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# A Right To A Healthy Environment In Ireland: A Contribution

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## Introduction

The urgency of the climate crisis needs few words to be conveyed.[1] It is a drastic emergency facing governments across the world. Our Earth is confronting the consequences of our cumulative actions today, such as increased temperatures leading to rising sea-levels and the eventual loss of human and wildlife habitat, worrying levels of carbon emissions, and the rapid endangerment of flora and fauna.[2] Moreover, the climate change crisis is no longer an arbitrary headline or a vague concept to be ignored: it is beginning to encroach in significant ways on all of our lives. The UN SDG Report (2022) estimates that roughly two billion people worldwide do not have access to safe drinking water and that the increased scarcity of water may have detrimental effects on food supply, due to its reliance on water for agriculture.[3] As a result of this increasing encroachment, governments and global organisations have felt immense pressure to mitigate the harmful effects of climate change. Many have responded with ambitious, yet ultimately empty, declarations claiming to commit to fighting environmental damage but little substantive work has been done to reduce carbon emissions and combat the environmental degradation at the hands of human development and 'progress'. In light of this, it is therefore essential that citizens have the opportunity to challenge governmental and corporate activities which cause harm to the environment. Many have done so by seeking redress in the courts, with a recent surge of climate litigation focused on challenging statutory and administrative blunders. More promising is the wave of rights-based climate litigation sweeping across national and international courts worldwide. One method which has had some success in furthering rights-based environmental arguments is the recognition and reliance on *the right to a healthy environment*. The right, while novel, has been recognized in numerous countries across the world in varying forms and is significant in that it acknowledges the intimate link between the state of the environment and the full enjoyment of human rights – such as rights to life and bodily integrity. This has only further been strengthened by the recent, admittedly symbolic in nature above all else, UN recognition of the right to a healthy environment, which explicitly noted the right's potential

[1] Thank you to the Laidlaw Foundation for their financial support.
[2] Rebecca Lindsey and Luann Dahlman, 'Climate Change: Global Temperature' (18 January 2023) < https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature#:~:text=Highlights,0.18%C2%B0%20C)%20per%20decade. > accessed 28 May 2023.
[3] United Nations Department of Economic and Social Affairs, *The Sustainable Development Goals Report* (2022). < https://unstats.un.org/sdgs/report /2022/ > accessed 28 May 2023.

to provide necessary safeguards to linked rights, such as those to water, healthcare and clean air.[4]

From a legal point of view, the right to a healthy environment has the immense potential to break down traditional barriers faced by climate litigants. Rights-based arguments generally fail in courts for three reasons: locus standi (or lack thereof), issues with separation of powers, and the justiciability of environmental rights when there is no constitutional recognition. This was certainly the case with the landmark *Friends of the Irish Environment v. the Government of Ireland*, where the applicants challenged the constitutionality of the government's 2017 National Mitigation Plan on the grounds that it was ultra vires the Climate Action and Low Carbon Development Act (2015). Although the Plan was quashed on a narrower statutory basis, Clarke CJ made important obiter dictum on locus standi rules and the possibility of the right to a healthy environment being derived from the Constitution.[5] This essay will analyse the status of the right within the Irish jurisprudence, in terms of the recent decision and identify key obstacles to its recognition. The second section of this research focuses on comparative constitutional analysis of the South African Constitution, in particular the Bill of Rights and its Section 24 'right to an environment which is not harmful to one's health and well-being'. Due to its rich history of rights-based litigation and the radical Constitution which not only recognizes socio-economic rights, but places positive obligations upon the government to fulfil the expectations of the right's protection, comparison of the South African model will illuminate the potential nature, scope and applicability of the right to a healthy environment. This essay argues for the recognition of the right to a healthy environment, as a mechanism for resolving the traditional obstacles faced by climate litigation. In the interests of a balanced argument, I will also examine the limitations of the right and its applicability.

## Section 1: Current Status of the Right to a Healthy Environment in Ireland

Why is the recognition of the right to a healthy environment important for Ireland? There are several reasons why the right is particularly important, namely: the severity of the effects of

[4] United Nations Human Rights Council Res. 48/13, 'Right to a Healthy Environment' (2023).
[5] *Friends of the Irish Environment v the Government of Ireland* [2020] IESC 49.

the climate crisis in Ireland and antiquated legal procedural rules which prevent the success of climate litigants. On the first reason, Ireland is both a major contributor to climate change processes, being the third-highest per capita greenhouse gas emitter in the EU despite its smaller population size, and a country which feels the effects more poignantly than others. With all major cities in Ireland situated on the coastline, the unprecedented rise in sea levels will have major economic and social effects on Irish inhabitants. Ireland has also experienced a 5% increase in precipitation levels, with reduced levels of spring and summer rainfall and increased heavy rainfall events during winter and autumn. Combined, these predictions indicate that the cumulative effects of climate change in Ireland will result in environmental degradation, such as coastal erosion, flooding and damage to property and livelihoods.[6] The Environmental Protection Agency also predicts that future impacts could include: changes in frequency of extreme weather events, negative impacts on water supply and quality, and negative impacts on human health and well-being.[7] More importantly however, is the growing number of rural inhabitants in Ireland. Eurostat found "an estimated 57% of people in Ireland aged 25 and over, lived predominantly rural regions" in stark contrast to the overall 21% for the entire EU region.[8] More specifically, the research showed that people over the age of 50 chiefly inhabit rural regions, over urban cities and towns.[9] Due to the fact that a majority of the Irish population live in areas which depend acutely on the natural resources available and the preservation of the environment, climate change will have tangible ramifications on their quality of living. Moreso, the demographics of such areas suggest that the elderly will be increasingly affected due to their geographic positioning, which is consistent with global research suggesting that marginalized communities are disproportionately affected by the effects of climate change.

