

WHITHER CONSTITUTIONAL ENVIRONMENTAL (RIGHTS) PROTECTION IN IRELAND AFTER ‘CLIMATE CASE IRELAND’?

Abstract: Although the Supreme Court rejected the claim that the Irish Constitution protects an unenumerated right to a healthy environment in *Friends of the Irish Environment v The Government of Ireland*, it clearly left the door open to future environmental (rights) litigation based on the Constitution. This article thus explores how the Constitution might be used in future to advance arguments that the State has obligations to protect the environment, in particular from the threat posed by climate change.

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Introduction

The unanimous decision on 31 July 2020 of a seven-judge Supreme Court in *Friends of the Irish Environment v The Government of Ireland*,¹ or ‘Climate Case Ireland’,² to quash the State’s plan for tackling climate change because it was insufficiently detailed in spelling out how carbon emissions would be reduced, was hailed as a ‘landmark’ moment.³ It was one of the few instances (at that point) in the context of global climate/environmental litigation, where a national apex court had found a government’s response to the threat of climate change to be legally inadequate.⁴ Since then, a number of other national courts have found government responses to climate change to be insufficient to protect human rights,⁵ and several cases alleging that state inaction or inadequate state action on emissions reductions constitutes a breach of human rights obligations under the ECHR have been launched before the ECtHR in Strasbourg.⁶ However, while human rights-based arguments have been crucial in convincing courts to rule in favour of climate and environmental activist litigants in other

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¹ [2020] IEBC 49.

² For critical analyses of the main issues in the case, see Áine Ryall, ‘Climate Case Ireland: Implications of the Supreme Court Judgment’ [2020] Irish Planning and Environmental Law Journal 106; Orla Kelleher, ‘The Supreme Court of Ireland’s decision in *Friends of the Irish Environment v Government of Ireland* (“Climate Case Ireland”)’ (*Blog of the European Journal of International Law*, 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 21 July 2021; Orla Kelleher, ‘A Critical Appraisal of *Friends of the Irish Environment v Government of Ireland*’ (2021) 30 *RECIEL* 138; Maeve O’Rourke, Rónán Kennedy and Cassy Roddy-Mullineaux, ‘When is a Plan Not a Plan? The Supreme Court Decision in “Climate Case Ireland”’ [2020] Irish Planning and Environmental Law Journal 60; and 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 *Journal of Human Rights Practice* 1.

³ UN Special Rapporteur on Human Rights and the Environment, ‘Amidst a Climate and Biodiversity Crisis, Hope Emerges: Friends of the Irish Environment Win Historic “Climate Case Ireland” in the Irish Supreme Court’ (*Climate Case Ireland*, 31 July 2020) <<https://www.climatecaseireland.ie/amidst-a-climate-and-biodiversity-crisis-hope-emerges-friends-of-the-irish-environment-win-historic-climate-case-ireland-in-the-irish-supreme-court/>> accessed 22 July 2021.

⁴ Kelleher (n 2).

⁵ Selected examples include Germany, France, and Belgium. Details of these cases and others can be found at the database of climate cases maintained by the Sabin Centre for Climate Change Law at Columbia University, available at: <<http://climatecasechart.com/climate-change-litigation/>> accessed 22 July 2021.

⁶ For example, *Duarte Agostinho and Others vs. Portugal and Others* (Application no. 29371/20) and *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* (Application no. 53600/20).

jurisdictions, this was not the case in Ireland. The judgment in ‘Climate Case Ireland’ essentially turned on statutory interpretation and not on the issue of whether insufficient State action in responding to climate change amounted to a breach of constitutional or human rights. Indeed, the Supreme Court rejected the argument that the Irish Constitution protects a right to a healthy environment. Nonetheless, the Court made a number of intriguing comments about the potential for the Constitution and human rights to form part of future environmental litigation.

Whereas previous literature has provided critical analysis of ‘Climate Case Ireland’ as a whole, this article homes in on the under-scrutinised *dicta* of the Supreme Court which signal the potential for the Constitution to be a source of State environmental protection obligations.⁷ For context, the first half of this article reviews the Supreme Court’s judgment in ‘Climate Case Ireland’, paying close attention to the constitutional rights arguments made in the case. It will also critique the Court’s (strictly speaking, *obiter*) finding regarding the claimed unenumerated constitutional right to a healthy environment. The second half will then explore the jurisprudence concerning those constitutional provisions which the Supreme Court suggested may have a role to play in future environmental/climate litigation in order to understand how they might provide a basis for advocating for a State duty of environmental protection. In doing so, the article paints a picture of where constitutional environmental (rights) protection in Ireland may go in the future.

‘Climate Case Ireland’

Background to the case and arguments of the parties

In 2017, the Irish Government adopted a National Mitigation Plan (NMP) pursuant to section 4 of the Climate Action and Low Carbon Development Act 2015 (‘2015 Act’). The function of this plan was to set out how the State would seek to achieve its National Transition Objective (NTO) of creating a ‘low carbon, climate resilient, and environmentally sustainable economy’ as defined in section 3 of the 2015 Act, by the year 2050.⁸ The fundamental issue in ‘Climate Case Ireland’ was the adequacy of the NMP. Also in 2017, Barrett J declared in a case involving a challenge to the granting of an extension of planning permission for the construction of a runway at Dublin Airport that Article 40.3 of the Constitution guaranteed an unenumerated personal constitutional ‘right to an environment consistent with the dignity and wellbeing of citizens at large’.⁹ The High Court’s acknowledgement of this right, coupled with the historic decision in the *Urgenda* climate case in the Netherlands,¹⁰ provided the impetus for Friends of the Irish Environment (‘FIE’) – an NGO with a track-record of environmental public interest litigation – to take the Government to court over its climate mitigation plan.¹¹

In January 2019, FIE’s judicial review challenge to the adoption of the NMP – ‘Climate Case Ireland’ – was heard in the High Court. FIE claimed that the NMP was unlawful and *ultra vires* the Climate Action and Low Carbon Development Act 2015 because it did not detail how the NTO would be achieved. It was also alleged that the plan was in breach of both

⁷ (n 2).

⁸ Climate Action and Low Carbon Development Act 2015, s 3.

⁹ *Friends of the Irish Environment v Fingal County Council* [2017] IEHC 695 [261].

¹⁰ 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.

¹¹ For more information on the background to the case, see generally Climate Case Ireland’s website: <<https://www.climatecaseireland.ie/>> accessed 22 July 2021.

constitutional and ECHR rights because it did not propose to reduce greenhouse gas emissions (responsible for rises in global temperature) by a sufficient amount quickly enough. This lack of ambition would, it was contended, exacerbate the risks posed to human life, private and family life, bodily integrity and a healthy environment, by climate change.¹² The State counter-argued that the NMP was simply a policy instrument and therefore not justiciable by a court, and that FIE as a corporate body lacked the standing necessary to invoke human rights as part of its case.

Decision of the High Court

The High Court, while accepting that FIE enjoyed sufficient standing on the grounds that the interests of its members and the public at large were or would be adversely affected by the consequences of climate change,¹³ held in favour of the State. Even though McGrath J did not reach a definitive conclusion as to the justiciability of the NMP,¹⁴ he reasoned that the Executive was entitled to a very wide latitude of discretion in the formulation of climate policy,¹⁵ and that the NMP was thus *intra vires* the 2015 Act.¹⁶ Furthermore, McGrath J was of the view that the NMP itself could not be said to violate rights as it was adopted in accordance with the terms of the 2015 Act, and it had not been argued that the 2015 Act was itself unconstitutional (the rationale being that the *intra vires* exercise of a statutory power could not breach rights unless it was suggested that the legislation providing for that statutory power was itself unconstitutional).¹⁷ However, McGrath J said that for the purposes of the case, he was prepared to agree that the Irish Constitution protected an unenumerated constitutional right to an environment consistent with human dignity,¹⁸ as established by Barrett J in the airport runway case involving FIE.¹⁹ Given the gravity and general public importance of the issues involved in the case, the Supreme Court agreed to hear an appeal directly from the High Court (thereby leapfrogging the Court of Appeal).²⁰

Decision of the Supreme Court

Clarke CJ gave the judgment of a unanimous seven-judge Supreme Court in favour of FIE, allowing their appeal. Clarke CJ held that the National Mitigation Plan was justiciable because in enacting the 2015 Act, the Oireachtas had converted what was previously a matter of policy into law by creating a legal obligation to formulate a plan which specified how the National Transition Objective was to be achieved.²¹

[W]here the legislation requires that a plan formulated under its provisions does certain things, then the law requires that a plan complies with those obligations and the question of whether a plan actually does comply with the statute in such regard is a matter of law rather than a matter of policy. It

¹² Kelleher (n 2).

