the case for constitutionalising express environmental rights and/or duties *for humans* in Ireland. The next section will explain the concept of environmental constitutionalism and provide some broader legal and policy context to the environmental rights debate in Ireland. It will then trace the recent judicial history of environmental constitutionalism in Ireland and set out to identify possible 'root[s] of title'[7] for tethering constitutional environmental rights and/or duties to Bunreacht na hÉireann. The article will then examine the potential advantages and disadvantages of integrating environmental rights into the Irish Constitution. The final section will conclude.

Environmental constitutionalism and the legal/policy context

Although Ireland has a 'well-developed system of environmental legislation,' much of which implements EU environmental law,[8] the outlook for Ireland's environment is 'not optimistic,' according to the Environmental Protection Agency (EPA).[9] Greenhouse gas emissions are not falling quickly enough to meet Ireland's 2030 or 2050 climate target[10]; air quality is not meeting the World Health Organisation's health-based guidelines at the majority of monitoring stations around Ireland[11]; water quality standards continue to decline[12]; and thousands of species are threatened with extinction.[13] The impacts of environmental degradation and climate change on human life, health and wellbeing are already having a profound impact in Ireland. For example, it was recently estimated that poor air quality causes over 3,300 premature deaths in Ireland per year.[14] The negative impacts of climate change in Ireland now and into the future are likely to include an increase in heat-

[5] Jamie McLoughlin, 'Whither Constitutional Environmental (Rights) Protection in Ireland After 'Climate Case Ireland'?' (2021) 5(2) *Irish Judicial Studies Journal* 26.

[6] Peter Doran and Rachel Killean, 'Rights of nature: Origins, development and possibilities for the island of Ireland' (2022) <https://ejni.net/wp-content/uploads/2022/07/EJNI-Briefing-Paper-Rights-of-Nature-Jan-21.pdf> accessed 12 April 2023.

[7] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 [8.6].

[8] Alan Roberts, Mark Thuillier and Chris Stynes, 'Environmental Law and practice in Ireland' (Thomas Reuters Practical Law, 1 November 2021) <https://uk.practicallaw.thomsonreuters.com/4-503-2701?contextData=(sc.Default)&transitionType=Default&firstPage=true> accessed 13 December 2022.

[9] EPA, *Ireland's Environment: An Integrated Assessment* 2020 (EPA, 2020)12 <https://www.epa.ie/publications/monitoring--assessment/assessment/state-of-the-environment/EPA_Irelands_Environment_2020.pdf> accessed 13 December 2022.

[10] EPA, 'Ireland's Greenhouse Gas Emissions Projections 2022-2040' (EPA, 2023) <https://www.epa.ie/publications/monitoring--assessment/climate-change/air-emissions/EPA-GHG-Projections-2022-2040_Finalv2.pdf> accessed 17 July 2023.

[11] EPA, *Air Quality in Ireland Report 2021* (EPA 2022) <https://www.epa.ie/publications/monitoring--assessment/air/EPA-Air_Quality_in-Ireland-Report_2021_-interactive-pdf.pdf> accessed 16 January 2023.

[12] EPA, Water Quality in Ireland 2016-2021 (EPA, 2022) 1 <https://www.epa.ie/publications/monitoring--assessment/freshwater--marine/EPA_WaterQualityReport2016_2021.pdf> accessed 16 January 2023.

[13] George Lee, 'Large gap' between climate action and planning, assembly hears' RTÉ (Dublin, 24 September 2022) <https://www.rte.ie/news/ireland/2022/0924/1325237-citizens-assembly-biodiversity/> accessed 16 January 2023.

[14] Pádraig Hoare, 'Up to 3,300 Irish people die from poor air quality every year, claims expert' Irish Examiner (Dublin, 30 November 2022) https://www.irishexaminer.com/news/arid-41018408.html#:~:text=Estimates%20that%20poor%20air%20quality,to%20a%20leading%20chemistry%20expert accessed 21 December 2022.

related health impacts like skin cancer and overheating; an increase in flood-related health impacts; an increase in food and water-borne diseases like e-coli; an increase in respiratory diseases; as well as adverse impacts on psychological wellbeing and mental health.[15] Biodiversity loss and species extinction also pose a significant threat to human health and wellbeing in Ireland as both food and pharmaceutical production are heavily reliant on stable and healthy ecosystems.[16]

A recent EPA survey found that 85% of Irish people are worried about climate change and 90% said that Ireland has a responsibility to act.[17] Growing concerns about the worsening climate and biodiversity crises has sparked interest in more transformative legal discourses like environmental constitutionalism. Transformative legal discourse can be understood here as a discourse aimed at triggering significant and lasting change in our understanding of how law interacts with the natural world. That is, a legal discourse that challenges the dominant paradigm of most environmental laws, which tend to be anthropocentric, piecemeal and, most fundamentally, premised on the subjugation, exploitation, and commodification of nature albeit with a view to managing and curbing the worst excesses of extractivism.[18] Rights have in recent times become *the* international moral currency and the language through which all manner of justice claims are articulated, environmental degradation and climate change being no exception. [19] Recognising and conferring constitutional or human rights has emerged as one of the main ways to accord value to persons and entities within modern societies. Environmental constitutionalism recognises that the environment (and possibly the climate system) are proper subjects for recognition and protection within constitutional texts and for vindication by national courts.[20] Environmental constitutional provisions are not generally seen to be a substitute to existing regulatory regimes, which already impose certain controls on environmentally destructive activities. Environmental constitutional rights and duties act as a complement that 'supports and scaffolds' other environmental laws and regulations.[21]

The 1972 Stockholm Declaration was the first document in the international environmental law context to explicitly recognise the link between human rights and environmental protection.[22] The gradual recognition of the fact that humans are 'ecologically embedded

[15] Department of Health, 'Health Impacts of Climate Change and the Health Benefits of Climate Change Action: A Review of the Literature' (2019) <https://assets.gov.ie/38323/8d78596ef0224d9a87eb83052ec2cbf7.pdf> accessed 21 December 2022.
[16] EPA, 'Biodiversity loss and Health' <https://www.epa.ie/our-services/monitoring--assessment/assessment/irelands-environment/environment--wellbeing/current-trends-environment-and-wellbeing/#d.en.87214> accessed 21 December 2022.
[17] EPA, 'Major new study shows overwhelming agreement among Irish public on the threat of climate change and the desire for action' (9 December 2021) <https://www.epa.ie/news-releases/news-releases-2021/major-new-study-shows-overwhelming-agreement-among-irish-public-on-the-threat-of-climate-change-and-the-desire-for-action.php> accessed 24 January 2023.
[18] See Doran and Killean (n6).
[19] Peter Burdon, 'Co-opting legal rights for environmental protection' (2014) 39(3) Alternative Law Journal 176.
[20] James May and Erin Daly, *Global Judicial Handbook on Environmental Constitutionalism* (3rd edn, UNEP 2019) 7.
[21] ibid 9.
[22] See Principle 1 of the Stockholm Declaration which states 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-

beings … utterly dependent on and vulnerable to changes in … the non-human world'[23] has slowly paved the way for a human rights approach to environmental protection. Subsequent environmental treaties[24] and regional human rights treaties[25] have reaffirmed the relationship between environmental protection and human rights, often placing a particular emphasis on the importance of a healthy environment for human health and wellbeing.[26]

According to UNEP as of 2017, 150 countries have environmental provisions in their national constitutions, most commonly articulated as an individual right or a state duty.[27] A further seven counties have expressly engaged with climate change in their constitutions.[28] Environmental constitutionalism can encompass one or more of the following: substantive environmental rights, corresponding duties on a State and/or individuals to protect the environment, procedural environmental rights, and the recognition of specific rights relating to water, nature, sustainability, climate change or future generations.[29] Substantive environmental rights are those that recognise a standalone right to some degree of environmental quality, such as a right to an 'adequate,' 'safe,' 'clean,' 'healthy,' and

being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'

[23] John Barry and Kerri Woods, 'The Environment' in Michael Goodhart (ed) *Human Rights: Politics and Practice* (3rd edn Oxford University Press 2016) 406.

[24] World Commission on Environment and Development: Our Common Future ('Brundtland Report') (Oxford University Press 1987) which in Annexe 1 recognises that 'all human beings have the fundamental right to an environment adequate for their health and well-being'; Rio Declaration on Environment and Development (14 June 1992), UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992). in which principle 1 refers to human beings being 'entitled to a healthy and productive life in harmony with nature.' Principle 10 makes a link between environmental protection and human rights in procedural terms. It states that access to information, public participation and access to judicial and administrative proceedings, including redress and remedy shall be guaranteed in recognition of the fact that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'; UNECE Convention Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998) 2161 UNTS 447, 38 ILM 517 (1999) (the Aarhus Convention) which at Article 1 sets out that the overall objective of guaranteeing three interrelated procedural environmental rights is to contribute 'to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.' Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (4 March 2018) (the Escazú Agreement) sets out a similar objective in Article 1 of guaranteeing procedural environmental rights to contribute to 'the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.'

[25] See for example Article 24 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 I.L.M. 58 (1982); Article 11(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) (entered into force 16 November 1999) OAS Treaty Series No 69 (1988); Article 38 of the League of Arab States Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008); Article 37 of the Charter of Fundamental Rights of the European Union (2012) 2012/C 326/02.

[26] Marie-Catherine Petersmann, 'Narcissus' Reflection in the Lake: Untold Narratives in Environmental Law Beyond the Anthropocentric Frame' (2018) 30(2) Journal of Environmental Law 235, 243-249.

[27] UNEP, *Environmental Rule of Law: First Global Report* (2019) 156 <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report#:~:text=NAIROBI%E2%80%94%2024%20January%202019%20%E2%80%93%20The,over%20the%20last%20four%20decades> accessed 3 January 2023.

[28] James May and Erin Daly, 'Global Climate Constitutionalism and Justice in the Courts' in Jordi Jaria-Manzano and Susana Borràs (eds) *Research Handbook on Global Climate Constitutionalism* (Elgar 2019) 240.

[29] May and Daly (n 20) 19.