## Analysis of *Friends of the Irish Environment v the Government of Ireland*

[6] Environmental Protection Agency, 'What impact will climate change have on Ireland?' (*Climate Change, Environment and You*) < https://www.epa.ie/environment-and-you/climate-change/what-impact-will-climate-change-have-for-ireland/ > accessed 29 May 2023.
[7] IBID.
[8] Francess McDonnell, 'More people aged over 25 now living in rural areas in Ireland' (*Agriland,* 11 February 2023) < https://www.agriland.ie/farming-news/more-people-aged-over-25-now-living-in-rural-areas-in-ireland/#:~:text=According%20to%20Eurostat%2C%20in%202021,lived%20in%20predominantly%20rural%20regions. > accessed 29 May 2023.
[9] IBID.

## 1. Statutory Claim

The most important and recent case in regards to the status of environmental litigation in Ireland is *Friends of the Irish Environment v the Government of Ireland*, which although it was decided on a much narrower, primarily statutory basis, the case shed much light into the hesitancy of the Irish Supreme Court to recognize the right to a healthy environment and expand procedural standing rules to allow for easier access of climate litigants to court.[10] The case concerned a request for judicial review of the National Mitigation Plan (2017) by the environmental organisation 'Friends of the Irish Environment', on the grounds that it was ultra vires the Climate Action and Low Carbon Development Act 2015.[11] More specifically, FIE alleged that the Plan was inadequate to reduce emissions in accordance with the principles laid out in the 2015 Act.[12] The case was first heard in the High Court, before leapfrog appeal to the Supreme Court.[13]

The Supreme Court, with a judgement delivered by Clarke CJ, held that the Plan was ultra vires the Act and ordered it to be quashed. The practical effect of this was to compel the Government to create a new Mitigation Plan, with the recommended amendments. In order for the constitutionality of the Act to be preserved, the Plan is regarded as delegated legislation, therefore requiring it to comply with the statutory purpose and scope of the original Act. There was suggestion from the High Court that the Plan cannot be challenged without challenge to the Act itself, as well as commentators who believed the Act should be challenged due to its controversial enactment, which was "a much more diluted version of what the FIE and Labour Party wanted."[14] Notwithstanding, the Court focused predominantly on whether the Plan had sufficient detail and engaged heavily with the substantive content of the Plan. This is in stark contrast to the High Court's more formalistic approach, which some commentators have criticised as being satisfied with the 'mere

[10] *Friends of the Irish Environment v the Government of Ireland* [2020] IESC 49.
[11] 'Friends of the Irish Environment' will further be referred to as 'FIE'. Additionally, the 'National Mitigation Plan 2017' will be referred to as "the Plan" and the 'Climate Action and Low Carbon Development Act 2015' as "the Act".
[12] [2020] IESC 49.
[13] Roy Suryapratim, "The Domestic Life of Climate Law: Friends of the Irish Environment v Ireland' (2021) 3 Irish Supreme Court Review 141, 144.
[14] Ibid, 152.

existence' of a government plan.[15] More accurately, MacGrath J of the High Court allowed for a higher level of deference in respect of the separation of powers, by acceding the weighing up of various factors which contribute to the creation of delegated legislation, to the executive and legislative spheres rather than the judiciary.[16] This approach allowed the High Court to rule against FIE and uphold the Plan's constitutionality.[17]

Contrastingly, in assessing the substantive content of the Plan, Clarke CJ focused on two main aspects: whether the Plan was sufficiently specific and the role of public consultation. Specificity has an important function within the wider context of the Act, in that it relates to the approval process of any delegated legislation and is the yardstick used to assess the Plan's constitutionality. This is expressed by Clarke CJ in:

> "[Level of specificity]…should be sufficient to allow a reasonable and interested member of the public to know how the government of the day intends to meet the NTO so as, in turn, to allow such members of the public as may be interested to act in whatever way, political or otherwise, that they consider appropriate in light of that policy."[18]

This is significant for two interrelated reasons. Firstly, it introduces the reasonable specificity test, on the condition that legislation requires intelligibility. In order for legislation to be intelligible, it needs to be specific – and it must be specific **and** intelligible enough that a reasonable member of the public can ascertain how the government intends to meet mandated targets set out in the Act. The purpose of this test is to allow for the proper democratic function of the three spheres of government – members of the public must be able to know with clarity what the government of the day is doing in order to properly participate in the democratic nature of the State. Further, the specificity test reflects the important role of public consultation. Clarke CJ pointed "to how the public cannot glean how climate targets would be achieved from the Climate Plan," as a key downfall of the Plan, ultimately one which led it to be quashed.[19] Moreso, the core of the Act is one of transparency, suggested by