¹³ *Friends of the Irish Environment v The Government of Ireland* [2019] IEHC 747 [132].

¹⁴ *ibid* [112].

¹⁵ *ibid* [97].

¹⁶ *ibid* [145].

¹⁷ *ibid* [121].

¹⁸ *ibid* [133].

¹⁹ [2017] IEHC 695.

²⁰ [2020] IESCDET 13.

²¹ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [6.27].

becomes a matter of law because the Oireachtas has chosen to legislate for at least some aspects of a compliant plan...²²

The question of whether the plan complied with the provisions of the 2015 Act was therefore a matter of law on which the Court was competent to rule.²³ In answering that question, the Supreme Court found that the NMP was excessively vague because it failed to specify in sufficient detail how the NTO would be achieved.²⁴ As such, the NMP had to be regarded as *ultra vires* the 2015 Act because, owing to its lack of detail, it failed to enable a reasonable and interested member of the public – in line with the principles of transparency and public participation which the Court found were key in informing the purpose of the statutory scheme – to ascertain how the Government intended to attain the NTO by 2050.²⁵ Such information was, according to Clarke CJ, key to ensuring public accountability in relation to the Government’s climate action policies:

The public are entitled to know how it is that the government of the day intends to meet the NTO. ... [and] ... to judge whether they think a plan is realistic or whether... a plan represent a fair balance as to where the benefits and burdens associated with meeting the NTO are likely to fall. If the public are unhappy with a plan then... the public are entitled to vote accordingly and elect a government which might produce a plan involving policies more in accord with what the public wish. But the key point is that the public are entitled, under the legislation, to know what the plan is with some reasonable degree of specificity.²⁶

Thus, the Supreme Court ordered that the NMP be quashed, thereby requiring the development of a new plan by the Government. Having held that the NMP was unlawful, the Court had determined the outcome of the case, but Clarke CJ thought it appropriate nonetheless to address other issues in the case involving constitutional and human rights.²⁷

Dealing first with the question of the standing of corporate bodies to make human rights claims – because it was an issue that would likely also affect future litigation, including any brought by FIE – Clarke CJ stated that because FIE could not itself enjoy a right to life or a right to bodily integrity, it was not entitled to invoke these rights as part of its case.²⁸ Furthermore, even though the courts had allowed exceptions to this rule in previous cases, Clarke CJ found that FIE should not benefit from such an exception here. He observed that an extensive class of affected natural persons with human and constitutional rights, not facing difficulty in asserting their rights, unlike prisoners with psychiatric conditions,²⁹ for example, could have brought the case.³⁰ Indeed, he queried why a human plaintiff who would have been able to rely on such rights was not added to the proceedings and he was not convinced that potential liability for costs, if the case proved unsuccessful, was sufficient reason for not doing so.³¹ This ruling on standing is an extremely disappointing aspect of the Court’s

²² *ibid.*

²³ *ibid.*

²⁴ *ibid* [6.46].

²⁵ *ibid* [6.21].

²⁶ *ibid.*

²⁷ *ibid* [6.49], [7.25].

²⁸ *ibid* [7.22].

²⁹ *Irish Penal Reform Trust v. Minister for Justice* [2005] IEHC 305.

³⁰ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [7.22].

³¹ *ibid.*

judgment and it will act as a barrier for future litigants given the potential liability for costs of individuals bringing cases in their own name.³²

Clarke CJ then addressed the ‘unenumerated’ rights doctrine,³³ saying that he felt it was better to ‘characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being *derived* rights, rather than *unenumerated* rights.’³⁴ This was because he thought the term ‘unenumerated’ was liable to give the false impression that judges merely deemed those rights of which they approved to be a part of the Constitution, whereas the term ‘derived’ stressed that for a right to be judicially identified it must have some ‘root of title’ in the text, structure, or values of the Constitution.³⁵ However, in saying this, Clarke CJ also emphasised that he was not advocating a ‘narrow textualist approach’ and that the ‘human personality’ doctrine, ie for a right to be protected under Article 40.3, ‘it must be shown that it is a right that inheres in the citizen...by virtue of his human personality [and] in the light of what the Constitution...deems fundamental to the personal standing of the individual...in the context of the social order envisaged by the Constitution’, espoused by Henchy J in cases such as *McGee*,³⁶ and *Norris*,³⁷ remained a part of the test for the identification of what should now be termed ‘derived’ rights.³⁸

Clarke CJ then turned to the status of the unenumerated or derived right to an environment consistent with human dignity (which he described as a ‘right to a healthy environment’) previously recognised by Barrett J in *FIE v Fingal County Council*,³⁹ and accepted in principle by McGrath J in the High Court. He did so, even though it was not necessary to decide the case, out of a concern that if the Court did not address the question, then it might be assumed that the Court was implicitly accepting the existence of the right.⁴⁰ In essence, Clarke CJ rejected the proposition that there was a right to a healthy environment in Irish constitutional law for two reasons. First, he was not satisfied that the right would add anything to the already recognised constitutional rights to life and bodily integrity – counsel for FIE had already accepted this for the purposes of the claims made in this case at oral argument – and was therefore unnecessary or superfluous.⁴¹ Second, even if the right to a healthy environment could be said to provide protections not already afforded by existing rights, the precise scope of such extra protections was so vague and ill-defined that it was impossible for the Court to carry out an analysis to determine whether the right could be said to be one which ‘derived’ from the Constitution.⁴² Importantly however, Clarke CJ went on to stress that his rejection of a constitutional right to a healthy environment did not mean that the Constitution had no role to play in future cases of an environmental nature.⁴³ Indeed, he acknowledged that had the plaintiffs enjoyed the requisite standing, it would have been necessary for the Court to consider the merits of their arguments that climate action measures (or the lack thereof) on the part of the State amounted to a breach of the rights to

³² Adelmant (n 2).

³³ For an account of the recent history of the unenumerated rights doctrine, see Conor O’Mahony, ‘Unenumerated Rights After NHV’ (2017) 40(2) DULJ 171.

³⁴ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [8.4] (emphasis added).

³⁵ *ibid* [8.6].

³⁶ *McGee v AG* [1974] IR 284 (SC) 325.

³⁷ *Norris v AG* [1984] IR 36 (SC) 71.

³⁸ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [8.7]-[8.8].

³⁹ (n 9).

⁴⁰ *ibid* [7.25].

⁴¹ *ibid* [8.10].

⁴² *ibid* [8.5] – [8.6].

⁴³ *ibid* [8.14], [8.17].

life and bodily integrity.⁴⁴ An analysis of the ‘green’ potential of the Constitution for future environmental/climate cases, ie the application of traditional human rights like the right to life and to environmental issues, forms the subject matter of the second half of this article. However, it is necessary in advance of that to interrogate in greater detail Clarke CJ’s reasoning regarding the non-existence of a right to a healthy environment under the Constitution.⁴⁵

A criticism of Clarke CJ’s rejection of a ‘derived’ right to a healthy environment

Underlying Clarke CJ’s sceptical stance towards the idea of the claimed unenumerated or ‘derived’ right to a healthy environment was a concern about the supposed uncertainty of the right’s content. This justification for rejecting the right raises two questions. The first is that if the right’s possible contents were so unclear, was it appropriate to draw any conclusion as to whether the right was coextensive with the rights to life and bodily integrity or whether it went beyond them? Second, if the major concern about the right was lack of precision as to its scope and content, then why not examine comparative jurisprudence to see what the right to a healthy environment has been established to mean in other jurisdictions to assess whether any of the possible conceptions might fit within the Irish Constitution? Admittedly, Clarke CJ noted that the right to a healthy environment was protected in many constitutions around the world, including in India where it had been judicially developed.⁴⁶ Although, he did so to point out that in most of the countries where the right was constitutionally protected, the right had been enshrined via some kind of democratic process rather than through the courts.⁴⁷ However, the fact that the right to a healthy environment has predominantly been adopted by democratic rather judicial means should not preclude Irish judges from having regard to the various conceptions of the right which have been adopted in order to gain insight into what the right might entail. Moreover, the fact that it might be *more* legitimate to adopt a right to a healthy environment via a democratic rather than a judicial process does not make it *illegitimate* to judicially create such a right if a coherent basis for it can be found in the Constitution. After all, part of the test propounded by Clarke CJ in *Climate Case Ireland* for the recognition of rights not expressly spelled out in the text of the Constitution is whether they have some ‘root of title’ in the text, structure or values of the Constitution, such that they might be said to ‘derive’ from it.⁴⁸ Had regard been given to comparative jurisprudence, then understandings of the right to a healthy environment in other jurisdictions could have been canvassed to see if any of them could be ‘derived’ from the text, structure or values in the Irish Constitution.⁴⁹ The means for engaging in a comparative review of environmental rights jurisprudence were at the Court’s disposal in the form of Boyd’s excellent book, *Human Rights and the Environment: the Environmental Rights Revolution*,⁵⁰ which Clarke CJ acknowledged had been referred to the Court in the course of argument in the case.