'sustainable' environment.[30] Substantive environmental rights can also include existing rights like the rights to dignity, life, health or shelter either explicitly connected to environmental protection or by a judicial interpretation that 'greens' these rights.[31] Environmental duties can identify individuals' duties to protect and defend the environment or governmental responsibilities toward specific aspects of the environment, including nature, animals, future generations, and the climate.[32] Procedural environmental rights – which include the rights to information, participation and access to justice in environmental matters – are often designed to ensure good environmental decision-making and to vindicate substantive environmental rights.[33] Constitutionally or legally recognised rights of nature acknowledge that ecosystems or elements of the natural environment have intrinsic value and importance irrespective of their utility or benefit to humans.[34]

Growing interest in environmental constitutionalism in Ireland culminated with a recommendation from the Citizens' Assembly on Biodiversity Loss in March 2023 that there should be a referendum to amend Bunreacht na hÉireann with a view to protecting biodiversity.[35] This overarching recommendation was supported by 83% of the Assembly members.[36] The Assembly voted that the specific proposal to be put to the people should include substantive and procedural environmental rights for humans as well as nature rights. The proposed amendment would confer a constitutional right to a clean, healthy, safe environment and a stable and healthy climate on present and future generations. The substantive environmental right recommendation was supported by 82% of Assembly members. It would place procedural environmental rights on a constitutional footing including access to environmental information, public participation in environmental decision-making and access to justice in environmental matters. The procedural environmental rights recommendation was supported by 77% of Assembly members. The proposed constitutional amendment would recognise nature as a holder of substantive constitutional rights to exist, flourish, perpetuate and to be restored, if degraded. It would give nature constitutional rights not to be polluted or harmed or degraded. This substantive nature rights recommendation was supported by 74% of Assembly members. It would confer procedural constitutional rights on nature including the right of nature to be a party in administrative decision-making, litigation and other situations where the rights of nature are impacted or likely to be impacted. This procedural nature right recommendation was supported by 78% of Assembly Members.

[30] James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2014) 64.
[31] David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011) 35.
[32] May and Daly (n 30) 75.
[33] ibid 77.
[34] UNEP, *Environmental Rule of Law: First Global Report* (2019) 141-142 <https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report#:~:text=NAIROBI%E2%80%94%2024%20January%202019%20%E2%80%93%20The,over%20the%20last%20four%20decades> accessed 3 January 2023.
[35] The Citizens' Assembly, *Report of the Citizens' Assembly on Biodiversity Loss* (March 2023) 16 <https://citizensassembly.ie/wp-content/uploads/Report-on-Biodiversity-Loss_mid-res.pdf> accessed 12 April 2023.
[36] ibid 120.

As the focus here is on substantive and procedural environmental rights for *humans* and/or environmental duties on the State and (potentially) private parties, the article will now examine the recent chequered history of substantive and procedural environmental rights/duties under Bunreacht na hÉireann.

A recent history of environmental constitutionalism in Ireland

In 1996, the Constitutional Review Group recommended the insertion of a basic constitutional statement of the State's responsibility in relation to the environment but cautioned that legislation should still be the 'chief source of specific provisions aimed at safeguarding the environment'.[37] It recommended that a constitutional 'duty on the State and public authorities as far as practicable to protect the environment, to follow sustainable development policies, and to preserve special aspects of our heritage' be incorporated into Article 10 of the Constitution (concerning State ownership of natural resources) or enshrined in a new article of the Constitution.[38]

Over twenty years later, the High Court of Ireland began to develop two parallel conceptions of environmental constitutionalism in two judgments both handed down in 2017.

In July 2017, Humphreys J delivered his judgment in *Brownfield Restoration Ireland Ltd v Wicklow County Council* where he ordered the council to carry out certain remediation work on an illegal landfill site.[39] In the course of his judgment, Humphreys J identified 'vigilant and effective protection of the environment' as '*an implied constitutional obligation*, to be laid at the door of private parties as well as the State.'[40] He elaborated that 'the EU Charter-level commitment to a high level of environmental protection and *the implied constitutional commitment to intergenerational solidarity* reflected in the children's rights provision (Article 42A.1°) and the directive principles of social policy (Articles 45.4.1° and 2°) of the Irish Constitution militates against … a lax and forgiving approach to fundamental issues of stewardship of the environment in trust for future generations'.[41]

In November 2017, Barrett J handed down his judgment in *Friends of the Irish Environment CLG v Fingal County Council* ('the *Dublin Airport Runway* case'),[42] which concerned a challenge to Fingal County Council's decision to grant the Dublin Airport Authority a five-year extension on its planning permission to build a new runway.[43] Here it was held that the applicant did not have standing to challenge a decision to grant an extension of duration of the planning permission.[44] The Court reasoned that there was no right of public participation

[37] Constitution Review Group, *Report of the Constitution Review Group* (1996) 402. <https://web.archive.org/web/20110721123125/http://www.constitution.ie/reports/crg.pdf> accessed: 9 October 2023.
[38] ibid.
[39] *Brownfield Restoration v Wicklow County Council* [2017] IEHC 456.
[40] ibid [307] (emphasis added).
[41] ibid (emphasis added).
[42] *Friends of the Irish Environment CLG v Fingal County Council* [2017] IEHC 695.
[43] For discussion see Orla Kelleher, 'The Revival of the Unenumerated Rights Doctrine: A Right to an Environment and its Implications for Future Climate Change Litigation in Ireland' (2018) 25(3) Irish Planning and Environmental Law Journal 97.
[44] ibid [13].

on the decision to extend planning permission as this type of decision did not come within the ambits of the Environmental Impact Assessment (EIA) Directive.[45] The Court noted that Friends of the Irish Environment had not participated in the planning process leading to the initial grant of permission for the runway extension and a challenge at this stage would 'constitute an entirely impermissible collateral attack on the validity of the said planning permission many years after the time-period for questioning the validity of such permission has passed'.[46] In the course of his judgment, Barrett J accepted that there exists and should now be recognised a constitutional 'right to an environment that is consistent with the human dignity and well-being of citizens at large'.[47] He described the right as:

> an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Article 40.3.1° of the Constitution. It is not so utopian a right that it can never be enforced. Once concretised into specific duties and obligations, its enforcement is entirely practicable.[48]

To tether the new right to other provisions of the Constitution, the Court drew on the Preamble and held that 'it is difficult to see how the dignity and freedom of individuals is being assured if the natural environment on which their respective wellbeing is concerned is being progressively diminished'.[49] The Court also saw the newly recognised right as being closely connected to existing constitutional rights like the right to life (Article 40.3.2°), the right to health (Article 40.3°), the right to work (Articles 40° or 45°) and the right to private property (Articles 43° and 40.3.2°).[50] The Court took the view that it did not need to delineate the outer parameters of the new right before it recognised its existence.[51] It did nevertheless acknowledge the types of questions that might be relevant in considering the contours of the newly recognised right:

> (i) [Does] the right impose a positive duty to act on government and/or others? (ii) does it afford protection from general environmental risks or actual harms? (iii) is it a right against government only and to what kinds of government action does it apply? (iv) is it the right knowingly to consent to serious health risks in the environment, to government abstention from direct or indirect participation in the creation of a health risk, to government compensation for harm suffered? (sic) (v) does it extend to the indoor environment, the home, and the workplace? (vi) what level of health is protected and whose health is protected? (vii) is it a civil right of humans or does it extend to animals and ecosystems?

The High Court still determined (arguably obiter) that the decision to extend the duration of planning permission for the new runway did not disproportionately interfere with the right

[45] ibid [16].
[46] ibid [9].
[47] ibid [264].
[48] ibid.
[49] ibid [246].
[50] ibid [263].
[51] ibid [255].

to an environment consistent with human dignity.[52] It is worth highlighting two other features of the *Dublin Airport Runway* judgment. First, the judgment made no reference to the dicta of Humphreys J in *Brownfield*. Second, the judgment of Barrett J was not appealed by the State or the applicants, presumably for strategic reasons. The Court of Justice of the European Union (CJEU) has since ruled in a separate judgment that a decision to extend the duration of planning permission does indeed come within the scope of the EIA Directive,[53] indicating Barrett J erred in dismissing the Dublin Airport case on that basis.[54]

The Irish courts were presented with an opportunity to consider the nascent constitutional right in *Friends of the Irish Environment v Government of Ireland* (or '*Climate Case Ireland*').[55] In this case, Friends of the Irish Environment (FIE) challenged by way of judicial review the government's approval of the National Mitigation Plan (NMP). FIE argued, *inter alia*, that the adoption of the NMP was ultra vires the Climate Action and Low Carbon Development Act 2015 (2015 Act) and violated the constitutional rights to life, bodily integrity and an environment consistent with human dignity. FIE also claimed that the government's approval of the NMP was in breach of Article 2 (right to life) and Article 8 (right to respect for private and family life) via the statutory duty on organs of the state to perform their functions in a manner compatible with the ECHR.[56]

In September 2019 in the High Court, McGrath J dismissed FIE's application for judicial review on the basis that the government has 'a considerable margin of discretion' under the 2015 Act in how it should achieve the 2050 National Transition Objective and 'it is not part of the function of the court to second-guess the opinion of government on such issues.'[57] On the constitutional rights point, the High Court stated that it was prepared to accept (for the purposes of the case) that there existed an unwritten constitutional right to an environment consistent with human dignity, relying on Barrett J's dicta.[58] However, it concluded that the making or approving of the NMP could not be said to breach or put at risk the right to life, bodily integrity or to an environment consistent with human dignity.[59]

On appeal, the Supreme Court in July 2020 quashed the NMP on the basis that it failed to specify in 'real or sufficient detail' how the government intended to meet the National Transition Objective by 2050.[60] Clarke CJ commented obiter that the right to an environment consistent with human dignity (or the 'right to a healthy environment' as it came to be

[52] ibid [264].
[53] Case C-411/17 *Inter-Environnement Wallonnie ASBL, Bond Beter Leefmilieu Vlaanderen ASBL v Council of Ministers* EU:C:2019:622; *Friends of the Irish Environment v An Bord Pleanála* [2019] IEHC 80; and Case C-254/19 *Friends of the Irish Environment v An Bord Pleanála* EU: C: 2020: 680.
[54] David Browne, *Simons on Planning Law* (3rd edn, Round Hall 2021) 15-767.
[55] *Friends of the Irish Environment v Government of Ireland* [2019] IEHC 747.
[56] ibid [12]. For discussion of the ECHR dimension of the Climate Case Ireland judgment, see Orla Kelleher, 'A critical appraisal of Friends of the Irish Environment v Government of Ireland' (2021) 30(1) Review of European Comparative and International Environmental Law 138, 142-143.
[57] ibid [97].
[58] ibid [133].
[59] ibid. For critique see Kelleher (n56) 142; Rónán Kennedy, Maeve O'Rourke and Cassie Roddy-Mullineaux, 'When is a Plan Not a Plan?:The Supreme Court Decision in "Climate Case Ireland"' (2020) 27(2) Irish Planning and Environmental Law Journal 60; and Suryapratim Roy, 'The Domestic Life of Climate Law: Friends of the Irish Environment v Ireland' (2021) 3 Irish Supreme Court Review 141.
[60] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 at [6.36].