[15] Domestic Life of Climate Litigation, 144.
[16] *Friends of the Irish Environment v the Government of Ireland* [2020] IEHC 225.
[17] IBID.
[18] [2020] IESC 49, at [6.38].
[19] 'Domestic Life of Climate Litigation', 152.

the particular need for public consultation in order for delegated legislation to be approved. In this way, the public interest played an important role in determining the constitutionality of the Plan which is additionally mirrored by the fact that this was a public interest lawsuit. Another key difference between the two Court's judgements was the weighting given to the Climate Change Advisory Council, which was set up under the Act. The Supreme Court acknowledged that the CCAC is a creature in law and although the government is not bound by its critical findings, sufficient weight will be given to its views in law. This is in stark contrast to the result of the High Court's findings, where the role and powers of the Advisory Council were still relatively unclear – they had no power to sanction nor initiate regulations. One commentator has suggested that the findings of the Supreme Court indicate a more "robust reviewing" role and that it is reminiscent of significant political collaboration in:

> "The process whereby different agents – CCAC, the judiciary, the citizenry, the Oireachtas – are engaged in 'fruitful conflict' rather than consensus to shape the life of climate law is a good example of institutional collaboration."[20]

All considering, although the Plan was eventually quashed on relatively narrow statutory grounds, the process by which it was held to be unconstitutional revealed significant facets of judicial oversight on the legislative and executive branches of government. By introducing the reasonable specificity test, the Court narrowly avoids overreach into policy matters and rather fulfils its role as the 'watchdogs' of the Constitution. Moreso, the function of public interest and the weighting given to said function demonstrates the important democratic considerations which come into play within judicial review.

## 2. Locus Standi and Rights-based Arguments

Due to the Plan being quashed on statutory bases, there was no need for the Court to engage in any of the rights-based arguments put forth by FIE, most significantly those of justiciability, locus standi and the right to a healthy environment. Nevertheless, Clarke CJ

[20] 'Domestic Life of Climate Litigation', 152.

made important obiter dictum about the status of these issues in Irish jurisprudence, which will be discussed below.

Two key procedural obstacles facing climate litigants are justiciability and standing, both of which were addressed within the aforementioned case. Justiciability of climate measures is an issue due to the nature of climate change, what Fisher et al. referred to as a "polycentric and complex issue which has been said to require a break from the continuity of existing legal practices."[21] Judicial intervention has often been prevented by the separation of powers issues which arise within review of governmental policy, so much so that MacGrath J in the High Court's decision refrained from concluding on the justiciability issue due to the "significant policy content", although did so after accepting that rights to life and bodily integrity were engaged in the present case.[22] In contrast, Clarke CJ opined that whilst the government has significant discretion within the policy arena, it is not without reasonable limits. It appears that the wide breadth of deference allowed by the High Court was in some ways unjustified; the mere fact that the legislature chose to enact the Plan allows the Court to review as consistent with the judiciary's constitutionally mandated duty. However, this ruling speaks to a larger issue within climate litigation, namely the tension, "between the protection of rights and deference for governmental policy discretion, and between the duty of the courts to provide remedies for rights violations and the principle of the separation of powers."[23] In this way, the Supreme Court judgement amounts to a win for climate litigants, in showing they are not only willing, but required to review legislation even where there are significant policy engagements.

The second issue, locus standi, was discussed in much more detail. The traditional test of *Cahill v Sutton* requires plaintiffs to personally demonstrate that the law or government action has infringed or threatened to infringe their rights.[24] However, the standing requirements can be relaxed if not hearing the case could lead to "a real risk that important rights would not be vindicated", further expanded on in *Society for the Protection of Unborn*

[21] E. Fisher, E. Scotford and E. Barritt, "The Legally Disruptive Nature of Climate Change' (2017) 80(2) Modern Law Review, 173.
[22] *Friends of the Irish Environment v the Government of Ireland* [2020] IEHC 225.
[23] 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) Journal of Human Rights Practice 1,
[24] *Cahill v Sutton* [1972] IR 269.

*Life v Coogan* and *Irish Penal Reform Trust v Governor of Mountjoy Prison.*[25] For the purposes of the present case, it would be more applicable to view the exceptions as products of their unique factual circumstances which are not necessarily applicable to FIE's argument.[26] *SPUC* concerned a non-governmental organisation seeking an injunction to prevent the publication of information pertaining to abortion services abroad, alleging that it violated the rights to life of unborn children. Logically, unborn children would never be able to assert their rights in court and therefore the Court granted them standing in these exceptional circumstances. Additionally, the nature of the infringed right and the level of public interest was heavy on the Court's minds.[27] Similarly, *IRPT* allowed for the expansion of standing rules "where a person who is prejudicially affected is not in a position to assert their constitutional rights adequately", in this case concerning the vulnerability of psychiatrically ill prisoners.[28] This case is distinguished as it was joined by two prisoners as plaintiffs.