⁴⁴ *ibid* [8.14].

⁴⁵ John H Knox, ‘Constructing the Human Right to a Healthy Environment’ (2020) 16 *Annual Review of Law and Social Science* 79.

⁴⁶ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [8.12-8.13].

⁴⁷ *ibid* [8.12].

⁴⁸ *ibid* [8.6].

⁴⁹ Adelmant (n 2).

⁵⁰ David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012).

Furthermore, it is argued that even if Barrett J's description of the right to an environment consistent with human dignity as being 'an essential condition for the fulfilment of all human rights' and an 'indispensable, existential right' were adopted,⁵¹ it would have been reasonable for the Supreme Court to conclude that the right to a healthy environment was derivable from, or enjoyed a 'root of title' in, the right to life in Article 40.3.2, insofar as it can be characterised as a right to exist,⁵² and a healthy environment, one which is capable of sustaining life, is integral to any right to exist. Of course, it might be argued in response that if a right to a healthy environment is simply an entitlement to conditions necessary for existence, such as unpolluted air to breathe and clean water to drink, then it does not in fact add anything to the right to life as a matter of Irish constitutional law. However, to definitively reach that conclusion, it is necessary to have an understanding of what the right to a healthy environment actually entails so that its scope can be measured against the rights to life and bodily integrity. It is thus contended here that the Supreme Court should have refrained from adopting a conclusive position on the existence or otherwise of a derived right to a healthy environment until a future case where its possible content could have been teased out in the concrete circumstances of a plaintiff with standing, alleging, for example, damage to their health or a risk to their life from air pollution. In such circumstances, the Court could then have properly decided whether such a set of facts triggered a breach of the rights to life and bodily integrity or was better dealt with by reference to a distinct, 'derived' right to a healthy environment.

Finally, it must be said that Clarke CJ's rationale for making a finding regarding the status of the right to a healthy environment in circumstances where it was not necessary to decide the case and where the plaintiff was found to lack standing, is unconvincing.⁵³ If the Supreme Court was concerned that in not commenting on the right it would be seen as implicitly endorsing it, then the Court could simply have stated that its failure to rule on the issue should not be taken as an endorsement either way and that the fate of the right to a healthy environment was properly a matter for another case. Ultimately, the Supreme Court has made clear, albeit *obiter*, that the right to a healthy environment is not protected as a 'derived' right under the Irish Constitution. However, in doing so the Court pointed to a number of constitutional provisions which may hold 'green' potential,⁵⁴ and arguably, by saying that the right to a healthy environment may not add anything to the rights to life and bodily integrity, it has said something quite significant about the content of those rights. Those rights and other possible constitutional sources of protection for the environment will now be considered.

Sources of Protection for the Environment in the Irish Constitution

Whilst the Supreme Court's dismissal of the idea of an unenumerated right to a healthy environment being protected under the Constitution was disappointing, its indications that that finding does not have to mean the end for constitutional environmental litigation is

⁵¹ *Friends of the Irish Environment v Fingal County Council* [2017] IEHC 695 [264].

⁵² In *G v An Bord Uchtála* [1980] IR 32, Walsh J, at [69], suggested the right to life included an entitlement to the basic necessities needed for human existence (see below). Though in contrast, in *MEO v Minister Justice* [2012] IEHC 448, Cooke J rejected the contention that the right to life included a right to receive medical care from the State.

⁵³ Adelmant (n 2).

⁵⁴ Kelleher (n 2).

encouraging. Intriguingly, Clarke CJ referred to a number of potential constitutional bases for future environmental cases:

[T]here *may well be cases, which are environmental in nature, where constitutional rights and obligations may be engaged.* Indeed, this case provides a good example *Had standing been established... it would have been necessary for this Court to consider the circumstances in which climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity...* In indicating that I consider the asserted right to a healthy environment to be an either unnecessary addition (if it does not go beyond the right to life and the right to bodily integrity) or to be impermissibly vague (if it does), *I should not be taken as suggesting that constitutional rights and state obligations have no role to play in environment issues...*

...the interplay of existing constitutional rights with the constitutional values to be found in the constitutional text and other provisions, such as those to be found in Art. 10 and also the right to property and the special position of the home, might give rise to specific obligations on the part of the State in particular circumstances. Exactly how any such rights or obligations should be characterised and how the boundaries of such rights and obligations might be defined is a matter to be addressed in cases where they truly arise and have the potential to affect the result...

I would reserve the position of whether, and if in what form, constitutional rights and state obligations may be relevant in environmental litigation to a case in which those issues would prove crucial.⁵⁵

This part of the article now examines, by reviewing relevant case law, each of these bases in turn to assess the degree to which they might be found in future cases to possess ‘green’ content which imposes on the State a duty of care towards the environment including protecting it from pressing and serious threats such as climate change and biodiversity loss. Where relevant, reference will also be made to comparative jurisprudence to illustrate how traditional human rights have been harnessed in practice to provide protection for the environment.

Article 40.3.2: Right to life

Article 40.3.2 of the Constitution lists the right to life as one of the personal rights which the State must ‘protect as best it may’ and ‘vindicate’. This provision has been interpreted as imposing positive obligations on the State to protect the right to life. In *Re a ward of court (withholding of medical treatment) (No. 2)*, for example, it was said that ‘The nature of the right to life and its importance imposes a strong presumption in favour of taking all steps capable of preserving it.’⁵⁶ This principle of positive State action to vindicate the right to life was put slightly more strongly in *Doherty v South Dublin County Council*.⁵⁷ In *Doherty*, Charleton J observed that the State may in ‘certain circumstances’ have an obligation (‘consistent with its financial and administrative commitments’) stemming from the right to life, to provide ‘welfare’ to impecunious citizens who would otherwise be unable to afford necessary medicine.⁵⁸ Just as a citizen’s inability to access essential medicine would threaten their life and therefore potentially trigger the State’s corresponding positive obligation to take steps

⁵⁵ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [8.14] – [8.17], [9.5] (emphasis added).

⁵⁶ [1996] 2 IR 79 (SC) 123.

⁵⁷ [2007] IEHC 4.

⁵⁸ *ibid* [36].

to make it accessible, it could be strongly argued by analogy that the threat to the conditions necessary for human life posed by climate change engages the State's responsibility to take positive measures under Article 40.3.2 of the Constitution to protect and vindicate the right to life.

It might be contended, however, that a distinction could be drawn between these scenarios on the basis that while a lack of access to essential medicine poses an *immediate* risk to life, the risk to life in *not* taking climate mitigation measures is more remote and lies in the distant future. There are two main problems with this line of argument. The first is that it fails to acknowledge that the consequences of climate change, including loss of life, are already transpiring.⁵⁹ The second, is that it pays no regard to the rights of future generations (discussed further below), which will be most adversely affected by the failure to take action in the here and now to prevent dangerous climate change. Moreover, from a doctrinal perspective,⁶⁰ it is arguable that there is no compelling reason why the State's positive constitutional obligations should *only* be triggered in response to *immediate* risks to life; they could also potentially be engaged in circumstances where the State has knowledge or foresight of a developing future threat to life, and it is within the State's power to implement *preventive* measures designed to reduce or eliminate that threat to life.