reformulated in the Supreme Court[61]) could not be 'derived' from the text or the structure of the Constitution.[62] The existence of a justiciable right to an environment consistent with human dignity/to a healthy environment had been strongly contested by the government in both the High Court[63] and the Supreme Court.[64] The Supreme Court was not prepared to recognise the existence of a constitutional right to a healthy environment '[a]s thus formulated', reasoning that it 'is either superfluous (if it does not extend beyond the right to life and the right to bodily integrity) or is excessively vague and ill-defined (if it does go beyond those rights).'[65] The Supreme Court noted that 'the beginning and end of this argument stems from the acceptance by counsel for FIE that a right to a healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity'.[66]

The judgment still left the door open for environmental constitutional litigation based on a 'green' reading of existing constitutional rights and obligations[67] and for a popular referendum on environmental rights.[68] The Supreme Court specifically pointed out that the advantage of express incorporation by referendum is that the 'precise type of constitutional right to the environment which is to be recognised can be the subject of debate and democratic approval'.[69]

The author has criticised the Supreme Court's rationale for rowing back on the right to a healthy environment recognised by the High Court, noting that existing rights (e.g. the right to life/bodily integrity) arguably cannot be stretched to deal with certain types of environmental harms such as where the harm is confined to nature and the impact on humans is scientifically uncertain.[70] The question of whether a substantive environmental right is superfluous is highly contingent on how broadly the right to life and bodily integrity are construed in an environmental context.[71] The Supreme Court's position that a right to a healthy environment could not be recognised because it lacked sufficient definition is also questionable given that most fundamental rights are by their nature vague but take shape as they discussed, debated and litigated.[72] Adelmant and others observe how many countries have already attributed very specific content to the right to a healthy environment and this jurisprudence has gone on to shape the UN Special Rapporteur on human rights and the environment's 16 framework principles on states' human rights obligations in relation to the

[61] ibid [8.3].
[62] ibid [8.3]-[8.6].
[63] *Friends of the Irish Environment v Government of Ireland* [2019] IEHC 747 [73].
[64] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 [5.4].
[65] ibid [9.5].
[66] ibid [8.10].
[67] ibid [8.14], [8.17]. For discussion see: Kelleher (n56) 146.
[68] ibid [8.12].
[69] ibid.
[70] Kelleher (n 56) 145; Orla Kelleher, 'The Supreme Court of Ireland's decision in Friends of the Irish Environment v Government of Ireland ("Climate Case Ireland") (EJIL Talk, 9 September 2020) <https://www.ejiltalk.org/the-supreme-court-of-irelands-decision-in-friends-of-the-irish-environment-v-government-of-ireland-climate-case-ireland/> accessed 28 April 2023.
[71] Andrew Jackson, 'Systemic climate litigation in Europe: transnational networks and the impacts of Climate Case Ireland' (2021) Legal Working Paper Series European Central Bank Euro System, 41. <https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp21~f7a250787a.en.pdf> accessed: 26 June 2023.
[72] Kelleher (n 56) 145; Kelleher (n 70).

environment.[73] The 16 framework principles were 'explicitly designed to give precise and empirically grounded content to the right to a healthy environment'.[74] These principles cover everything from ensuring and providing for substantive and procedural environmental rights to protecting environmental defenders, maintaining substantive environmental standards and ensuring effective enforcement.[75]

In refining the test for identifying 'derived rights', the Supreme Court emphasised that 'there must be some root of title in the text or structure of the Constitution'.[76] In addition to the catalogue of constitutional rights previously cited by the High Court, there is a strong argument that the preambular reference to 'assuring dignity' could have provided a 'source'[77] for recognising a substantive environmental right and could have also been used as a 'background principle'[78] to inform the application of such a right to the facts of the case.[79] As the UN Special Rapporteur on Human Rights and the Environment observed as early as 2012: 'Human rights are grounded in respect for fundamental human attributes such as *dignity*, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish … Human rights and environmental protection are inherently interdependent'.[80] May and Daly observe that 'human dignity and environmental outcomes are inextricably intertwined'.[81]

What is striking about the Supreme Court's reformulation of the asserted right is not just that it distanced the right from the constitutional tether of assuring dignity, but also that the Court seems to go against a wider trend in international environmental constitutional practice and scholarship. According to May and Daly, judges are often unwilling to make judgments about what constitutes a 'quality' or 'healthy' environment but are more familiar with dignity as a standard of evaluation.[82] It is arguable that by removing the reference to dignity, the Supreme Court compounded the issue of vagueness. Of course, dignity is itself a loose concept and is vulnerable to becoming a 'conduit for arbitrary and unprincipled decision making.'[83] Notwithstanding this potential weakness, O'Mahony argues that dignity – understood as the notion that all human beings are worthy of equal treatment and respect – can 'play a valuable role' in constitutional adjudication in Ireland, provided that it is deployed appropriately.[84] That is, where the principle of dignity is used as a normative justification for

---

[73] Victoria Adelmant, Philip Alston, and Matthew Blainey, 'Human Rights and Climate Change Litigation: One Step Forward, Two Steps Backwards in the Irish Supreme Court' (2021) 13(1) Journal of Human Rights Practice 1, 19.
[74] ibid.
[75] UN Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* A/HRC/37/59 (2018).
[76] *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 [8.6].
[77] Conor O'Mahony 'The Dignity of the Individual in Irish Constitutional Law' in Dieter Grimm, Alexandra Kemmerer & Christoph Mullers (eds) *Human Dignity in Context* (Hart Publishing, 2018).
[78] ibid.
[79] See also McLoughlin (n 5) 38.
[80] UN Human Rights Council, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' A/HRC/22/43 2012, [10 (emphasis added)].
[81] May and Daly (n 20) 93.
[82] ibid 91.
[83] O'Mahony (n 77).
[84] ibid.

the existence of a right or as an interpretative aid to other rights provisions.[85] McCrudden also notes the important role dignity has to play in judicial interpretation of human rights which includes providing a language in which courts can indicate the weighting given to particular rights/values, the domestication and contextualization of rights, and the generation of new or more extensive rights.[86] In constitutional environmental rights adjudication, dignity could alleviate the nebulous nature of a substantive right either by tipping the balance in favour of better environmental outcomes or by providing a familiar benchmark against which a violation or remedy could be assessed.[87] It is also conceivable that the principle of dignity could be used to justify the extension of rights/constitutional protections to future generations and the environment.

In July 2023, the High Court handed down its judgment in *Coyne v An Bord Pleanála*.[88] The judgment is the most recent judicial engagement with environmental constitutionalism in Ireland. Here, Holland J dismissed a claim that An Bord Pleanála's decision to grant planning permission for a data centre breached several of the applicants' rights including their right to a healthy environment. The applicants had argued, *inter alia*, that the generation of electricity for the data centre would produce very significant carbon dioxide (CO_2) emissions, exacerbating climate change and its many negative effects, such as to imperil their constitutional and ECHR rights.[89] Holland J was critical of the applicants for not engaging with the question of causation, noting that the 'fact of climate change and its present and foreseen deleterious effects, are not, *ipso facto*, evidence that the data centre will causatively result in a breach of the [applicants'] personal rights'.[90] Holland J held that because the applicants had not raised rights-based arguments before the Board, they were not entitled to do so in subsequent judicial review proceedings.[91] While this finding sufficed to dismiss the rights-based arguments, lest he was mistaken, Holland J considered the rights-based arguments further. On the constitutional right to a healthy environment specifically, Holland J observed that because the dicta of Barrett J in the *Dublin Airport Runway* case and of Clarke CJ in *Climate Case Ireland* could be considered obiter, it remained open to him to identify such a right.[92] However, because the Supreme Court's observations in *Climate Case Ireland* were 'of the highest possible authority (a unanimous court of seven),' Holland J saw no reason not to follow the Supreme Court's conclusions.[93] Holland J also found that the applicants lacked standing to argue a breach of constitutional rights in 'the absence of evidence of imminent, clear and adverse effect upon [the applicants] in a real and concrete way by reason specifically

[85] ibid.
[86] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) The European Journal of International Law 655, 724.
[87] ibid; May and Daly (n 20) 91.
[88] *Coyne v An Bord Pleanála* [2023] IEHC 412.
[89] ibid [233]. The focus here is on the alleged breach of constitutional rights. However, it is worth mentioning that the Coynes also argued that the decision to grant planning permission for the data centre breached Article 2 (right to life) and Article 8 (right to respect for private and family life) of the ECHR via the statutory duty on organs of the state to perform their functions in a manner compatible with the ECHR, pursuant to section 3 of the ECHR Act 2003.
[90] ibid [235].
[91] ibid [243]-[244], [248].
[92] ibid [304].
[93] ibid.

of the operation of the data centre'.[94] Holland J concluded that even if a constitutional right to a healthy environment existed, the State would still have a 'very considerable margin of appreciation as to the means of vindicating it'.[95] In the present case, the applicants had not shown that the State's choice of means for reducing CO_2 emissions of electricity generation (via the Emission Trading Scheme and transition to renewables) would fall outside that margin of appreciation.[96]

The High Court's judgment is disappointing on several fronts. It ignored the burgeoning academic scholarship exploring how the causation challenge could be resolved in climate litigation based on a contribution to real and serious risk of harm.[97] It endorsed a narrow vision of public sector human rights obligations.[98] It supported a highly restrictive approach to standing.[99] And, it imported the 'wide' margin of appreciation in environmental matters at the ECHR level into Irish constitutional law, without any acknowledgement of the different legal contexts. For example, the rationale for a wide margin of appreciation at the ECHR level is a recognition that the social and technical aspects of environmental problems can be difficult to assess and national authorities – which include domestic courts – are better placed (than the European Court of Human Rights (ECtHR)) to strike a balance between competing interests.[100] The ECtHR has also made clear that even at the ECHR level, the breadth of the margin of appreciation depends on factors like context, the nature of the right at issue, its importance for the applicant, and the nature of the impugned activities. [101] Notwithstanding these shortcomings, the *Coyne* judgment is important as it leaves a blank canvas to design a strong and enforceable environmental constitutional rights/duties provision for a future referendum.