MacGrath J in the High Court reviewed *Merriman v Fingal County Council,* where although the applicants were denied standing, the Court recognized a personal right to an environment.[29] The Court further reviewed *Digital Rights Ireland v Minister for Communications,* in which the Court granted standing to a well-intentioned non-governmental organisation seeking to assert privacy rights on behalf of the public. The key aspect to this exception was that it was unlikely any individual applicant would be able to assert their rights adequately and the infringement alleged was of serious public concern.[30] The High Court granted FIE standing as "the bona fides of the applicant [is] not called into question" and due to the significance of the rights asserted, consistent with the above mentioned cases.[31] Additionally, it suggests that body corporates may obtain standing where there is significant public interest, with the condition that the rights affect not only the public, but the body corporate as well.[32] In contrast, the Supreme Court reviewed *Cahill* and *Mohan*

[25] *Society for the Protection of Unborn Children (Ireland) Ltd v Diarmuid Coogan & Others* [1988] IR 734 *Irish Penal Reform Trust Ltd & Others v the Governor of Mountjoy Prison* [2005] IEHC 305.
[26] Adelmant et al. "Human Rights and Climate Change,' 4.
[27] [1988] IR 734.
[28] [2005] IEHC 305.
[29] *Friends of the Irish Environment CLG v Fingal County Council* [2019] IEHC 747.
[30] *Digital Rights Ireland v Minister for Communications* [2020] IEHC 221.
[31] [2020] IEHC 225.
[32] "Domestic Life of Climate Litigation" 153.

*v Ireland*.[33] They acknowledged the possibility of relaxation of standing rules, but took a cautious approach to ensure that hypothetical arguments are avoided and that the separation of powers is upheld.[34] Ultimately, the Court rejected standing for FIE in respect of rights-based claims, continuing the High Court's initial observation that although they obtained standing to advance the ultra vires arguments, they did not enjoy standing prima facie for rights-based ones. FIE argued that there were financial obstacles which did not allow an individual citizen to bring the case, but the Court distinguished it through application of *Digital Rights,* where not only did the applicant waive costs but the body corporate itself alleged its rights were infringed (Clarke CJ also expressed hesitations about the result of *Digital Rights*). This restrictive approach has been criticised as being inconsistent with both *SPUC* and *IPRT,* in that no consideration was given to the nature of the rights alleged to have been infringed nor the urgency. Adelmant, Alston and Blainey have further suggested that the Court "focused solely on the fact that individuals could have brought FIE's rights-based claims in its stead."[35] Additionally, the approach has been criticised as an undue limitation of the *Cahill* exception. The result is to narrow any relaxation of standing to only "where there would be a real risk that important rights would not be vindicated unless a more relaxed approach to standing were adopted."[36] Thus, the granting of standing to climate litigants was made that much more difficult, by not only rejecting FIE standing straight out, but additionally by questioning the validity of *Digital Rights* and limiting the scope of relaxation stemming from *Cahill, SPUC and IPRT*. Moreso, it appears that climate litigants do not have the Court's ear – delivering a large blow to the potential recognition of the constitutional right to a healthy environment.

## 3. The right to a healthy environment

The most significant portion of the judgement, for the purposes of this essay, was the discussion on the right to a healthy environment. FIE sought to assert a right to a healthy environment and the Court was asked whether the right could be derived from the Constitution.[37]The applicants relied upon *Fingal County Council,* where the High Court

[33] *Mohan v Ireland* [2019] IESC 18.
[34] Adelmant et al. "Human Rights and Climate Change,' 5.
[35] "Human Rights and Climate Change" 6.
[36] *Cahill v Sutton.*
[37] [2020] IESC 49.

recognized a personal right to the environment, declaring that it is "consistent with the human dignity and well-being of citizens at large".[38] The Court linked the right to the enjoyment of all human rights, aptly naming it an "essential condition" and an "indispensable existential right".[39] However, the right was limited by the admission that its true nature and parameters are somewhat vague, and even more so from its derivation from the right to bodily integrity, a right first derived in *Ryan v Attorney General.*[40] In this way, *Fingal County Council* was successful in deriving a right to the environment and identifying the key role it plays in the enjoyment of other fundamental rights, but lacked definition and concreteness, a criticism still lobbed by the Supreme Court presiding over the present case.[41]

The High Court accepted FIE's argument that the rights to life, bodily integrity and the environment were engaged in the Plan and further supported the derived right to a healthy environment. Despite accepting the engagement of the rights, the Court held that they were not infringed by the Plan, which was but a single part in a larger machine of climate mitigation legislation.[42] This speaks to a crucial problem within climate litigation: causation. The nature of climate change, which is cumulative and the product of all human activities around the world, does not lend itself to be easily pinned down to one single cause, nor one single actor to blame.[43] It is for this reason that I believe climate litigants have had more success challenging the administrative dimensions of climate mitigation plans, rather than the human rights-based arguments – because there is a concrete link between the aspirations of government' principles and the subsequent failure to reflect this in legislation.