While beginning and end of life issues such as abortion, IVF,⁶¹ passive euthanasia and assisted dying,⁶² have featured prominently in the right to life jurisprudence, less attention – apart from general statements of judicial opposition to constitutional social and economic rights –⁶³ has been devoted to the issue of living conditions and whether the conditions necessary for human life to exist are protected by the right to life. The only explicit characterisation of the right to life as a right to a certain minimum standard of living is that made by Walsh J in *G v An Bord Uchtála*⁶⁴: 'the right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation.'⁶⁵

Manifestly, a healthy environment in terms of breathable air, potable water, and arable land to grow food, is necessary, as a minimum, for human survival.⁶⁶ It is not possible for humans to enjoy any standard of living without first having an environment which is capable of sustaining life. This fact is starkly illustrated by the Environmental Protection Agency's most recent report on air quality in Ireland which states that air pollution, from the burning of fossil fuels specifically, is the principal contributor to an estimated 1,300 premature deaths

⁵⁹ Damian Carrington, 'Climate crisis made deadly German floods 'up to nine times more likely' *The Guardian* (London, 23 August 2021) <<https://www.theguardian.com/environment/2021/aug/23/climate-crisis-made-deadly-german-floods-up-to-nine-times-more-likely>> accessed 25 September 2021; Amy Croffey, '294 deaths may have been caused by Irish... heatwaves' *The Journal* (Dublin, 7 June 2013) <<https://www.thejournal.ie/heatwave-deaths-ireland-940705-Jun2013/>> accessed 25 September 2021.

⁶⁰ As Fisher and others note, climate change is a legally disruptive phenomenon which is causing traditional doctrinal paradigms to evolve and adapt: Elizabeth Fisher, Eloise Scottford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *Modern Law Review* 173.

⁶¹ *Attorney General v X* [1992] 1 IR 1 and *Roche v Roche* [2010] 2 IR 321, for example.

⁶² *Fleming v Ireland* [2013] 2 IR 417 and *Re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79, for example.

⁶³ See *TD v Minister for Education* [2001] 4 IR 259 (SC) – in particular, Keane CJ at [282] and Murphy J at [316-317], and *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 394.

⁶⁴ [1980] IR 32.

⁶⁵ *ibid* 69.

⁶⁶ Erin Daly and James R. May, 'Bridging Constitutional Dignity and Environmental Rights Jurisprudence' (2016) 7 *J. Hum. Rts. & Env't* 218.

per annum.⁶⁷ Furthermore, the historic decision of a London coroner to rule that air pollution in the form of nitrogen dioxide, mainly from traffic emissions, was a contributory cause in the death of a nine-year-old girl who lived near busy roads, made news headlines at the end of 2020.⁶⁸ A similar set of facts, supported by clear scientific evidence of the link between air pollution and ill-health or death, would surely generate at least an arguable case that the right to life was being violated by the State's failure to take sufficient measures to reduce air pollution.

In the seminal case of *Ryan v Attorney General*,⁶⁹ which birthed the unenumerated rights doctrine and upheld the constitutionality of adding fluoride to the public water supply to protect public health, both Kenny J in the High Court and Ó'Dálaigh CJ in the Supreme Court recognised the indispensability of water to human life and the latter also discussed what this meant in terms of State responsibility to protect public health. Kenny J said that it is 'true that water to-day is a necessity of life and that the plaintiff probably has a right of access to a supply of water'.⁷⁰ Ó'Dálaigh CJ commented that 'It was accepted by the Attorney General that water is one of the essentials of life, and that man therefore has an inherent right to it'.⁷¹ What is of most significance in the above judicial remarks is the recognition that water is literally essential to life and that logically therefore the right to life must entail a right to water at least in the sense of a right of access to some supply of water. The question then arises of course, that if the judiciary are prepared to accept this logical nexus between the right to life and the right to water, then why not also in relation to the other aspects of a healthy environment essential to human life.⁷² Importantly, the comments of Kenny J and Ó'Dálaigh CJ in *Ryan* cannot merely be dismissed as rhetoric from a bygone era of judicial activism, as a right to water 'derived' from the right to life would surely pass muster under the test identified in 'Climate Case Ireland' of a 'root of title' in the constitutional text for judicially identified constitutional rights, given the necessity of water to life. The best way to test this proposition of course would be through litigation and it is not difficult to imagine how potential cases could arise in light of studies published by the Environmental Protection Agency into the poor and potentially harmful quality of drinking water in Ireland in recent times and in relation to cryptosporidium outbreaks in parts of the country in the past which have deprived people of access to the public water supply.⁷³ The framing of the right as a 'right to access a water supply' is perhaps suggestive of a State duty to ensure that everyone is able to access at least some water. Access to water will be adversely affected by climate change as a result of temperature rises exacerbating the risk of drought and water shortages.⁷⁴

⁶⁷ Kevin O'Sullivan, 'Smoke from solid fuel fires and stoves killing 1,300 a year, EPA says' *The Irish Times* (Dublin, 25 September 2020) <<https://www.irishtimes.com/news/environment/smoke-from-solid-fuel-fires-and-stoves-killing-1-300-a-year-epa-says-1.4363878>> accessed 22 July 2021. Environmental Protection Agency, *Air Quality in Ireland 2019* (2020) <<https://www.epa.ie/publications/monitoring--assessment/air/>> accessed 22 July 2021.

⁶⁸ Sandra Laville, 'Air pollution a cause in girl's death, coroner rules in landmark case' *The Guardian* (London, 16 December 2020) <<https://www.theguardian.com/environment/2020/dec/16/girls-death-contributed-to-by-air-pollution-coroner-rules-in-landmark-case>> accessed 22 July 2021.

⁶⁹ [1965] IR 294 (HC).

⁷⁰ *ibid* 315.

⁷¹ *Ryan v Attorney General* [1965] IR 294 (SC) 342.

⁷² Philip Alston, Victoria Adelmant, and Matthew Blainey, 'Litigating Climate Change in Ireland' (2020) New York University School of Law, Public Law Research Paper No. 20-19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3625951> accessed 20 June 2020.

⁷³ Kevin O'Sullivan, 'Third of Irish rivers and a quarter of lakes fail water quality standards' *The Irish Times* (Dublin, 15 December 2020) <<https://www.irishtimes.com/news/environment/third-of-irish-rivers-and-a-quarter-of-lakes-fail-water-quality-standards-1.4436683>> accessed 22 July 2021.

⁷⁴ Conor Murphy and Simon Noone, 'Drought: a risk being overlooked in Ireland?' (*Royal Irish Academy*, 2 June 2020) <<https://www.ria.ie/news/science-committees-climate-change-and-environmental-sciences->

As such, if the right to life does guarantee access to water, then it could provide a constitutional basis for a State duty to take measures (including pre-emptive measures) to protect this vital natural resource from the risks, both present and future, posed to it by climate change and other environmental harms such as pollution.

In another foundational case in Irish constitutional law, that of *McGee v AG*,⁷⁵ concerning the constitutionality of a State prohibition on the importation of contraception, Walsh J said that the right to life included the right of a woman not to have her life jeopardised by the impact of a law prohibiting the availability of contraceptives in circumstances where pregnancy would pose serious risks to her health:

One of the personal rights of a woman in the plaintiff's state of health would be a right to be assisted in her efforts to avoid putting her life in jeopardy. I am of opinion also that not only has the State the right to do so, but by virtue of the terms of the proviso to s 1 and the terms of s 3 of Article 40, the State has the positive obligation to ensure by its laws as far as is possible (and in the use of the word 'possible' I am relying on the Irish text of the Constitution) that there would be made available to a married woman in the condition of health of the plaintiff the means whereby a conception which was likely to put her life in jeopardy might be avoided when it is a risk over and above the ordinary risks inherent in pregnancy.⁷⁶

While it might be said that Walsh J's remarks here are quite fact-specific, arguably they are capable of a broader reading beyond the specific circumstances of *McGee*. A plausible interpretation of Walsh J's remarks is that the State has a duty to ensure access to medical treatment which is necessary to avert serious risks to a person's life or health in circumstances where they would not otherwise be able to obtain such treatment, as was the case here where the plaintiff was unable to access contraceptive products because of the State's criminal prohibition. It is arguable that this understanding of what the right entails conceptualises the right to life as a right to not die of preventable causes.⁷⁷ Conceptualised as such, it is not hard to see how the right to life could have a role to play in shaping the State's response to climate change by creating a constitutional obligation on the State to protect the health of the environment – which is necessary for life – from the existential, but preventable threat, of climate change.