More recently, discussions on environmental constitutionalism in Ireland started to shift from the courtroom to the political arena. In June 2021, Climate Case Ireland along with other environmental NGOs, social justice organisations, trade unions and legal, medical and student advocacy groups wrote to the Government urging it to convene a Citizens' Assembly on Biodiversity Loss with environmental rights on the agenda.[102] In February 2022, the

[94] ibid [322].
[95] ibid [328].
[96] ibid.
[97] Nataša Nedeski and André Nollkaemper, 'A guide to tackling the collective causation problem in international climate change litigation' (EJIL Talk, 15 December 2022) < https://www.ejiltalk.org/a-guide-to-tackling-the-collective-causation-problem-in-international-climate-change-litigation/> accessed 27 July 2023; and Orla Kelleher, 'Incorporating climate justice into legal reasoning: towards a risk-based approach to causation in systemic climate litigation' (2022) 13(1) Journal of Human Rights and the Environment 290.
[98] On the idea of a standalone public sector human rights obligation, see section 42(1)(c) of the Irish Human Rights and Equality Commission Act 2014 which states that 'a public body, shall in in the performance of its functions, have regard to the need… to protect the human rights of its members, staff and *the persons to whom it provides services*. (emphasis added).'
[99] See *Coyne v An Bord Pleanála* [2023] IEHC 412 [319]-[321] where the Holland J equated the Irish rules of standing with the highly restrictive (and controversial) rules on standing for private persons seeking to challenge an EU measure directly before the CJEU.
[100] *Hatton and Others v. the United Kingdom* App no. 36022/97 (Judgment of the Grand Chamber of 8 July 2003) [97].
[101] *Buckley v UK* App. No. 20348/92 (Judgment of the Chamber of 29 September 1996) [74].
[102] Climate Case Ireland, 'Open letter on Citizens' Assembly on Biodiversity Loss' (10 June 2021) <https://www.climatecaseireland.ie/open-letter-on-citizens-assembly-on-biodiversity-loss-and-a-constitutional-right-to-a-safe-clean-healthy-and-sustainable-environment/>

Citizens' Assembly was formed; it first met in May 2022; and it delivered its final report in March 2023 – with one of its central recommendations being to call for a referendum on environmental rights.[103]

Over the last several years, the Government's position on recognising substantive environmental rights as constitutional/human rights has been marred by inconsistency. On the international political stage, the Irish government has been supportive of rights-based approaches to climate action and of recognising the existence of right to a safe, clean, healthy, and sustainable environment internationally. For example, in December 2015 Ireland was one of 14 countries that signed a joint statement calling for human rights to remain within the operative text of the Paris Agreement.[104] On substantive environmental rights specifically, Ireland was one of the 69 countries that wrote to the UN Human Rights Council in March 2021 calling for the international recognition of a right to a safe, clean, healthy and sustainable environment.[105] This came to fruition in October 2021 when the UN Human Rights Council adopted Resolution 48/13 recognising for the first time the right to a clean, healthy, and sustainable environment as a human right; encouraging States to work together to give effect to this right; and inviting the UN General Assembly to consider the matter.[106] In July 2022, the UN General Assembly (UNGA) passed Resolution 76/300 recognising the right to a clean, healthy, and sustainable environment as a human right and called on States to 'scale up efforts' to ensure a clean, healthy and sustainable environment for all.[107] Ireland voted in favour of this UNGA resolution. At the regional human rights level, the Irish State has not publicly voiced opposition in political fora to the recognition of a right to a healthy environment at the ECHR level. In 2021 the Parliamentary Assembly of the Council of Europe published a resolution and a recommendation on an additional protocol on the right to a safe, clean, healthy and sustainable environment.[108] Once again, Ireland voted in favour of this resolution.[109] In May 2022, the Committee of Ministers' recommendation called on Council of Europe 'member states to actively consider recognising, *at national level*, the right to a clean, healthy and sustainable environment, as a human right' and to ensure

[103] For a helpful overview of the process, see Ursula Quill, 'Ireland's Citizens' Assembly on Biodiversity Loss: Potential and Limitations for Deliberative Democracy' (Constitution Net, 31 January 2023) <https://constitutionnet.org/news/irelands-citizens-assembly-biodiversity-loss> accessed 28 June 2023.

[104] WeDo, 'COP21: Human Rights and Gender Equality' (Wedo.org, 29 December 2015) < https://wedo.org/cop21-human-rights-gender-equality/ > accessed 17 July 2023.

[105]Children's Environmental Rights Initiative, 'Core Group Statement on Right to a Healthy Environment at Human Rights Council 46th Session' < https://ceri-coalition.org/2021/04/20/core-group-statement/ > accessed 28 June 2023.

[106] UNHRC, Resolution on the human right to a clean, healthy, sustainable environment (21 October 2021) A/HRC/RES/48/13 < https://digitallibrary.un.org/record/3945636?ln=en> accessed 28 November 2023.

[107] UNGA, Resolution on the human right to a clean, healthy, and sustainable environment (26 July 2022) A/RES/76/300. < https://digitallibrary.un.org/record/3982508?ln=en> accessed 28 November 2023.

[108] PACE, 'Anchoring the Right to a Healthy Environment: Need for Enhanced Action by the Council of Europe', Resolution 2396 (2021), <https://pace.coe.int/en/files/29499> ; PACE, 'Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe', Recommendation 2211 (2021) <https://pace.coe.int/en/files/29499>

[109] PACE, Vote on Resolution - Doc. 15367 Anchoring the right to a healthy environment: need for enhanced action by the Council of Europe< https://pace.coe.int/en/votes/38649 >accessed 17 July 2023.

environmental procedural rights.[110] In May 2023, the Heads of State and Government of the Council of Europe met at the Council's Fourth Summit and adopted the Reykjavík Declaration. The Reykjavík Declaration affirms that 'human rights and the environment are intertwined and that a clean, healthy and sustainable environment is integral to the full enjoyment of human rights by present and future generations'.[111]

Notwithstanding its political support for the recognition of a right to a healthy environment at the international and regional human rights level, the Irish government has been staunchly resistant to the idea of justiciable or expansive substantive constitutional/human environmental rights in defending litigation. Examples of this can be seen not only in *Climate Case Ireland* and *Coyne*[112] but also in the Irish government's recent oral intervention in *Klimaseniorinnen v Switzerland,* one of the first climate cases before the ECtHR. The case is being taken by an association of Swiss elderly women and four individuals. Elderly women are a demographic at an increased risk of mortality and morbidity during heatwaves which are becoming more intense and frequent due to climate change. In their written and oral submissions, the plaintiffs argued that Switzerland is failing to fulfil its positive obligations to take necessary steps to effectively protect the lives, health and wellbeing of the plaintiffs by not doing everything in its power to limit global temperature rise to +1.5°C.[113] While a number of countries made written submissions to the ECtHR, Ireland was the only state other than Switzerland (the respondent) to make an oral intervention.[114] The Irish government's oral intervention advocated for a narrow application of the ECHR in the case – emphasising that there is no standalone right to a healthy environment under the Convention; that Article 2 (right to life) only applies to the environment in 'exceptional circumstances'; and that in the environmental sphere states enjoy a 'wide margin of appreciation'.[115]

The Irish government is not under any obligation to act on the Citizens' Assembly recommendation on holding a referendum on environmental constitutional rights but it will still need to respond to the recommendation and must indicate a timeframe for

[110] Recommendation CM/Rec(2022)20 of the Committee of Ministers to member States on human rights and the protection of the environment <https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a83df1> accessed 17 July 2023 (emphasis added).

[111] Reykjavík Declaration CM(2023)57 at the 4th Summit of Heads of State and Government of the Council of Europe <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680ab364c#_ftn1> accessed 4 June 2023.

[112] *Coyne v An Bord Pleanála* [2023] IEHC 412 [219].

[113] *Klimaseniorinnen v Switzerland*, filed 26 November 2020 < http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126_Application-no.-5360020_application-1.pdf [57]; https://www.echr.coe.int/w/verein-klimaseniorinnen-schweiz-and-others-v.-switzerland-no.-53600/20-1 >accessed: 19 July 2023.

[114] Caroline O'Doherty, 'Irish Government defends moving against Swiss grannies who are fighting for the climate' *The Irish Independent* (Dublin, 11 April 2023) <https://www.independent.ie/news/irish-government-defends-moving-against-swiss-grannies-who-are-fighting-for-the-climate/42426658.html> accessed 3 October 2023.

[115] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (no. 53600/20) Grand Chamber hearing - 29 March 2023 <https://www.echr.coe.int/w/verein-klimaseniorinnen-schweiz-and-others-v.-switzerland-no.-53600/20-1> accessed: 19 July 2023.

implementation if it accepts it.[116] The constitutional rights recommendation must be considered by the Joint Oireachtas Committee on Environment and Climate Action (JOCECA).[117] The JOCECA started considering the Citizens' Assembly recommendations in September 2023; this follow-up process is likely to give further momentum to environmental constitutionalism in Ireland.[118] It will force government to take a clear stance on what they actually support when it comes to recognising constitutional procedural and substantive environmental rights and/or constitutionalising environmental duties. This process could also be an important opportunity to learn from the early case law and scholarship on environmental constitutionalism so as to design a constitutional amendment proposal that confers citizens with an effective, enforceable constitutional tool in the environmental sphere. With this context in mind, it is worth considering the potential advantages and disadvantages of inserting substantive and procedural environmental rights and/or an environmental duties clause into the Irish constitution.

Advantages and Disadvantages to Constitutionalising Environmental Rights/Duties in Ireland

Advantages

There is already a burgeoning international scholarship on the potential advantages of constitutionalising environmental rights/duties, from which we can extrapolate important lessons for Ireland.

Daly and May identify five benefits of constitutional environmental rights/provisions.[119] First, constitutionally enshrined environmental provisions are more durable than ordinary environmental statutes.[120] Inserting environmental rights into the Constitution may therefore prevent governments from rolling back environmental laws and standards in the future.[121] Second, located at the apex of a legal order, constitutionally embedded environmental rights inform, shape, and guide public discourse and behaviours.[122] Framing a healthy environment as a rights issue 'raises it above a mere policy choice'.[123] Raising environmental concerns to the top of the hierarchy of legal sources ensures that they are given precedence over other legal norms that are not based on rights and can thus act as a bulwark against any kind of 'race to the bottom'.[124] In other words, environmental rights can put a brake or limit on environmentally harmful practices that prioritise short-term economic growth over the long

[116] Citizens' Assembly on Biodiversity Loss, 'Terms of Reference' <https://citizensassembly.ie/citizens-assembly-on-biodiversity-loss/terms-of-reference/>
[117] ibid.
[118]Joint Committee on Environment and Climate Action debate Tuesday, 19 September 2023 < https://www.oireachtas.ie/en/debates/debate/joint_committee_on_environment_and_climate_action/2023-09-19/2/ >accessed 4 October 2023.
[119] Erin Daly and James May, 'Comparative environmental constitutionalism' (2015) 6(1) Jindal Global Law Review 9, 21-22.
[120] ibid.
[121] Boyd (n 31) 30.
[122] Daly and May (n 119) 22.
[123] Dinah Shelton, 'Human Rights and the Environment: Problems and Possibilities' (2008) 38 Environmental Policy and Law 41, 44.
[124] ibid.

term benefits of environmental protection.[125] Third, there is a greater chance of compliance with constitutional environmental provisions compared with environmental regulation, potentially because of their normative superiority.[126] The fourth advantage is that compared to statutory environmental laws, which tend to protect specific environmental resources and regulate selected environmental problems, constitutional environmental rights guarantee a broad individual right to a certain quality of environment.[127] Fifth, environmental constitutional rights provide a safety net for addressing environmental problems, particularly where there are gaps in environmental statutes or they do not offer a high level of environmental protection.[128]

In their 'Right to a Healthy and Sustainable Environment' report, the present and former UN Special Rapporteurs on the environment and human rights, Boyd and Knox, cite examples of where a substantive right to a healthy environment specifically has raised the profile of environmental protection and provided a basis for the enactment of stronger environmental laws and policies.[129] They point to jurisdictions like Costa Rica, France and Spain where the right to a healthy environment is seen as 'one of the fundamental principles shaping, strengthening and unifying the entire body of environmental law'.[130] Substantive and procedural environmental rights can improve the implementation and enforcement of existing environmental laws and increase respect for other connected rights e.g., the right to life or bodily integrity.[131]

Constitutional environmental rights can be a powerful weapon in the arsenal of environmental campaigners and marginalised groups that shoulder a disproportionate share of the burden of pollution and environmental harm.[132] Boyd and Knox cite several studies showing a correlation between the right to a healthy environment and healthier people and ecosystems.[133] Three other advantages of environmental constitutionalism highlighted by Boyd in *The Environmental Rights Revolution* include creating a level playing field *vis-à-vis* other rights; fostering greater government and corporate accountability; and strengthening environmental democracy by empowering citizens with stronger environmental procedural rights.[134] The article will now consider each of these potential advantages in more detail, focusing (where relevant) on the Irish context.