After rejecting standing for FIE in respect of rights-based arguments, the Supreme Court made important obiter dictum on the right to a healthy environment, possibly in light of its recognition at the High Court in *Fingal.* Firstly, Clarke CJ made an important characterization of derived rights in order to distinguish it from unenumerated rights. The Court emphasised the textual link required to derive rights from the Constitution, as a

[38] [2019] IEHC 747.
[39] [2020] IEHC 225.
[40] *Ryan v Attorney General* [1965] IR 294.
[41] [2019] IEHC 747.
[42] [2020] IEHC 225.
[43] Elena Cima, "The right to a healthy environment: Reconceptualizing human rights in the face of climate change' (2022) 31(1) RECIEL 38.

mechanism for preventing the "misimpression" of judges simply plucking fundamental rights out of thin air as they see fit.[44] Rather:

> "It may stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure."[45]

This initial foundation to the discussion of the right to a healthy environment is significant for several reasons. Firstly, it sets out the 'ground rules' for the previously dormant derived rights doctrine. The doctrine had been fading out of relevance for several years, subject only to the exception of *Fingal County Council,* which some commentators have proclaimed to be a new era for the use of derived rights.[46] Whether the Court was looking to resurrect the doctrine or not, it fell to Clarke CJ's hands to clear up any confusion, making this portion of the judgement one of the most notable. The Court takes a balanced approach to derived rights – whilst emphasising the textual link, Clarke CJ goes on to opine that he does not "advocate for a narrow textualist approach" and cites Henchy J's human personality test set out in *McGee.*[47] He further addresses the separation of powers concerns by stating that the hallmark of a properly derived right, is its avoidance of the risk of blurring the lines between politics and the judiciary. The detailed analysis of the derived rights doctrine suggests that it may become judicially relevant in the coming years. It appears to me that there would be no need to spend so much time on the subject, when rights-based arguments were not even allowed to proceed in Court given that FIE could not obtain standing, unless there was some hope for the resurrection of the doctrine, and perhaps more specifically the derivation of an environmental right from the Constitution. On the other hand, Clarke CJ could have been seeking to clear up any confusion arising from the High Court's *Fingal County Council* derivation of the right – thus delivering a powerful blow to the future of environmental rights in Irish jurisprudence.

[44] [2020] IESC 49 at [8.5]
[45] Ibid, at [8.6]
[46] Charlotte Renglet, "The Decision of the Irish Supreme Court in Friends of the Irish Environment v Ireland: A Significant Step Towards Government Accountability for Climate Change?' (2020) 2 CCLR 163.
[47] [2020] IESC 49 at [8.7]

The Court found two primary issues with the right to a healthy environment: either the right does not extend the protections found under already recognised rights to life and bodily integrity (as demonstrated by the fact that the right would have no bearing on the scope of the current proceedings) or, if it does extend the aforementioned rights, it is impermissibly vague, as the nature and parameters of the right have not been successfully defined. Clarke CJ accepts that details of the right may be further developed through case law, but "there needs to be at least some concrete shape to a right before it is appropriate to identify it as representing a […] separate right."[48] This appears to me to be entirely logical – although the only caveat identified was that despite acknowledging the relative lack of detail on the right to a healthy environment in Ireland, there was no further attempt by the Supreme Court to define it, nor take into account any of FIE's submissions. The reasoning for this is that it did not pertain to the scope of the proceedings at hand, and it is accepted that if a case did arise where the asserted right was engaged, this would present an opening for the Court to define it more concretely and derive it from the Constitution. In doing so, the Court missed an important opportunity to provide clarification on the issue, which even if they did not ultimately recognise the right, would have guided future climate litigation and allowed for litigants to purposively assert the right more successfully, according to the precedent set. The result of the obiter dictum is therefore bittersweet: Clarke CJ engaged with the right sufficiently enough to explain why it was not recognised at the present case, but did so in a manner which discourages and creates massive obstacles for future climate litigants, even though the Court expressed its, albeit resistant, willingness to hear arguments for the right in the appropriate factual and legal circumstances and provided a framework for the derivation of fundamental rights in the future.

### 4. Conclusion for Section

The Plan was ultimately quashed on the grounds that it was ultra vires the Act. Despite the narrow statutory basis for the decision, the administrative discussion shed much light on the responsibilities of actors involved in the creation of delegated legislation in the climate sphere. This is expressed primarily through the introduction of the reasonable specificity test, which requires legislation to be sufficiently specific and intelligible enough that an interested

[48] Ibid, at [8.11].

member of the public could know with clarity what the government of the day intends to do in order to meet climate mitigation targets. Additionally, this relates intimately to the role of public consultation and its links to the proper democratic function of the State. Beyond the narrow statutory grounds, *Friends of the Irish Environment v the Government of Ireland* undoubtably provides crucial insights for the future of climate litigation in Ireland through the identification of the obstacles facing litigants. These are primarily those of locus standi and the asserted right to a healthy environment. In terms of standing, the Supreme Court took a restrictive approach to the rights-based arguments asserted by FIE, a body corporate, despite precedent which allowed for standing which suggested otherwise. The nature of the allegedly infringed rights and the urgency of the climate crisis was not taken into account, disregarding the important effect of both *SPUC* and *IPRT*. Nevertheless, the approach to standing will need to be relaxed significantly in order to allow climate litigants to succeed to court. Secondly, the Court identified two key issues with the derivation of the right to a healthy environment: it is superfluous (as it does not extend existing rights to life or bodily integrity) or it is impermissibly vague (as the nature and parameters of the right have not been defined). These three factors will be addressed in the following section, through comparative constitutional analysis of the South African jurisprudence.[49]