The direct relationship between the continuation of human life and the constituent components of a healthy environment formed the kernel of the argument made earlier that it would have been reasonable for Clarke CJ to find that the right to a healthy environment had a 'root of title' in the right to life and was thus derivable from it, and that he should have refrained from prematurely denying the existence of the right and waited for an appropriate future case to definitively decide the issue. In any event, the scope for 'greening' the content of the right to life by infusing it with 'subsidiary rights' to aspects of a healthy environment,⁷⁸ such as air and water, which are 'logical extensions' of it, is apparent, and has also been

[committee-climate-change-blog-1#:~:text=The%20year%202018%20revealed%20the,pandemic%2C%20another%20drought%20is%20brewing>](#) accessed 22 July 2021.

⁷⁵ [1974] IR 284 (SC).

⁷⁶ *ibid* 315.

⁷⁷ Sandra Fredman, *Human Rights Transformed* (OUP 2008) 67.

⁷⁸ Elizabeth Wicks, 'The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties' (2012) 12 *Human Rights Law Review* 199.

confirmed by repeated successful reliance on the right to life in climate/environmental litigation in other jurisdictions.⁷⁹

In India, the Supreme Court has, in a number of cases, acknowledged the link between a healthy environment and the enjoyment of the right to life by holding that the right to a healthy environment is an aspect of the right to life under Article 21 of the Indian Constitution.⁸⁰ In *Subhash Kumar v. State of Bihar*,⁸¹ the Court said that the basic environmental elements, such as air, water, and soil, which are vital to the right to life, must be protected from pollution. This finding was reiterated in *Charan Lal Sahu v. Union of India*,⁸² where the Court affirmed that the right to life included a right to a healthy environment. The German Federal Constitutional Court recently cited the State's obligation to protect the right to life, including the right of future generations, as informing its reasoning in holding that German climate change legislation is inadequate and must be amended to provide for more ambitious emissions reduction measures to be implemented prior to 2030 instead of being postponed until after that date.⁸³ The right to life under Article 2 of the ECHR was also successfully invoked in the historic Dutch *Urgenda* climate decision of the Supreme Court of the Netherlands in which the State was ordered to reduce emissions by 25% compared to 1990 levels by the end of 2020.⁸⁴ Although the outcome was radical, the Dutch Supreme Court relied on well-established ECHR principles to reach its decision that climate change represents a serious threat to human rights which the State has a duty to address.⁸⁵ These included the positive State duty to safeguard the lives of those within its jurisdiction established in *LBC v UK*,⁸⁶ and the existence of a 'real and immediate threat' to rights held in *Osman* to be necessary to trigger the State's positive obligations under Article 2.⁸⁷ Finally, at the international level, the UN Human Rights Committee in General Comment 36 has officially acknowledged the importance of a healthy environment to the enjoyment of the right to life and the danger that climate change entails:

The *duty to protect life* also implies that states parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to *life with dignity*...

Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life... Implementation of the obligation to respect and ensure the right to life, and in particular *life with dignity*, depends, inter alia, on measures taken by States parties to preserve the

⁷⁹ Alston (n 72).

⁸⁰ Anup Surendranath, 'Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

⁸¹ No. 1991 A.I.R. 420.

⁸² A.I.R. 1990 S.C 1480.

⁸³ *Neubauer, et al. v. Germany* (BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20).

⁸⁴ *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* NL:HR:2019:2007 (20 December 2019).

⁸⁵ Rebecca Mooney, 'The Urgenda case: human rights obligations to reduce carbon emissions' (*OxHRH Blog*, 29 January 2020) <<https://ohrh.law.ox.ac.uk/the-urgenda-case-human-rights-obligations-to-reduce-carbon-emissions>> accessed 22 July 2021.

⁸⁶ (1999) 27 EHRR 212.

⁸⁷ (2000) 29 EHRR 245.

environment and protect it against harm, pollution and climate change caused by public and private actors.⁸⁸

In *NHV v Minister for Justice*,⁸⁹ a case challenging the constitutionality of prohibiting asylum seekers from working, O'Donnell J consulted a General Comment of the UN Committee on Economic, Social and Cultural Rights to inform his understanding of the right to work under the Irish Constitution.⁹⁰ In a similar fashion, the Irish courts could treat General Comment 36 as being of persuasive value in interpreting the content of the right to life in any future environmental litigation. In that regard, it should be noted that General Comment 36 adopts the concept of 'life with dignity' or 'dignified life' which is linked to 'freedom from threats to life that arise from general societal conditions',⁹¹ which include (as mentioned above) 'environmental degradation and climate change.'⁹² The concept of 'dignity' is also found in the Preamble to the Irish Constitution and has been used by Irish courts to 'aid' with the interpretation of the scope and content of constitutional rights.⁹³ Thus, 'dignity' could provide a constitutional basis for the Irish courts to emulate the UN Human Rights Committee's adoption of a 'green'⁹⁴ or environmentally conscious conception of the right to life.⁹⁵ This interpretive approach could be buttressed by reference to the 'human personality' doctrine (outlined above) which O'Donnell J connected to human dignity in *NHV* by holding that the right to work is a part of the 'human personality' and that it could not therefore be withheld absolutely from non-citizens because of the 'damage' this would cause to an individual's 'self-worth and sense of themselves.'⁹⁶ O'Mahony has described this as a 'clear example of dignity analysis' and notes how O'Donnell's J judgment in *NHV* treats the concepts of human personality and dignity almost 'interchangeably.'⁹⁷ Thus, as Alston has argued, because of the 'clear linkages' between human dignity, human personality, and a healthy environment, including the fact that 'a healthy environment is essential to creating the conditions necessary for people to live a life with dignity', a strong case can be made that a right to a healthy environment is derivable from the Irish Constitution, whether as an aspect of the right to life or via the combined concepts of human personality and human dignity.⁹⁸

Right to bodily integrity/ 'right to not have one's health harmed by the State'

⁸⁸ UN Human Rights Committee (HRC), General comment No. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35 <<https://www.refworld.org/docid/5e5e75e04.html>> accessed 22 July 2021 (emphasis added).

⁸⁹ [2018] 1 IR 246 (SC) 315.

⁹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18, Article 6 (Right to Work), 6 February 2006, E/C.12/GC/18, <<https://www.refworld.org/docid/4415453b4.html>> accessed 22 July 2021.

⁹¹ Sarah Joseph, 'Extending the Right to Life under the International Covenant on Civil and Political Rights: General Comment 36' (2019) 19 Human Rights Law Review 347. See also, Ginevra Le Moli, 'The Human Rights Committee, Environmental Protection and the Right to Life' (2020) 69 International and Comparative Law Quarterly 735.

⁹² General Comment 36 (n 88).

⁹³ O'Mahony (n 33). See also, Conor O'Mahony, 'The Dignity of the Individual in Irish Constitutional Law' in Dieter Grimm, Alexandra Kemmerer and Christoph Müllers (eds), *Human Dignity in Context* (Hart 2018), and Christopher McCrudden, 'Where Did Human Dignity Come From? Drafting the Preamble to the Irish Constitution' (2020) 60 American Journal of Legal History 485.

⁹⁴ Knox (n 45).

⁹⁵ Alston (n 72).

⁹⁶ [2018] 1 IR 246 (SC) 317.

⁹⁷ O'Mahony (n 33).

⁹⁸ Alston (n 72).