---

[125] ibid.
[126] Daly and May (n 119) 22.
[127] ibid.
[128] ibid.
[129] OHCHR *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* A/73/188 (2018) [40].< https://www.ohchr.org/en/documents/thematic-reports/a73188-report-special-rapporteur-issue-human-rights-obligations-relating> accessed 28 November 2023.
[130] ibid.
[131] ibid [41]-[42].
[132] ibid.
[133] Ibid [44]. One study cited in the report found that environmental constitutional rights have a positive causal influence on environmental performance. See: Chris Jeffords and Lanse Minkler, 'Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes' (2016) 69(2) Kyklos 294.
[134] Boyd (n 31) 30-32.

On the question of creating a level playing field *vis-à-vis* other rights, a strong and legally enforceable constitutional environmental right could potentially act as a counterbalance to the exercise of property rights in an environmentally destructive manner. Bosselmann refers to a 'human rights' tragedy of the commons where many forms of environmental degradation are perfectly legal, because individual rights such as property rights create an entitlement to use the environment as the property owner desires.[135] The collective exercise of these rights results in systemic and widespread environmental degradation.[136] Whilst this assessment may be accurate on a global level, it is arguably a less apt description of Irish constitutional property law. As Walsh notes in her article on the tensions between climate mitigation measures and property rights in Ireland, 'the Irish Constitution protects property rights in terms that are not rigid, and that put the common good and social justice front and centre'.[137] In exploring the potential constitutional barriers to the Irish government imposing compulsory retrofitting obligations, she argues that there is in fact ample scope – based on the overall tenor of Irish constitutional property law – to justify such measures as a proportionate restriction on property rights to secure the common good and social justice.[138] While property rights may not impede the imposition of more ambitious environmental and climate measures in Ireland, constitutionalising an environmental right or duty could nevertheless reduce the danger of anthropocentricism and tip the balance in favour of higher levels of environmental protection and more ambitious climate action in political and judicial decision-making.[139]

In terms of government accountability, Boyd argues that both the substantive and procedural aspects of a constitutional right to a healthy environment provide processes, forums and standards for holding governments accountable for failing to protect human health and the environment.[140] This is well-exemplified by the fact that the right to a healthy environment is increasingly being invoked in climate litigation to challenge the implementation or ambition of a government's climate targets and policies.[141] One of the first *global* studies on the role of the right to a healthy environment in climate litigation reached the 'tentative' conclusion that, so far, the right seems to contribute to success in climate cases.[142] In the *European* context, constitutional environmental rights/duties have to date been deployed in climate litigation with varying levels of success. Peel and Osofsky argue that the existence of a constitutional right to a healthy environment or safe climate, alone, is not determinative of the successful deployment of rights arguments in climate litigation.[143] Other relevant factors include the existence of legislation or procedures that facilitate rights-based cases and the

[135] Klaus Bosselmann, 'Environmental and human rights in ethical context' in Anna Grear and Louis J. Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Elgar 2015) 531, 532.
[136] ibid.
[137] Rachael Walsh, 'Climate Action and Constitutional Property Rights – Partners or Adversaries?' (2019-2020) 42(2) Dublin University Law Journal 131, 149.
[138] ibid 133.
[139] Boyd (n 31) 30.
[140] ibid 30-31.
[141] Pau de Vilchez and Annalisa Savaresi, 'The Right to a Healthy Environment and Climate Litigation: A Game-Changer?' (2021) 32(1) Yearbook of International Environmental Law 3, 17.
[142] ibid.
[143] Jacqueline Peel and Hari Osofsky, 'A Rights Turn in Climate Change Litigation' (2018) 7(1) Transnational Environmental Law 37, 62.

presence of case law or judicial practices receptive to novel rights-based arguments.[144] According to May, factors that continue to hinder the judicial vindication of constitutional environmental rights in a more general context include the text and its meaning, judicial receptivity, political willingness, and poor implementation and monitoring of judicial orders in environmental cases where they have been made.[145] Applying these predictors for successful deployment of constitutional environmental rights in climate/environmental litigation in Ireland, it is noteworthy that Clarke CJ seemed to indicate a receptivity to rights-based arguments in climate/environmental cases in *Climate Case Ireland.*[146]

It is worth considering judicial engagement and enforcement of constitutional environmental provisions in other European climate litigation to date. In the now famous *Urgenda* case – where the Dutch government was ordered to increase the ambition of its climate mitigation target to at least a 25% reduction in GHG emissions by 2020 relative to 1990 levels – The Hague District Court used the constitutional duty to protect the environment[147] as an interpretative aid.[148] The Court of Appeal and Supreme Court – which upheld The Hague District Court's ruling– did not engage with the constitutional duty to protect the environment focusing instead of ECHR rights.[149]

In *People v Arctic Oil,* the Norwegian Supreme Court was asked for the first time to rule on the right to a healthy environment,[150] which was only inserted into the Norwegian constitution in 2014.[151] The Court rejected the claim that the Norwegian State's grant of petroleum exploration licenses violated this newly enshrined constitutional right to a healthy environment.[152] The Supreme Court recognised that the right to a healthy environment also covered the climate[153] and that the right imposes a legal duty on government to adopt 'adequate and necessary' measures to protect the environment.[154] However, it went on to state that the courts would only set aside a legislative decision based on the constitutional right to a healthy environment where the duty is 'grossly neglected,' expressly stating that this is a 'very high' threshold.[155] In circumstances where the Norwegian Parliament had adopted some measures to reduce GHG emissions within its own territory, the threshold

144 ibid.
145 James May, 'The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes' (2021) 42 Cardozo Law Review 983, 1011.
146 *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 [8.16]-[8.17].
147 Article 21 of the Dutch Constitution provides that 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.
148 *Urgenda Foundation v Netherlands* (24 June 2015) ECLI:NL:RBDHA:2015:7196, [4.52].
149 *Netherlands v Urgenda Foundation* (9 October 2018) ECLI:NL:GHDHA:2018:2610; *Netherlands v Urgenda Foundation* (20 December 2019) ECLI:NL:HR:2019:2007.
150 Article 112(1) of the Norwegian Constitution provides 'Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.' Article 112(3) provides 'The authorities of the state shall take measures for the implementation of these principles.'
151 Christina Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law and Politics' (2021) 33(3) Journal of Environmental Law 697, 700.
152 *Greenpeace Nordic Association v. Ministry of Petroleum and Energy,* judgment of the Supreme Court given on 22 December 2020, HR-2020-2472-P, (case no. 20-051052SIV-HRET).
153 ibid [147]-[148].
154 ibid [136]-[137].
155 ibid [142].

had not been exceeded.[156] Commentators have criticised the judgment as being 'highly political' and seemingly 'hurried' so as to 'align the law with the prevailing political preferences for unlimited petroleum exploration, extraction and export'.[157] It has also been described as a 'backward-looking judgment,' which missed an opportunity to establish the substantive content of the right to a healthy environment in light of developments since 2014 including Norway's ratification of the Paris Agreement, growing public awareness and concern about climate change and advances in climate science.[158] That said, the judgment left a door open for establishing responsibility for extraterritorial emissions in future.[159] The Supreme Court indicated that whilst the constitutional right to a healthy environment does not provide protection outside of Norway, it may still be applicable where harm occurs in Norway as a result of activities taking place abroad, where the Norwegian authorities have direct influence over these harmful activities or could take measures to mitigate against them.[160]

In *Neubauer v Germany*, the German Federal Constitutional Court found that the Federal Climate Protection Act 2019 was unconstitutional because the emissions it permitted until 2030 created a disproportionate risk that constitutional rights would be impaired in the future by significantly narrowing the emissions possibilities after 2030.[161] The Court sidestepped the question of whether the German constitution protects a *right* to an ecological subsistence level or a right to a future consistent with human dignity,[162] but did engage in a detailed analysis of the constitutional *duty* to protect the environment.[163] The Court emphasised that the constitutional duty to protect the environment, enshrined in Article 20a of the Basic Law, is 'a justiciable provision.'[164] It 'obliges the state to take climate action' which includes the aim of achieving climate neutrality.[165] The Court further elaborated that the Paris Agreement temperature goal of well-below-2°C and ideally 1.5°C is 'a specification of the climate action required under constitutional law'.[166]Article 20a 'imposes a special duty of care on the legislature, including a responsibility for future generations' where there is scientific uncertainty about future irreversible environmental impacts.[167] This constitutional duty to protect the environment does not automatically trump other interests, however, as the

[156] ibid [157]-[158].
[157] Christina Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law and Politics' (2021) 33(3) Journal of Environmental Law 697, 698.
[158] ibid 703.
[159] For discussion ibid 705-706; Alexandru Gociu and Suryapratim Roy, 'Extraterritoriality of Oil Constitutionalism in People v Arctic Oil' (EJIL: Talk!, 16 February 2021)< https://www.ejiltalk.org/extraterritoriality-of-oil-constitutionalism-in-people-v-arctic-oil/ > accessed: 28 July 2023.
[160] *Greenpeace Nordic Association v. Ministry of Petroleum and Energy,* judgment of the Supreme Court given on 22 December 2020, HR-2020-2472-P, (case no. 20-051052SIV-HRET) [149].
[161] BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 at [183].
[162] ibid [113].
[163] Art 20a of the Basic Law provides that 'the State, mindful also of its responsibility towards future generations, shall protect the natural foundations of life and animals.'
[164] BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18 at [112].
[165] ibid [198].
[166] ibid [210].
[167] ibid [229].

climate crisis intensifies the constitutional obligation to take climate action should be accorded increasing weight in any balance process.[168]

It is important to emphasise that climate litigation relying on a constitutional right to a healthy environment/duty of environmental protection is still a relatively new phenomenon and, as can be seen by openings left by the various superior courts to date, is ripe for further development. These cases raise interesting questions that should inform any future development of environmental constitutionalism in Ireland. Some of these questions will be addressed in present article. For example, if a constitutional environmental provision were to be inserted into the Constitution: would it be justiciable? How should it be interpreted by the courts? Would there be a high threshold for finding a breach of the right/duty? Would the right to a healthy environment also encompass a right to a safe and stable climate system? Other questions are beyond the scope of the present article but will still need to be teased out. For example, who would the beneficiaries be of such environmental rights? How, if at all, would such rights mediate the relationship between current and future generations? Would a constitutional environmental right have extraterritorial scope?