## Section 2: The South African 'Right to a Healthy Environment'

The South African Constitution was signed into law on the 10th of December 1996, and remains to this day an innovative example of radical, transformative constitutionalism. The creation of the post-Apartheid constitution was done in several stages, with each stage being scrutinized by the highest court in the land, the Constitutional Court. The Court ensured that the proposed drafts did not violate any of the seven fundamental Constitutional Principles, including equality, democracy, reconciliation, diversity, respect, responsibility and freedom. Moreso, the creation of the South African Constitution was not only a result of the past, but a reflection of the needs and hopes for the future of a racially united country. This is shown through the preamble, which states the highest priorities as "[healing] the divisions of the past and establish a society based on democratic values, social justice and fundamental human

[49] All information is referenced above.

rights."[50] One of the most important mechanisms of doing so, is the inclusion of socio-economic rights in the Bill of Rights, which span across section 24 – 29 and contain provisions for the right to access adequate housing (S26), the right to access healthcare, food, water and social security (S27), and the right to education (S29).[51] The First Certification Judgement of the Constitutional Court approved the inclusion of socio-economic rights, overruling arguments which ranged from concern over budgetary implications to fear of disruption of the newly-established separation of powers. Most importantly, the Court declared that socio-economic rights are "clearly justiciable", paving the way for South Africans to have their voices heard against the infringement of fundamental rights.[52]

This section will focus on the right enshrined in Section 24 – the right to an environment. Beginning with analysis of the constitutional right itself, the essay will look at interpretations of the right and its various facets, including approaches to environment and the positive and negative aspects contained. The purpose of this is as a potential model for the Irish right to a healthy environment. This section will additionally examine case law in which the S24 right has been expanded upon to its present generous interpretation, as well as assess South African approaches to standing.

## Analysis of the right

Chapter two of the South African Constitution, otherwise known as the Bill of Rights, contains Section 24 which states:

"Everyone has the right

a. To an environment that is not harmful to their health or well-being; and
b. To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
    i. Prevent pollution and ecological degradation;
    ii. Promote conservation; and

[50] South African Constitution, preamble.
[51] South African Constitution, Bill of Rights, Articles 24 -29.
[52] Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

iii. Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."[53]

It would be pertinent to define precisely what is meant by 'environment' before delving into the various components of the right. This was further clarified in the National Environmental Management Act [No.107 of 1998] (NEMA 107) which establishes a framework for management and protection of the environment, centring on the concept of sustainable development enshrined in the aforementioned right and the positive obligations placed on the government as stewards of the environment.[54] It defines the environment as "the surroundings within which humans exist and that are made up of:

a. The land, water and atmosphere of the earth;
b. Micro-organisms, plant and animal life;
c. Any part or combination of (a) and (b) and the interrelationships among and between them; and
d. The physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being."[55]

The anthropocentric view of the environment is important as not only does it recognise that the environment must be protected for its individual virtues, but specifically for its interconnectedness with the humans which rely upon it. The range of reliance is broad – it covers basic survival as reflected in S27's rights to healthcare, food and water, but additionally extends the scope towards aesthetic and cultural values and conceptions of the environment. Given the context in which the right operates, where South Africa has both a large impoverished population as well as historic tribal traditions which relate intimately to the environment for their religious expression, these facets of the definition of environment is particularly important.[56] This conception of 'environment' was confirmed in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs,* where

[53] South African Constitution, Bill of Rights, Section 24.
[54] National Environmental Management Act [No. 107 of 1998]
[55] NEMA 107 of 1998, Section 1(a).
[56] Mirja Trilsch, "What's the use of socio-economic rights in a constitution? – Taking a look at the South African experience' (2009) 42(4) Law and Politics in Africa, Asia and Latin America https://www.jstor.org/stable/43239540 accessed 28 June 2023.

it was held that the composite environmental right must include social and cultural dimensions in order to retain its balance.[57] Additionally, this view is consistent with indigenous legal systems, which one commentator has praised as "shifting individual and collective perceptions of nature, as something with integrity and value" leading to more "thoughtful decisions" regarding the impact on our natural environment.[58] Furthermore, the interrelationship between the environment and the human population is reflective of the interdependency of human rights on the protection of the environment, a factor identified in Irish courts in *Fingal County Council.*[59]

The Section 24 environmental right can be divided into two parts: negative and positive rights. The negative right is contained in S24(a) which creates a fundamental right to an environment which is **not** harmful to health or well-being.[60] The negative phrasing implies a minimum standard of protection which each member of the public can expect, but does not enshrine a limitless positive right.[61] Nonetheless, this phrasing is significant as it demonstrates the potential of the right to extend rights to life and bodily integrity – it specifies the distinctions which can be made between general violations of rights to life and those which take on a different character when related to the environmental right. Brooks suggests that this is the fundamental purpose of the right: "to frame the description of a pollution event in terms of a public assault upon an individual's substantive right to life and health."[62] In this way, the negative phrasing of the right not only extends the right to life by covering broader circumstances, but allows for more specific claims to be advanced by litigants and therefore the acquisition of remedies tailored to the instances where negative environmental effects can be linked to a particular activity. It additionally enables litigants to assert rights where they may have been prevented if solely relying on the right to life, by recognising the unique infringements which environmental degradation may lead to.