As mentioned in the previous section, *Ryan v AG* established the unenumerated rights doctrine in Irish constitutional law and recognised the right to ‘bodily integrity’ (later broadened to include a more general right to not have one’s health endangered by the State) as the first of these rights.⁹⁹ Although on the facts no violation of this right was found by the State’s policy of adding fluoride to the public water supply (either by the High Court or the Supreme Court), Ó’Dálaigh CJ went on to discuss the idea of a State duty to protect public health. He said that where water was deficient in elements which would protect children’s dental health, it was a community obligation to make good that deficiency where this could be done without harm to the public. This meant, he said, that the State, being ‘organised for the common welfare of all its citizens’ had ‘the duty of protecting’ them from ‘dangers to health in manner not incompatible or inconsistent with the rights of those citizens as human persons.’¹⁰⁰

It is clear from these comments that if adding fluoride to the public water supply had been shown to be harmful to human health then a breach of the right to bodily integrity would have been established where the State mandated its addition to the water supply. Of course, the evidence showed that adding fluoride to water was beneficial from a health perspective and that a failure to add it would have exacerbated a threat to dental health in the form of dental caries. It is interesting, therefore, to pay close attention to the wording used by Ó’Dálaigh CJ in this regard: ‘[Dental caries] has adversely affected *generation after generation* and will continue to do so *if measures are not taken*. This constitutes the *type of danger* from which the State has not merely the right but the *duty to protect* its citizens.’¹⁰¹ This suggests, that if the State had not adopted the decision to add fluoride to the water supply (or taken a similar public health measure) to combat the identified threat of dental caries, and a case was brought against it by a citizen suffering from poor dental health, it would not have been open to the State to rely on a defence of omission, ie that it did not actively cause the harm to health that people were experiencing in order to escape liability. It appears, at least based on the words of Ó’Dálaigh CJ here, that the Court could have found the State in breach of a positive obligation to protect citizens’ health from a known and preventable threat by its inaction in failing to address the public health problem of dental caries. The parallels with State inaction in relation to the well-established public health risk posed by the far graver threat of climate change, require little elaboration. Undoubtedly, State inaction or insufficient action to combat climate change would greatly imperil public health and human life.¹⁰²

The idea of a right not to have one’s health endangered by the State was developed in later cases, often relating to conditions of detention in prisons,¹⁰³ out of the right to bodily integrity recognised in *Ryan*. In *State (C) v Frawley*,¹⁰⁴ a prisoner suffering from a serious psychiatric disorder asserted that he was not being given the highly specialised care that he

⁹⁹ [1965] IR 294 (HC). Gerard Hogan, Gerry Whyte, David Kenny and Rachel Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury 2018) 1692.

¹⁰⁰ [1965] IR 294, (SC) 348-349 (emphasis added).

¹⁰¹ *ibid* (emphasis added).

¹⁰² Inter-Governmental Panel on Climate Change, *Special Report on Global Warming of 1.5°C* (2018) <<https://www.ipcc.ch/sr15/>> accessed 22 July 2021. Johnathan Watts, ‘We have 12 years to limit climate change catastrophe, warns UN’ *The Guardian* (London, 8 October 2018) <<https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report>> accessed 22 July 2021. Inter-Governmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis* (2021) <https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_Full_Report.pdf> accessed 09 August 2021.

¹⁰³ See also, *The State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82, and *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269.

¹⁰⁴ [1976] IR 365 (HC).

needed. Finlay P (as he then was) said there was: ‘...no reason why the principle [of bodily integrity as an unspecified personal right] should not also operate to prevent *an act or omission* of the Executive which, without justification, would *expose the health of a person to risk or danger...*’¹⁰⁵ However, he also held that the State’s duty was not an absolute one and that it was only to do what was reasonably possible to protect the plaintiff’s health. This could not, he held, extend to the provision of the highly specialised care which the plaintiff sought but which was not available in the State at the time. He stated further that it was not the role of the court to determine the State’s health policy priorities. While it may be argued that it was reasonable not to require the State to expend significant resources providing very specialised care to only a limited number of persons, it would not, by contrast, be reasonable to argue that State actions or omissions which aggravate the already severe risk that climate change poses to the public at large should receive the same degree of judicial deference. Indeed, the Supreme Court has said that there may be circumstances where the normal discretion afforded to the Oireachtas in the allocation of public funds under the separation of powers may be circumscribed by judicial intervention where necessary to protect the most basic constitutional rights of the vulnerable.¹⁰⁶ Clarke CJ also stressed the preparedness of the courts in Climate Case Ireland to ensure State compliance with the Constitution:

[I]f an individual with standing to assert personal rights can establish that those rights have been breached [or]...the Constitution is not being complied with in some matter that affects every citizen equally...then the courts can and must act to vindicate such rights and uphold the Constitution. That will be so even if an assessment of whether rights have been breached or constitutional obligations not met may involve complex matters which can also involve policy. Constitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes.¹⁰⁷

It should also be mentioned under this heading that the constitutional protection of the ‘person’ in Article 40.3.2, which Hogan J (writing extra-judicially) has argued ought to have provided the textual hook for the right to bodily integrity rather than the unenumerated rights doctrine,¹⁰⁸ might offer a complementary basis, alongside the right to bodily integrity, for a State duty to protect against environmental hazards like climate change. Indeed it is Hogan J who has rescued the right to protection of the person from obscurity and pioneered its use in recent times.¹⁰⁹ His jurisprudence, including cases such as *Kinsella v Governor of Mountjoy*, have held that the right covers the physical, mental, and emotional wellbeing of the individual.¹¹⁰ Each of these aspects of the right to the protection of the ‘person’ could be jeopardised by unmitigated climate change and its consequences.¹¹¹ Indeed it has already been established that people’s mental health is suffering because of climate or eco-anxiety.¹¹²

¹⁰⁵ *ibid* 372 (emphasis added).

¹⁰⁶ *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105.

¹⁰⁷ *Friends of the Irish Environment v The Government of Ireland* [2020] IESC 49 [8.16].

¹⁰⁸ Gerard Hogan, ‘Unenumerated Personal Rights: The Legacy of *Ryan v Attorney General*’ in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017).

¹⁰⁹ David Kenny, ‘Recent Developments in the Right of the Person in Article 40.3: *Fleming v Ireland* and the Spectre of Unenumerated Rights’ (2013) 36(1) DULJ 322.

¹¹⁰ Hogan and others (n 99) 1666.

¹¹¹ The IPCC Special Report on Global Warming (n 99) documents the severe threats to people’s physical security which will emanate from climate breakdown related environmental disasters if global temperatures are allowed to rise by greater than two degrees Celsius.

¹¹² On the concept of ‘eco-anxiety’, see Pihkala Panu, ‘Anxiety and the Ecological Crisis: An Analysis of Eco-Anxiety and Climate Anxiety’ (2020) 12(19) Sustainability 7836.

Article 40.5: the inviolability of the dwelling

In the case of *DPP v Barnes*,¹¹³ concerning the scope of the defence of lawful use of force when relied on by a burglar who had killed a homeowner in self-defence, Hardiman J spoke with great eloquence about the value of the ‘dwelling’ which the Constitution in Article 40.5 declares to be ‘inviolable’. Describing a person’s dwelling as ‘far more than bricks and mortar’ Hardiman J said:

[T]he home of a person and his or her family...is entitled to a very high degree of protection at law...

...The free and secure occupation of it is a value very deeply embedded in human kind and this free and secure occupation of a dwellinghouse, apart from being a physical necessity, is a necessity for the human dignity and development of the individual and the family.¹¹⁴

Similarly, in *DPP v Barry O’Brien*,¹¹⁵ in relation to Article 40.5, Hardiman J opined that:

This constitutional guarantee presupposes that in a free society the dwelling is set apart as a place of repose from the cares of the world... Article 40.5 complements and reinforces other constitutional guarantees and values, such as assuring the dignity of the individual ...the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby assures the citizen that his or her privacy, person and security will be protected against all comers, save in the exceptional circumstances presupposed by the saver to this guarantee.¹¹⁶

Just as the sanctuary of the home may be violated by a burglar or other trespasser, in the very near future it may also be threatened by more extreme weather events, including the increased risk of rising sea levels, major flooding, and forest fires as a result of global warming and the corresponding climate disruption.¹¹⁷ Climate change may thus lead to certain areas becoming uninhabitable, forcing people to leave their homes in order to survive.¹¹⁸ It is obvious therefore that climate change and environmental disaster would imperil the constitutional values which Hardiman J stated are enshrined in Article 40.5, including the physical need to have secure accommodation which is vital to ensuring human dignity and the development of the human personality. Although traditionally seen as a negative

¹¹³ [2007] 3 IR 130.

¹¹⁴ *ibid* 144.

¹¹⁵ [2012] IECCA 68.

¹¹⁶ *ibid* [17] (emphasis added).

¹¹⁷ Johnathan Watts, ‘Climate scientists shocked by scale of floods in Germany’ *The Guardian* (London, 16 July 2021) <<https://www.theguardian.com/environment/2021/jul/16/climate-scientists-shocked-by-scale-of-floods-in-germany>> accessed 22 July 2021; Environmental Protection Agency, *National Risk Assessment of Impacts of Climate Change: Bridging the Gap to Adaptation Action* (2020) <https://www.epa.ie/publications/research/climate-change/Research_Report_346.pdf> accessed 22 July 2021. Land in Ireland which is expected to be below the annual flood level by 2050 can be found here: <https://coastal.climatecentral.org/map/12/-6.2488/53.3608/?theme=sea_level_rise&map_type=year&basemap=roadmap&contiguous=true&elevation_model=best_available&forecast_year=2050&pathway=rcp45&percentile=p50&refresh=true&return_level=return_level_1&slr_model=kopp_2014> accessed 22 July 2021.