On the question of corporate accountability, a constitutional right to a healthy environment could also foster greater corporate accountability for environmentally destructive practices. The Irish Constitution is somewhat unusual in that it has a well-established doctrine of direct horizontal effect that allows for the application and enforcement of constitutional rights against non-state actors.[169] The Irish superior courts have said that existing private law remedies (e.g., under tort law) will usually suffice to vindicate constitutional rights in the context of litigation between individuals (or between individuals and corporations) unless existing torts were 'basically ineffective' at protecting constitutional rights.[170] If existing torts prove to be ineffective at vindicating constitutional rights,[171] it may in future be possible to assert a violation of constitutional rights (including the right to a healthy environment) by a corporate actor before the Irish courts for failing to align their activities with the temperature goals of the Paris Agreement, for example.

Constitutionalising environmental rights also has potential to enhance transparency, inclusivity and accountability in environmental governance in Ireland by elevating environmental procedural rights to the top of the hierarchy of legal sources. The natural starting point for any discussion of procedural environmental rights is the 1998 Aarhus Convention. [172] The Aarhus Convention is an international environmental human rights law treaty that guarantees three procedural rights relating to environmental matters: the right to

[168] ibid [198].
[169] *Educational Company of Ireland Ltd v Fitzpatrick* [1961] IR 345 at 368; *Meskell v CIÉ* [1973] IR 121 at 133; *PH v Murphy (John) and Sons Ltd* [1987] IR 621 at 626. For a comparative analysis of the relatively strong form of horizontality in Irish constitutional law, see: Colm Ó Cinnéide and Manfred Stelzer, 'Horizontal effect/state action' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds) *Routledge Handbook of Constitutional Law* (Taylor & Francis Group, 2017) 177.
[170] *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629 [7.1.165]–[7.1.167].
[171] To date, there has not been a tort-based climate case in Ireland. Globally, tort-based climate cases have had limited success. For examples of unsuccessful tort actions in other jurisdictions, see: *Smith v Fonterra Co-Operative Group Ltd* [2021] NZCA 552 and *Minister for the Environment v Sharma* [2022] FCAFC 35.
[172] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998 38 ILM 517 (Aarhus Convention).

access environmental information held by public authorities; the right to participate in decision-making; and the right of access to justice to enforce environmental laws. The Convention also makes clear that the three procedural rights are not an end in themselves but are a means of 'contribut[ing] to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'.[173] As May and Daly put it, procedural environmental rights should be understood as a complement to substantive environmental rights.[174] Substantive environmental rights without complementary procedural rights may not be able to protect human health and well-being (e.g., if the substantive right is non-justiciable); whereas procedural rights by themselves ensure fair procedures but may not necessarily prevent environmentally disastrous decisions.[175] The complementary nature of substantive and procedural environmental rights is well exemplified by the Aarhus Convention itself.

Ireland ratified the Aarhus Convention in June 2012, but the Convention still has not been fully incorporated into Irish domestic law through enacting legislation.[176] Because the EU is a Party to the Convention – having ratified it in 2005 – the Convention still enters the Irish legal order indirectly through the mechanism of EU law.[177] Whilst the Convention is seen as a 'transformative force in EU and Irish environmental governance … implementation [in Ireland] is widely regarded as unsatisfactory.'[178] The risk of 'backsliding' on the important progress that has been made to implement Aarhus rights, particularly on the right of access to justice, is a real prospect in Ireland.[179]

The right of access to justice is guaranteed by Article 9 of the Aarhus Convention. Article 9 has several dimensions: a right to a review procedure to enforce access to environmental information[180] and participation rights[181]; a general right of access to justice to challenge breaches of national law relating to the environment[182]; and overarching minimum standards for access to justice including that these review procedures shall provide 'adequate and effective remedies… and be fair, equitable, timely and not prohibitively expensive'.[183] The Aarhus Convention has been partially implemented in EU law at the Member State level

173 Article 1 of the Aarhus Convention.
174 May and Daly (n 20) 23.
175 Walter Baber and Robert Bartlett, *Environmental Rights in Earth System Governance Democracy beyond Democracy* (2020) at 15 cited in James May, 'The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes' (2021) 42 Cardozo Law Review 983, 1017.
176 Aarhus Convention, Status of Ratification <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en> accessed 31 July 2023.
177 ibid.
178 Alison Hough and Ciara Brennan, 'Finding Common Ground Report on Aarhus Implementation– Ireland' (2022) 4, 7 <https://static1.squarespace.com/static/62821548d89ad1244a3b1509/t/62b217f33b64af02534730e7/1655838713431/Aarhus+ireland+Report+210622.pdf> accessed 1 August 2023.
179 Alison Hough and Gavin Elliott, 'A joint submission to the Committee on Housing Local Government and Heritage by Community Law and Mediation (CLM) and Environmental Justice Network Ireland (EJNI)' (27 February 2023) 7 <https://communitylawandmediation.ie/wp-content/uploads/2023/02/Joint-EJNI-CLM-PD-Submission-final-version-2-27Feb23.pdf> accessed 1 August 2023.
180 Article 9(1) of the Aarhus Convention.
181 Article 9(2) of the Aarhus Convention.
182 Article 9(3) of the Aarhus Convention.
183 Article 9(4) of the Aarhus Convention.

through Directive 2003/4/EC on access to environmental information and Directive 2003/35/EC on public participation.[184] Attempts to legislate for the general right of access to justice at the Member State level have been unsuccessful,[185] though the Court of Justice continues to champion the right through its doctrine of consistent interpretation.[186]

There have been several legislative proposals in Ireland in recent years seeking to restrict access to justice in the context of planning decisions. The most recent iteration is the Draft Planning and Development Bill 2022.[187] Hough and Elliott argue that the draft Bill is designed to 'radically overhaul the planning system and related court processes … to increase efficiency and the speed of the development consent process by centralising power and restricting access to justice in order to remove perceived impediments to housing development'.[188] While this framing is not borne out by evidence – less than 4% of An Bord Pleanála's decisions are challenged[189] – the proposal would make it much more difficult for individuals, NGOs and community groups to challenge planning decisions which impact the environment. For example, the draft Bill includes a requirement that leave applications be heard 'on notice,'[190] which would lead to longer hearings and higher legal costs. It would also introduce more onerous standing rules for individuals and NGOs and all but eliminate legal challenges by residents' groups.[191] These proposed changes to the law arguably fall foul of the international human rights law principle of non-regression[192] and the objective of 'effective judicial protection' underpinning Article 9(3) of the Aarhus Convention and Article 47 of the Charter of Fundamental Rights of the EU.[193] The current patchwork of protections for Aarhus rights under international and EU law can (to a certain extent) be invoked to

184 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice [2003] OJ L 156. The access to justice obligations arising under these directives mirror those under Article 9(1) and (2) of the Convention. See Áine Ryall, 'Careful What You Wish For: Amending the Rules Governing Judicial Review in Planning Matters' (2019) 4 Irish Planning and Environmental Law Journal 151, 157.

185 ibid. In 2003, the Commission proposed a Directive on access to justice at the Member State level but scrapped the proposal in 2014 due to resistance from some Member States. See: European Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM (2003) 624 final. See also: Council Decision 2005/370/EC [2005] OJ L 124/1, wherein the European Council in ratifying the Aarhus Convention made a declaration with specific reservations concerning Article 9(3).

186 Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* EU:C:2011:125, [50]; Case C-664/15 Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd EU:C:2017:987 [54]-[57]; C-873/19 Deutsche Umwelthilfe eV v Bundesrepublik Deutschland EU:C:2022:857 [75]-[79].

187 For an example of a previous attempt to significantly restrict access to justice, see General Scheme of the Housing and Planning and Development Bill 2019.

188 Hough and Elliott (n179).

189 ibid 3.

190 Section 249(2) of the Draft Planning and Development Bill 2022.

191 Section 249(10)(c) of the Draft Planning and Development Bill 2022.

192 Ryall (n 184).

193 The interaction between Article 9(3) of the Convention and Article 47 of the Charter was recently discussed in: Case C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* EU:C:2022:857. For a detailed critique of the public participation and access to justice issues with the draft Planning and Development Bill 2022, see: Hough and Elliott (n 179).

resist these changes. However, it is arguable that constitutional environmental rights (depending on how they are formulated) could provide a definitive block to any proposed roll-back on Aarhus rights.