[57] *BP Southern Africa (Pty) Limited v Mec for Agriculture, Conservation, Environment & Land Affairs* (03/16337) [2004] ZAGPHC 18 (31 March 2004).
[58] Carmen G. Gonzalez, "Environmental Justice, Human Rights, and the Global South' (2015) 13(1) Santa Clara Journal of International Law 151.
[59] *Friends of the Irish Environment CLG v Fingal County Council.*
[60] South African Constitution, Bill of Rights, Section 24(a).
[61] Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (5th edn, Juta Law 2005) 523.
[62] Richard Brooks, "A Constitutional Right to a Healthful Environment,' (1992) 16 Vr L. Rev, 1063 1109.

The right contained in Section 24(a) also refers to both **health** and **well-being**.[63] The World Health Organisation defines 'health' as including "being in a state of complete physical, mental and social well-being, and not merely the absence of disease."[64] Given the inclusion of well-being, it may safely be said that this portion of language refers primarily to the interaction between the environment and physical or mental health. This is demonstrated succinctly through a comparison to poverty – there is a clear link between those living in poverty, the state of the environment and their overall health.[65] A UN Report from 2007 found that: "Poor people live in unhealthy environments. Health risks arise from poor sanitation, lack of clean water, overcrowded and poorly ventilated living and working environments and from air and industrial pollution."[66] Due to the aforementioned factors, poverty and its links to an unhealthy environment also lead to an increased lack of resistance to disease. This shows the direct connection between the environment and health, but additionally the substantial effect the state of the environment can have on the realisation of other fundamental rights, including food and water, sanitation and housing – a further example of the interdependency of environmental rights and the enjoyment of human rights.[67] Moreso, health is particularly relevant to the State's positive obligations in that many of the negative health consequences of environmental degradation are within the State's ambit of governance.[68]

The inclusion of well-being is disputed as being more vague and undefined. Du Plessis suggests that it provides for environmental protection where there are no evident health risks, but may cause harm in an actualised manner, such as the spiritual and psychological

[63] There is an important passage on the right in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 (5) SA 512 (T) (28 March 2006). The Court states: "Section 24…contains two components. Section 24(a) entrenches the fundamental right to an environment not harmful to health or well-being, whereas s 24(b) is more in the nature of a directive principle, having the character of a so-called second generation [or socio-economic] right imposing a constitutional imperative on the State to secure the environmental rights by reasonable legislation and other measures. Despite its aspirational form, or perhaps because of it, s 24(b) gives content to the entrenched right envisaged [section 24(a)], by specifically identifying the objects of regulation, namely the prevention of pollution and environmental degradation; the promotion of conservation; and the securing of ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."
[64] World Health Organisation (WHO) (1946). Preamble.
[65] Anél Du Plessis, "South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty? (2011) 27 South African Journal on Human Rights 279.
[66] 'UN Population Fund State of the World Population Report' (2007) <www.unfpa.org/swp/> 16.
[67] As expressed by the constitutional principle of the interdependency of rights, which requires rights to be interpreted in a manner whereby they complement each other.
[68] Du Plessis, "South Africa's Constitutional Environmental Right" 3.

conceptions of the environment. The commentator further suggested that 'well-being' has an intimate relationship with the constitutional principle of human dignity, in terms of environmental identity, the economic dimensions relating to security and safety, and the idea of environmental integrity.[69] The well-being factor therefore has the potential to make the environmental right exceptionally broad and cover a range of environmental-wrongs. It is more so important in that it extends the right beyond simply health – it recognises the complex relationship between individuals and their environment and allows for protection of the environment where it affects their ability to be content within their surroundings. It is additionally in line with international findings on the importance of well-being and environmental health; the UNEP and IISD have suggested ten factors relating to the environment which improve well-being including: nourishment, health, cleanliness and hygiene of housing, clean air and lack of pollution, and the ability to make use of natural resources in spiritual and religious practices.[70] In this way, well-being is an important inclusion as it provides for instances where environmental wrongs may not negatively impact health, but does damage other aspects of the person's life and livelihood. It is a recognition that to live healthily is not only the acquisition of a baseline lack of disease but encompasses a wealth of other factors, such as religious expression, cultural beliefs and practices.

The State's positive obligations in terms of the environment are found in Section 24(b)(i) – (iii), which form the second part of the constitutional environmental right. The core of S24(b) is the right to have the environment protected by the state and the mechanisms by which the protection should be accomplished. This section also details the specific objectives which the government must attain in respect of the environmental right, those of prevention of pollution, conservation and sustainable development.[71] Underscoring these objectives is the concept of intergenerational equity – in which the present government and individual citizens are regarded as holding the environment on trust for future generations. They must therefore, preserve the environment and its resources so that each following generation may enjoy them. This concept was applied in *BP Southern Africa,* where the Court found that the refusal to grant authorisation for a new filling station based on economic concerns was constitutional,

[69] Ibid.
[70] UN Environmental Program (UNEP) and the International Institute for Sustainable Development (IISD) Report 'Exploring the Links: Human Well-being; Poverty and Ecosystem Services' (2004) < https://www.iisd.org/system/files/publications/economics_exploring_the_links.pdf>.
[71] South African Constitution, Section 24(b).