¹¹⁸ Saeed Kamali Dehghan, ‘Climate disasters ‘caused more internal displacement than war’ in 2020’ *The Guardian* (London, 20 May 2021) <<https://www.theguardian.com/global-development/2021/may/20/climate-disasters-caused-more-internal-displacement-than-war-in-2020>> accessed 22 July 2021.

guarantee against unwarranted State intrusion, the values protected by Article 40.5 may afford a basis, perhaps in conjunction with other constitutional provisions, such as those alluded to by Hardiman J above, for contending that the State has a *positive duty* to mitigate the risk of environmental disaster from climate breakdown to ensure that the ‘dwelling’ can remain a place of safety and repose.

From a comparative perspective, it is interesting to observe that Article 8 of the European Convention on Human Rights which guarantees respect for ‘private and family life’ as well as the ‘home’ has provided the principal foundation for attempts to convince the European Court of Human Rights to extend the Convention’s scope to expressly include environmental human rights including the right to a healthy environment.¹¹⁹ While the ECtHR has thus far resisted these efforts,¹²⁰ it has acknowledged that environmental pollution which meets a certain threshold of severity,¹²¹ and which directly and seriously affects an individual in terms of impairing their ability to enjoy their right to respect for home,¹²² or private and family life,¹²³ regardless of whether it is caused by the State or as a result of State failure to regulate private third-parties,¹²⁴ may represent a violation of Article 8 of the Convention. A real test of the ECtHR’s preparedness to interpret the Convention (whether using Article 8 or another provision) to protect a right to a healthy environment is coming down the tracks in the form of a major climate case being brought by a group of Portuguese children against a large number of Council of Europe Member States, including Ireland.¹²⁵ The case alleges that the failure of States to do more to reduce greenhouse gas emissions constitutes a violation of their Convention rights. It should also be noted here that alleged violations of Article 8 of the ECHR formed part of the successful strategy in the Dutch climate case taken by *Urgenda* which saw the Supreme Court of the Netherlands order the Dutch Government to adopt more ambitious emissions reduction targets.

Article 10: natural resources

Article 10 of Bunreacht na hÉireann establishes that ‘all *natural resources*, including *the air* and all forms of potential energy’ and ‘All *land* and all mines, minerals and *waters*’ within the State’s jurisdiction belong to the State subject to existing rights of private ownership.¹²⁶ It also stipulates that ‘provision may be made by law’ for the ‘*management*’ of the State’s property, for the ‘control of the alienation’ of that property, and for the ‘*management*’ of further property acquired by the State.¹²⁷

There is a limited amount of case law interpreting Article 10. However, its scope and effects were addressed relatively recently in *Barlow v Minister for Agriculture*.¹²⁸ The case concerned fishing for pearl mussels in Irish territorial waters by Northern Irish registered ships with the knowledge and approval of the Irish Government under a *voisinage* agreement. The plaintiffs argued that the pearl mussels were a ‘natural resource’ within the meaning of Article 10.1 of

¹¹⁹ O’Rourke (n 2).

¹²⁰ *Kyrtatos v Greece* (Application no. 41666/98).

¹²¹ *Lopez Ostra v Spain* (1995) 20 EHRR 277.

¹²² *Hatton and Others v the United Kingdom* (2003) 37 EHRR 611.

¹²³ *Jugheli and Others v Georgia* (Application no. 38342/05).

¹²⁴ *ibid.*

¹²⁵ *Duarte Agostinho and Others vs. Portugal and Others* (n 6).

¹²⁶ A majority of the Constitution Review Group recommended that either a new Article should be created or Article 10 should be amended to incorporate ‘a duty on the State...as far as practicable to protect the environment.’ See Constitution Review Group, *Report of the Constitution Review Group* (Pn 2632, Stationary Office, 1996) 402.

¹²⁷ Emphasis added.

¹²⁸ [2016] IESC 62.

the Constitution and that accordingly any authorisation to fish for them had to be provided 'by law', as stipulated in Article 10.3, ie through an Act of the Oireachtas, rather than via a grant of permission from the Executive. The defendants argued in response that to hold that pearl mussels were a 'natural resource' meant that they were 'State property' and that this was not only contrary to the ancient common law principle of *nullius in bonis* which treated wild animals as not being owned by anyone, but also to long established public fishing rights. They further argued that such a radical interpretation of Article 10 would not have been intended by those who voted to approve the 1937 Constitution.

In the Supreme Court, O'Donnell J (speaking for a unanimous Court), held in favour of the plaintiffs because, on the basis of the ordinary meaning of the language of Article 10, it was clear that harvesting mussel seed within territorial waters came within the ambit of the concepts of managing and controlling a natural resource, whether the mussel seed itself, or the water from which it was extracted, or the capacity to extract it, was the natural resource.¹²⁹ In response to the defendants' arguments about the consequence of such a finding, he reasoned that Article 10 could be understood as providing for a system of 'residual State ownership' of natural resources including fishing in territorial waters, which did not alter existing public fishing rights. By analogy, mussel seed could come within the scope of Article 10 in the same manner that wind or waves for the purposes of energy generation could, even though no one could be said to own the wind or the waves, he concluded.

Two aspects of Article 10 highlighted in the *Barlow* case are of interest for the purposes of this article. The first, is it shows that elements of the natural environment, whether in the form of the air, the land, the sea, or other sources of water etc., and at least some animals, come within the contemplation of the Constitution.¹³⁰ The second is the requirement that if the State is to manage or control or alienate any property which it possesses by virtue of Article 10, then it must do so 'by law', ie through an Act of the Oireachtas and not by Executive fiat. As O'Donnell J noted in his judgment, this ensures an element of democratic accountability, whereby the representatives of the sovereign People have a role in overseeing how natural resources expressed to be State property are managed.¹³¹ However, this principle could arguably be extended to encompass a supervisory role under Article 10 for the judicial branch which can also 'make law' (albeit in a far more indirectly accountable fashion than elected legislators) via the writing of reasoned legal judgments which are subject to public scrutiny.

Thus, it is conceivable that Article 10, framed as mandating responsible State management of natural resources which are part of and come from the natural environment, could be construed as creating something akin to a State duty of care or stewardship, on behalf of the People, towards the environment. The climate change and bio-diversity crises bring into sharp focus the question of what it means to manage natural resources in a responsible way for the benefit of the Irish people. It is not unreasonable, therefore, to argue that in a future case, in the context of worsening biodiversity loss and climate change, (perhaps involving a challenge to the State granting oil drilling licenses, or failing to take measures to prevent irreversible species loss due to overfishing, for example), that Article 10 and the value of responsible management or stewardship of natural resources which it arguably endorses,

¹²⁹ *ibid* [65].

¹³⁰ See also, *McArdle v Minister for Communications* [2012] IEHC 118, where Herbert J stated that the respondent Minister was responsible by virtue of Article 10 of the Constitution for the proper management of the eel population in the Shannon River Basin which he described as a valuable resource of the State.

¹³¹ *Barlow v Minister for Agriculture* [2016] IESC 62 [69]. The idea of the State managing its property on behalf of the People of Ireland was also alluded to by Kearns J (as he then was) in *Murphy v Wicklow County Council* (HC, 19 March 1999).

could provide the basis for imposing a constitutional obligation on the State to protect the natural environment from harm.