Two further advantages related to access to justice are the introduction of a more intense level of judicial scrutiny of environmental/planning decisions and the potential for more effective remedies from an environmental protection perspective. A constitutional framing of environmental and climate issues is significant because it heightens the level of judicial scrutiny of .an impugned decision/act/omission by introducing a proportionality test. In Ireland, the proportionality test was authoritatively articulated by Costello J in *Heaney v Ireland*, as follows:

> 'The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible, and
>
> (c) be such that their effects on rights are proportional to the objective'.[194]

In theory at least, the heightened level of scrutiny involved in a proportionality enquiry[195] can give a constitutional framing of environmental and climate issues an edge over more conventional modes of environmental litigation based on administrative law (e.g., planning cases). In traditional administrative law-based environmental or climate planning cases, courts are usually concerned with the process followed by the decision-maker, as opposed to the substance or merits of the impugned decision. The threshold for review of the substance of a decision is unreasonableness or irrationality. The seminal judgment in Ireland on this point, influenced by the UK's *Wednesbury* unreasonableness test[196] is *O'Keeffe v An Bord Pleanála* where Finlay CJ indicated that 'to satisfy a court that the decision-making authority has acted irrationally … so that the court can intervene and quash its decision, it is necessary that the applicant should establish …that the decision-making authority had before it no relevant material which would support its decision'.[197] The rationale for curial deference to planning authorities is that bodies like An Bord Pleanála are expert decision-makers on questions of planning and are given jurisdiction under the planning legislation to strike the proper balance between development and environmental protection.[198] However, the problem with this highly deferential approach is that An Bord Pleanála – like any public body

[194] *Heaney v Ireland* [1994] 3 IR 593 [607]
[195] For a critique of how the proportionality test has not been applied in a rigorous, transparent or consistent way in Ireland, see Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [7.1.49]-[7.1.82]
[196] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[197] *O'Keeffe v An Bord Pleanála* [1993] IR 39 [72]
[198] ibid[71]-[72]

– is not infallible[199] and close judicial scrutiny can ensure that poor quality decisions that could have a deleterious effect on the environment are not allowed to stand.[200]

A source of frustration for many environmentalists is that the State or a private developer of an environmentally harmful project (e.g., fossil-fuel infrastructure) which loses an administrative law case can usually remedy the procedural defect in the decision-making process and have as many more bites of the cherry as they like until, for example, they secure a permit or whatever their desired outcome is. This situation is only likely to be exacerbated by the draft Planning and Development Bill 2022 (if enacted) as it would allow the planning authority to amend its decision to remedy the defect complained of, or take any act they had failed to take, within eight weeks of the decision/at any time after the issuing of proceedings.[201] Hough and Elliott highlight a number of problems with this proposed power of amendment, including the facilitation of public body wrongdoing by removing the opportunity for a court to censure and oversee the body in remedying the action and a risk of exposure to costs for the litigation for the applicant who sought to highlight the defect because the legal question would now be moot .[202]

Where a particular policy – like a climate mitigation policy – threatens constitutional rights like the right to a healthy environment, courts have a mandate to closely scrutinise and engage in a proportionality review that potentially shifts its analysis towards a more merits-based review of the impugned policy. Second, unlike procedural environmental cases, if the impugned policy is to be found to be in breach of constitutional rights like the right to a healthy environment, the State or a private developer cannot simply fix a procedural defect – which, in principle at least, means that environmentalists who pursue rights-based systemic climate litigation can secure remedies that achieve longer lasting, more favourable environmental outcomes.

Two examples of this from the planning/project-based climate litigation sphere are the South African case of *Earthlife Africa Johannesburg v Minister of Environmental Affairs & others (Thabametsi)*[203] and the Irish case of *An Taisce v Bord Pleanála and Others.*[204] The *Thabametsi* case involved a challenge by an environmental NGO to an authorisation for a coal-fired power plant in Limpopo Province in northern South Africa on the basis that the authorisation failed to adequately consider the climate-related impacts of the project. At the first level of appeal, the Minister for Energy acknowledged the need for a climate change impact assessment but nevertheless upheld the authorisation.[205] At the second level of appeal, the High Court found that the original decision-maker (the Chief Director of the Department of Environmental

[199] Arthur Beesley, 'Review of An Bord Pleanála calls for urgent 'reset' and measures to tackle caseload' *The Irish Times* (Dublin, 20 December 2022) < https://www.irishtimes.com/ireland/housing-planning/2022/12/20/review-of-an-bord-pleanala-calls-for-urgent-reset-and-measures-to-tackle-caseload/> accessed 3 August 2023.
[200] Hough and Elliott (n 179).
[201] Section 249(5)(a) of the draft Planning and Development Bill 2022.
[202] Hough and Elliott (n 179). The costs issue would arise due to the interaction of section 249(5)(a) with section 250 of the draft Bill which imposes a mandatory requirement that no order as to costs is to be made.
[203] *Earthlife Africa Johannesburg v Minister of Environmental Affairs & others (Thabametsi)* Unreported, Case No 65662/16 (Gauteng High Court Pretoria, 8 March 2017).
[204] *An Taisce v Bord Pleanála and Others* [2015] IEHC 633.
[205] *Earthlife Africa Johannesburg v Minister of Environmental Affairs & others (Thabametsi)* [62]-[67].

Affairs) had overlooked relevant considerations[206] concerning climate change impacts and had therefore 'failed to apply his mind' to these impacts and took a 'decision that was not rationally connected to the information before him'.[207] The High Court quashed the Minister's decision and remitted the matter for reconsideration in light of the potential climate change impacts.[208] The Minister reconsidered the matter in light of a new climate change impact assessment and again approved the environmental authorisation for the plant.[209] The Minister's decision was once again challenged and set aside by the High Court; this time by agreement of the parties.[210] While the environmental NGO ultimately won, the protracted nature of the litigation gives some insight into how environmental and climate 'wins' in administrative law cases can potentially be somewhat transient.

A similar example of the 'whack-a-mole' nature of planning or project-by-project administrative law-based climate cases is the *An Taisce* case.[211] Here, an environmental NGO secured a High Court order overturning a planning permission for the continued operation of a peat-fired power plant in Ireland until 2030 on the basis that environmental effects of extracting the peat for the project were not assessed as part of the environmental impact assessment.[212] However, while the matter was working its way through the courts, *Bord na Móna* lodged a fresh planning application with a view to remedying the procedural defect identified in the High Court ruling and was ultimately granted planning permission to continue operating the plant until (only) 2023.[213]

Both *Thabametsi* and *An Taisce* clearly secured important climate wins and the importance of planning challenges to fossil fuel infrastructure from a GHG emissions perspective cannot be overstated. However, the two cases highlight the at times temporary nature of judicial protection in planning cases and illustrate some of the attraction of rights-based arguments – including arguments based on strong, justiciable substantive constitutional environmental rights – which may move courts towards more substantive or merits-based review (or something approximating this).

It is fair to say that some of the advantages of constitutionalising environmental rights are not dissimilar to the arguments in favour of rights-based approaches to environmental protection more generally. One might therefore ask what is the *specific* added-value of constitutionalising environmental rights/duties? What would be transformative about inserting substantive and procedural environmental rights into the catalogue of rights guaranteed under the Constitution if it is possible to 'green' existing rights? Depending on how the right itself is formulated, it could be a more powerful tool for individuals and NGOs

[206] ibid [91]. The High Court reached this conclusion notwithstanding the fact that the relevant statutory provision, section 24 of National Environmental Management Act 1998, requires the competent body to take into account 'all relevant factors' but does not expressly refer to climate change.
[207] ibid [101].
[208] ibid [121].
[209] *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others* (Sabin Center for Climate Change Law) < https://climatecasechart.com/non-us-case/4463/> accessed 10 August 2023.
[210] ibid.
[211] Andrew Jackson, Climate Allies Podcast series 2 episode 3 with Andrew Jackson: the role of law in climate action.
[212] *An Taisce v Bord Pleanála and Others* [2015] IEHC 633 [73].
[213] An Bord Pleanála, *Case reference: PL19.245295* (21 December 2016) < https://www.pleanala.ie/en-ie/case/245295>accessed 10 August 2023.

to use to hold government/private actors accountable compared with constitutional rights – like the right to life or bodily integrity – because it would not be necessary to show a threat of harm to humans before the right could be engaged. It could operate on a more precautionary basis. Such a new right could also be carefully designed to ensure that it would be meaningful, protective and empowering for vulnerable and marginalised communities who tend to bear the brunt of environmental pollution. We can already distil some important lessons from judicial engagement with constitutional environmental provisions in European climate litigation when it comes to ensuring that a new constitutional environmental right is an effective advocacy tool for such communities. For example, such a right would need to be drafted in a manner that made clear that the right to a healthy environment also encompass a safe and stable climate to avoid time-consuming and costly litigation about the basic scope of such a right. For it to be worthwhile pursuing the constitutionalisation of substantive/procedural environmental rights – overspending time and energy trying to 'green' other constitutional rights or enact/enforce other environmental laws[214] – the right would also need to be justiciable. It would need to be possible for both individuals and NGOs to invoke the right in defence of both the environment and future generations. This would give a substantive constitutional environmental right a practical edge over a 'greened' constitutional right to life and bodily integrity because NGOs, not just individuals, would have standing to litigate such a right in the public interest.[215] The threshold for engaging such a right would also need set at such a level to not render it 'theoretical or illusory'.[216] Engagement with the approach in climate litigation – that a contribution to real and serious *risk* of harm[217]should suffice to engage the right – would be a good place to start. Whilst this interpretative question is likely to be more of a question for the courts than the drafters of a new constitutional right, the right could still be designed to signal that the right should be practical and capable of being relied upon in court. This strong, eco-centric and vulnerability-oriented framing of environmental rights could signal an important paradigmatic shift in human understanding of environmental protection, climate action and care.[218]

Whilst there are clear advantages to constitutionalising environmental rights/duties, there are also valid criticisms of rights-based approaches to environmental protection – and by extension constitutional environmental rights/duties – to which the article now turns.

Disadvantages

Many of the potential disadvantages associated with constitutionalising environmental rights/duties depend on how the provisions are designed and/or interpreted by the courts. As seen from climate cases in Ireland like the *Dublin Airport Runway case* and *People v Arctic Oil* in Norway, a major risk with constitutionalising environmental rights/duties is potential judicial irrelevance because the constitutional provision is non-justiciable, weak or difficult

[214] May (n145) 986.
[215] See *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 [7.22] where the Supreme Court made clear that an NGO did not have standing to litigate personal constitutional rights. For critique of the Supreme Court's approach to standing see: Orla Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' (2022) 34 (1) Journal of Environmental Law 107, 121-128.
[216] *Airey v Ireland* (1979) Series A no. 32 [24].
[217] See (n 97).
[218] Doran and Killean (n 6).

to engage. In both of these cases, the threshold for finding a breach of constitutional environmental rights was set so high by the courts that they could not be successfully relied on by individuals/NGOs in court to hold a public authority accountable for their inadequate climate responses.

One critique levelled particularly at liberal rights discourse by critical legal theorists, like Horwitz, Mutua and Chandler, is the intrinsic indeterminacy of rights.[219] The abstract and ambiguous nature of constitutional and human rights means that they can reflect radical and progressive goals – a significant factor in their deployment and support worldwide – but this also makes them vulnerable to abuse.[220] The arguably ephemeral, ungrounded and elastic nature of rights language means that it can be deployed both to challenge, and protect, existing structures of privilege.[221] Either side can invoke and frame their grievance in the language of rights: fundamental rights can be mobilised to maintain the *status quo* and as an emancipatory tool to challenge and unsettle that same *status quo*.[222] Kampur notes that the 'dark side' of rights 'enables everyone to use the vocabulary of human rights, while at the same time [advancing] agendas that may not be emancipatory'.[223]

Burdon notes that where constitutional and human rights are an 'empty or irresolute signifier', their operation and effectiveness become contingent on how these rights come into existence and who gets to enforce them or fill them with meaning: their simple recognition does not necessarily protect against unequal outcomes.[224] In a similar vein, Grear and others argue that the language of rights has been 'co-opted' by neoliberalism to service the needs of capitalist globalisation, thereby diminishing its resistive potential.[225]

These criticisms are levelled at rights discourse more generally, but a constitutional environmental right could be vulnerable to the same kind of abuse and co-option. As Burdon put it, corporate actors can influence juridical processes to appropriate the function of legal rights – like constitutional environmental rights – so that their own interests are protected.[226] It seems plausible, for example, that a constitutional right to a healthy environment could be cynically deployed to support renewable or rewilding projects that damage and alienate rural communities by reproducing or exacerbating existing inequalities. As Ireland seeks to improve its afforestation rate to meet its domestic and EU climate targets, the practice of

[219] David Chandler, 'Contemporary Critiques of Human Rights' in Michael Goodhart (eds) *Human Rights: Politics and Practice* (Oxford University Press 2016) 111; Morton J Horwitz, 'Rights' (1988) 23 Harvard Civil Rights-Civil Liberties Law Review 393, 399; Makau Mutua, 'Human Rights and Powerlessness: Pathologies of Choice and Substance' (2008) 56 Buffalo Law Review 1027, 1028.
[220] ibid.
[221] ibid.
[222] Paul O'Connell, 'On the Human Rights Question' (2018) 40(4) Human Rights Quarterly 962, 974, 978.
[223] Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 Sydney Law Review 665, 683.
[224] Peter Burdon, 'Idealism and Struggle: Co-opting legal rights for environmental protection' (2014) 39(3) Alternative Law Journal 176, 177-178.
[225] Anna Grear, 'Towards Climate Justice: A Critical Reflection on Legal Subjectivity and Climate Injustice:Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy' (2014) 5 Journal Human Rights and the Environment 103, 121 citing Tony Evans and Alison Ayers, 'In the Service of Power: The Global Political Economy of Citizenship and Human Rights' (2006) 10(3) Citizenship Studies 289, Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2000) 147.
[226] Burdon (n19) 178.

selling off land to private investment funds for 'rewilding' may start to become more commonplace.[227] This practice has already attracted controversy in both Ireland[228] and Scotland as a form of 'greenwashing' because land is bought and trees are planted to offset the corporate actor or wealthy owners' emissions from elsewhere.[229] This practice has been accused of exacerbating the rural housing crisis by inflating land prices and displacing communities already lively and working on the land.[230] It is certainly conceivable that if environmental NGOs and local communities were to try to use legal avenues to oppose these kinds of controversial rewilding projects, private investors could themselves invoke constitutional environmental rights in defence of such carbon sequestration projects. However, these risks could be mitigated by improving access to justice for individuals and environmental NGOs (through broad standing and not prohibitively expensive costs rules) and by designing constitutional environmental rights inclusively to ensure that first and foremost they are targeted at protecting and empowering the vulnerable and marginalised communities. What is more, NGOs and local communities, if properly organised, could themselves rely on, enforce and shape the meaning of such rights.

Related critiques of human rights language point to how the formal recognition of rights in the public sphere does not necessarily lead to genuine human emancipation or tangible improvements in people's lives: the accrual of new rights in a legal catalogue can be quickly undone through political changes.[231] West notes that rights language can insulate and facilitate the subordination of the weak by the strong in the private sphere.[232] This arbitrary delineation is just as relevant in the environmental sphere as it is in the contexts envisioned by West, namely in family law and employment law matters.[233] Rights discourse, as West observes, runs the risk of diverting our attention from deeper structural issues of inequality and injustice.[234] Marxist scholars, like O'Connell, contend that the lexicon of human rights conceals and upholds substantive inequality and can never fully challenge the inherent inequalities created by the extant capitalist order.[235] Rights-based approaches have also been criticised for being a depoliticising force.[236] Moyn argues that human rights rose to prominence precisely *because* they are premised on incremental and piecemeal reform and do

[227] For a recent example see: Padraig Hoare, 'Coillte plan to sell thousands of acres to investment fund already a 'done deal'' *The Irish Examiner* (Dublin , 25 January 2023) <https://www.irishexaminer.com/news/arid-41057075.html> accessed 10 August 2023.
[228] Patrick Bresnihan and Patrick Brodie, 'We need a fundamental rethink of land ownership and value' *The Irish Examiner* (Dublin, 24 January 2023) <https://www.irishexaminer.com/opinion/commentanalysis/arid-41055689.html> accessed 10 August 2023.
[229] Eleanor Salter, 'Rewilding, or just a greenwashed land grab? It all depends on who benefits' *The Guardian* (UK, 28 May 2022) https://www.theguardian.com/commentisfree/2022/may/28/rewilding-greenwash-land-schemes accessed 10 August 2023.
[230] Bresnihan and Brodie (n 228).
[231] O'Connell (n 222) 967, 976 citing Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' (1982–83) 11 NYU Review of Law & Social Change, 369.
[232] Robin West, 'Tragic Rights: The Rights Critique in the Age of Obama' (2011) 53 William & Mary Law Review 713, 720.
[233] ibid.
[234] ibid 721.
[235] O'Connell (n 222) 968, 972.
[236] Chandler (n 219) 122-123; Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) Modern Law Review 57, 74.

not require a commitment to social and political revolution,[237] making them a favourable outlet for those ideologically disillusioned by the Cold War stalemate.[238] Drawing on three examples of human rights investigations into arbitrary detention in Afghanistan, disaster relief in Haiti and a global food price crisis in 2007, Marks argues that the human rights movement often fails to adequately take into account the root causes of human rights abuses: prematurely ending its investigation into the causes of rights violations; conflating cause and effect; and identifying causes only to set them aside.[239] There is a danger that blinkered human rights analysis prevents us not just from seeing the root causes of human rights violations, but from also seeing what it might take to prevent them.[240] Once again these criticisms relate to the human rights framework more generally, but it does not take much to extrapolate lessons to the constitutional environmental rights context. There is a risk that narrow legalistic framing of environmental harms centred on environmental rights/duties could overlook the root causes of the climate and biodiversity emergencies: side-lining questions of power, agency and uneven responsibility.[241]

The litmus test for a constitutional environmental rights/duties provision is whether it contributes to material benefits for both people and the environment like better health and wellbeing outcomes through cleaner air and water, healthier soil, recovering biodiversity and rapidly reducing emissions. A constitutional environmental provision will not instantaneously or single-handedly achieve these sorts of outcomes. There is undoubtedly a chasm between what rights discourse promises – and by extension a constitutional environmental right – and the theoretical and practical limits of what it seems capable of delivering. Yet, most critics would be unwilling to reject rights discourse outright, recognising in an environmental context constitutional environmental rights' normative status and strategic value.[242] As Kapur puts it, we 'cannot not want' human/constitutional rights.[243] Rights are a radical tool for those who have never enjoyed them and remain a very useful vocabulary for many marginalised groups even if they are deeply flawed.[244] Notwithstanding the many flaws of rights discourse, social movements around the world (not just in the climate and environmental sphere) continue to frame their campaigns and demands in the language of rights.[245] Whilst Burdon questions whether environmental rights can constitute a transformative discourse, he acknowledges that it may be 'strategically necessary from time to time to use human rights arguments to gain whatever ground is possible'.[246] Elsewhere

[237] Samuel Moyn, *The Last Utopia* (Harvard University Press, 2010) 4.
[238] ibid 130.
[239] Marks (n 236) 60-74.
[240] ibid 77.
[241] See generally Alex Randall, 'Neoliberalism drives climate breakdown, not human nature' *Open Democracy* (UK, 7 August 2018) < https://www.opendemocracy.net/en/opendemocracyuk/why-new-york-times-is-wrong-about-climate-change/ > date accessed 11 August 2023; Martin Lukacs, 'Neoliberalism has conned us into fighting climate change as individuals' *The Guardian* (Canada, 17 July 2017) < https://www.theguardian.com/environment/true-north/2017/jul/17/neoliberalism-has-conned-us-into-fighting-climate-change-as-individuals > accessed 11 August 2023.
[242] Barry and Woods (n 23) 409.
[243] Kapur (n 223) 682.
[244] ibid.
[245] O'Connell (n 222) 963.
[246] Peter Burdon, 'Environmental human rights: a constructive critique' in Anna Grear and Louis J. Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Elgar 2015) 77.

Burdon argues for environmental rights discourse to be 'understood not as an end, but as a means', as a project that 'does not colonise space' but can inspire, co-exist alongside or grow into larger projects based around justice, equality, power-sharing and the collectivisation of power.[247]

Ultimately constitutional environmental rights are an imperfect but strategically necessary tool for defending and advancing the interests of those most vulnerable to the impacts of climate change and environmental degradation. Constitutionalising environmental rights will not be a silver bullet for tackling either of these crises, but it could still provide a useful language for challenging in a powerful and enduring way the extant carbon intensive social order. For example, if a constitutional environmental provision could be mobilised to support the delivery of, and potentially even strengthen, the emission reduction targets in the Climate Action and Low Carbon Development Act 2015 (as amended)[248] – in a manner that safeguards the rights/interests of the most vulnerable – it has potential to become a transformative legal discourse.

Conclusion

Environmental constitutionalism in Ireland is experiencing renewed interest and momentum in the wake of developments in the courts, at the Citizens' Assembly and on the international stage. The JOCECA is likely to consider the Citizens' Assembly's recommendations – including its recommendation on holding a referendum on constitutional environmental rights in October 2023. This democratic process for deliberating on the Assembly's recommendations will be an important moment to take stock of the potential added value of constitutionalising environmental rights/duties.

This article has attempted to document the state of play with environmental constitutionalism in Ireland. In doing so, it has sketched out some answers to the questions policymakers will need to consider if they are to design a constitutional environmental provision to put to the people in a referendum. These questions have already surfaced in domestic cases like the *Dublin Airport Runway* case but also through close readings of international rights-based climate cases. Some of these questions – like who should be a duty bearer? Or whether the right should afford protection against environmental risks or actual harm? – can already be readily answered. For example, it would seem that the scope of any such right should – based on the relatively strong form of horizontality in Irish constitutional law – impose positive duties on both government and private actors. It would also seem that a real and serious *risk* of harm should be enough to engage a constitutional environmental right. However, many other questions remain to be answered – Should the right have extraterritorial scope? Should future generations and non-humans be the beneficiaries of such rights? How could or should the right interact with a potential constitutional right of nature? How should a constitutional environmental rights provision be worded to maximise its utility for vulnerable and marginalised communities? Teasing out these questions in a

[247] Burdon (n 19) 178.

[248] See ss 3(1,) 6A(5) of the Climate Action and Low Carbon Development Act 2015 (as amended), which set a net zero target by 2050 and an interim target of a 51% reduction in GHG emissions by 2030 compared to 2018 levels.

robust manner will be essential to ensuring that any future constitutional environmental rights/duties underpin a truly transformative legal discourse.