Article 45: Directive Principles of Social Policy

Although not specifically mentioned by Clarke CJ in ‘Climate Case Ireland’, it is possible that Article 45 of the Constitution, which sets out the Directive Principles of Social Policy, could be used to support the case for a State duty of environmental protection. Despite the preface to Article 45 appearing to exclude the principles from the cognisance of the courts, the Supreme Court has never given a definitive judgment on the extent to which (if any) the courts may legitimately engage with the contents of Article 45.¹³² Furthermore, there is High Court authority to the effect that Article 45 is only off limits to the courts when reviewing the constitutionality of legislation, but not for other purposes, such as drawing on its provisions to aid with the identification of unspecified constitutional rights.¹³³ Thus, it is advisable for prospective litigants who wish to try and invoke the provisions of Article 45 in support of a State duty of environmental protection, to avoid challenging the constitutionality of legislation and focus instead on the (in)action of the Executive or public bodies in relation to climate change or environmental harm.¹³⁴ Indeed, Humphreys J in *Brownfield Restoration Ireland Ltd v Wicklow County Council*,¹³⁵ (a case where the constitutionality of legislation was not at issue) invoked Articles 45.4.1 and 45.4.2 (together with Article 42A.1 on the rights of children) in support of his decision to make an order compelling a local authority to implement remediation works in relation to an illegal rubbish dump.¹³⁶ He interpreted these provisions as containing an ‘implied constitutional commitment to intergenerational solidarity’ which served to impose an implied constitutional obligation on the State and private parties to ensure the ‘vigilant and effective protection of the environment.’¹³⁷ The principle of inter-generational solidarity powerfully captures the importance of safeguarding the environment from existential threats such as climate change and bio-diversity loss because it provides a reminder that it is not just for the benefit of people alive today that the environment must be protected.¹³⁸ It must also be protected to ensure a habitable planet for future generations. Therefore, Article 45 may have a part to play as an interpretive support in recognising a State duty to preserve the environment, including for the benefit of future generations.

As against this, though, it must be noted that in *NHV v Minister for Justice*,¹³⁹ Hogan J in the Court of Appeal expressed doubts about the manner in which Article 45 had been relied on originally to support the finding of a right to work as an unenumerated right under Article 40.3 of the Constitution. Similarly, in the same case in the Supreme Court, O’Donnell J, while not directly mentioning Article 45, stated that he shared Hogan J’s concerns about the

¹³² Hogan and others (n 99) 2518.

¹³³ *Murtagh Properties v Cleary* [1972] IR 330 (HC). See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (IPA 2015).

¹³⁴ Adelmant (n 2).

¹³⁵ [2017] IEHC 456.

¹³⁶ Article 45.4.1: ‘The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.’. Article 45.4.2: ‘The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.’

¹³⁷ [2017] IEHC 456 [307].

¹³⁸ On the idea of the present generation owing a duty to future generations, see also Humphreys J’s comments in *Clonres CLG v An Bord Pleanála* [2021] IEHC 303 in relation to private property rights and the development of land having to be carried out subject to the interests of society as a whole, at [83]-[84].

¹³⁹ [2016] IECA 86.

legitimacy of the original decisions to recognise a right to work, thereby further indicating judicial disapproval of the use of Article 45 as an interpretive touchstone.¹⁴⁰

Anthropocentric limitations: the bio-diversity crisis, and the rights of nature

Throughout this article, climate change has repeatedly been referenced as a significant threat to environmental health and the enjoyment of constitutional rights. However, the crisis of biodiversity loss is arguably just as great a risk to human life because all living things on the planet are connected in an ecological web.¹⁴¹ The extinction of bees, for example, would have dire repercussions for human food production.¹⁴² Similarly, continued deforestation will only worsen the carbon emissions disaster human society is facing.¹⁴³ The problem is, as Kelleher has pointed out, that the ‘greening’ of existing rights such as the rights to life and bodily integrity, which are anthropocentric in nature, may struggle to capture harms to nature which do not appear to affect humans immediately and directly.¹⁴⁴ Moreover, beyond the concept of ‘natural resources’ in Article 10 of the Constitution, it is difficult to imagine an avenue through which the Constitution as it currently stands could be used to protect the rights of nature, other than indirectly, by arguing that the effective vindication of human rights and the preservation of a healthy environment (which is indispensable for human survival) depends on the protection of nature. It is hard to picture, for example, an Irish court at present recognising that the Burren or Killarney National Park are subjects of rights or enjoy legal personhood, in the way the Colombian Supreme Court did in relation to the Amazon rainforest.¹⁴⁵ As such, a referendum to amend the Constitution to expressly incorporate protection for the rights of nature is a topic that should be discussed by the citizens’ assembly on biodiversity loss which was promised as part of the Programme for Government agreed in June 2020.¹⁴⁶ Such a step would complement and reinforce the existing provisions of the Constitution which may offer a basis for a judicially developed State duty to protect the environment.

Conclusion

This article has attempted to show how a number of different constitutional provisions referenced by Clarke CJ in ‘Climate Case Ireland’, may provide a basis for arguing that the Irish Constitution imposes obligations of environmental protection on the State, including a duty to tackle climate change. The potential constitutional sources of such State obligations are the right to life, the right to bodily integrity and the right to the inviolability of the

¹⁴⁰ [2017] IESC 35.

¹⁴¹ Niall Sargent, ‘Loss of Ireland’s biodiversity is accelerating - and we’re missing the chance to halt it’ (Noteworthy, 27 August 2021) <<https://www.noteworthy.ie/endangered-species-part-1-5520770-Aug2021/>> accessed 25 September 2021; and Damian Carrington, ‘Climate and nature crises: solve both or solve neither, say experts’ *The Guardian* (London, 10 June 2021) <https://www.theguardian.com/environment/2021/jun/10/climate-and-nature-crises-solve-both-or-solve-neither-say-experts?CMP=Share_AndroidApp_Other> accessed 22 July 2021.

¹⁴² Maddie Moate, ‘What would happen if bees went extinct?’ *BBC Future* (London, 2 May 2014) <<https://www.bbc.com/future/article/20140502-what-if-bees-went-extinct>> accessed 22 July 2021.

¹⁴³ Lucas R Vargas Zeppetello *et al*, ‘Large scale tropical deforestation drives extreme warming’ (2020) 15(8) *Environmental Research Letters* 084012.

¹⁴⁴ Kelleher (n 2).

¹⁴⁵ Corte Suprema de Justicia [Supreme Court of Justice], STC4360-2018, Radicación n. 11001-22-03-000-2018-00319-01, 5 April 2018 (Amazon case).

¹⁴⁶ Kelleher (n 2); Emer Slattery, ‘Environmental rights must be preserved in the Constitution’ *The Irish Times* (Dublin, 23 July 2021) <<https://www.irishtimes.com/opinion/environmental-rights-must-be-preserved-in-the-constitution-1.4627768>> accessed 23 July 2021.

dwelling, State responsibility for the management of natural resources under Article 10, and the Directive Principles of Social Policy in Article 45.

Even though climate change has now become a mainstream political issue in Ireland and the need to reduce greenhouse gas emissions has garnered broad acceptance amongst political parties (albeit to differing degrees),¹⁴⁷ the country is set to miss its 2020 emissions reduction targets.¹⁴⁸ If this political failure persists, then the question surely arises as to whether judicial intervention will become necessary to prompt the action required from the political system to meet future emissions targets, such as the goal of becoming net neutral by 2050. The Supreme Court in *TD v Minister for Education* spoke of the possibility of mandatory orders against the Executive to ensure the vindication of constitutional rights and the discharge of constitutional obligations only in the extreme and exceptional circumstances of ‘clear disregard’ in the sense of a ‘conscious and deliberate’ failure by the executive, accompanied by ‘bad faith or recklessness’, in relation to its constitutional obligations.¹⁴⁹ There is a strong case to be made, given the ‘existential’ nature of the threat posed by climate change,¹⁵⁰ where global temperatures increase by greater than two degrees Celsius, that a continuing ‘conscious and deliberate’ failure by the State to ensure emissions reductions on a level sufficient to prevent such warming, would represent a ‘clear’, and at the least a ‘reckless’, ‘disregard’, by the State, of what this article posits is its constitutional obligation to protect the environment. In such a scenario the incredibly high bar for judicial intervention to secure State compliance with the Constitution via mandatory orders will have been surpassed. It is to be hoped that it does not come to this, but if it does, ‘Climate Case Ireland’ has planted seeds, which, if necessary, may be reaped in future constitutional litigation seeking to advance climate action and environmental protection.

¹⁴⁷ Kevin O’Sullivan, ‘Election 2020 climate policies: From the ambitious to the vague’ *The Irish Times* (Dublin, 3 February 2020) <<https://www.irishtimes.com/news/environment/election-2020-climate-policies-from-the-ambitious-to-the-vague-1.4159457>> accessed 22 July 2021.

¹⁴⁸ Environmental Protection Agency, *Ireland’s Greenhouse Gas Emissions Projections 2020-2040* (2021) <<https://www.epa.ie/publications/monitoring--assessment/climate-change/air-emissions/irelands-greenhouse-gas-emissions-projections-2020-2040.php>> accessed 22 July 2021.

¹⁴⁹ [2001] 4 IR 259, 337.

¹⁵⁰ Alston (n 72).