as socio-economic dimensions must be taken into account with environmental responsibility. The Court further characterized the relationship between environmental rights and socio-economic facets in:

> "The balancing of environmental interests with justifiable economic and social development is to be conceptualized well beyond the interests of the present living generation. This must be correct since S24(b) requires the environment to be protected for the benefit of 'present and future generations'."[72]

There is therefore, a clear connection between the balancing of environmental and socio-economic concerns within the jurisdiction of the S24(b) right, which is considered through the lens of intergenerational equity. Not only are interests weighed up in terms of categorical concern, but additionally through the consequences of the impugned action on generations to come. There is a further link between intergenerational equity and environmental integrity, discussed in *Hichange Investments (Pty) Ltd v. Cape Produce Company and Others,* in which it was identified as "a sense that we ought to utilize the environment in a morally responsible, considered and ethical manner."[73] In this way, intergenerational equity becomes the way in which we measure the effects of environmental damage in terms of whether they constitute a violation of the environmental right for both the present and future generations.

## *Analysis of Sustaining the Wild Coast NPC and Others v Minister for Mineral Resources and Energy*

It would be beneficial to stop here and examine a recent case in which the above discussed aspects were engaged before proceeding to analyse procedural rules which advance climate litigation: that is the *Sustaining the Wild Coast NPC and Others v Minister for Mineral Resources and Energy and Others* case.[74] The case concerned the granting of an exploration right to Impact Africa (3rd respondent) which was subsequently partially acquired by Shell, in

[72] *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs* (03/16337) [2004] ZAGPHC 18 (31 March 2004).
[73] *Hichange Investments (Pty) Ltd v. Cape Produce Company and Others* JDR 0040 (E) 1050/2001.
[74] *Sustaining the Wild Coast NPC and Others v Minister for Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55.

order to perform a seismic survey on the South-east coast of South Africa. The applicants, which consisted of various environmental activists and affected communities, applied for an interdict on the grounds that the granting of the right was procedurally unfair and failed to take into account relevant considerations (including those of environmental impact and cultural infringement). On the grounds of procedural unfairness, the applicants alleged that the respondents had failed to engage in meaningful consultation with affected communities. Consultations were done with monarchs of the communities and notice was given in English and Afrikaans, rather than the dominant spoken language of the affected region, Xhosa. The Court sided with the applicants and quashed the exploration right on this ground alone, holding that meaningful consultation is not another "box to check" but rather a substantive, two-way process aimed at achieving democratic consensus. Moreover, the Court criticised the respondents choice to only consult the monarchs, stating that treating them as authorised representatives is "a thing of the past which finds no space in a constitutional democracy."[75] The significance of this portion of the judgement lies in its undeniable similarities to *Friends of the Irish Environment v the Government of Ireland* – although the Irish applicants succeeded due to the impermissible vagueness of the Plan, both cases emphasise the importance of public consultation within the unique cultural circumstances, as well as its intimate relation to a functioning democracy. Where they differ however, is in regards to environmental arguments. While the Irish applicants were dismissed out of hand due to lack of standing, the present case succeeded on their second ground.

The second ground concerned the failure to take into account relevant considerations. The applicants alleged that anticipated harm of the exploration right was not considered – to which the Court agreed and stated that the precautionary principle should have applied in circumstances of disputed climate evidence.[76] Secondly, the Court agreed that the respondents had failed to mitigate the harm done by the proposed seismic survey to the affected communities' religious beliefs. In doing so, the Court referred to the importance of intergenerational equity as contained in the S24 environmental right and its relation to the religious beliefs of the communities.[77] The Court also approved remarks from Bloem J in:

[75] Ibid.
[76] (3491/2021) [2022] ZAECMKHC 55.
[77] The affected communities held the religious belief that their ancestors were lain to rest in the ocean and the exploration right would disrupt their peace.

> "Under the Constitution, customary practices and beliefs must be respected and where the conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment."[78]

The acknowledgement of the relationship between religious practices and the environment has not only demonstrated constitutional respect for said practices, but emphasised the significance environmental harm can have on aspects of individual's lives beyond simply their physical health. It is in line with the environmental right's protection of well-being and shows the breadth of which the right encompasses. Further, the Court concurred with the applicant's submissions on the impact of the exploration right on climate change and its non-compliance with South Africa's international commitments to reduce further harmful activities to the environment. Citing intergenerational equity again, the Court found the respondents to be contrary to the Integrated Coastal Management Act 24 of 2008 and concluded that had they considered the requirements under said Act, they "may very well have concluded that the proposed exploration right was neither needed nor desirable."[79] The case is akin to that of its Irish equivalent in that although decided on much narrower statutory and administrative grounds, it sheds light on the status of the environmental right in both jurisdictions. In *Friends of the Irish Environment*, the Court identified the main issues facing the recognition of the right to a healthy environment, and the current restrictiveness of standing rules. In the present case, the Court quashed the right on administrative grounds, which emphasised the importance of public consultation and its place within democracy. Moreover, it demonstrated the key role that Courts can play in expanding upon the environmental right to affirm its cultural and religious dimensions, as well its willingness to consider climate change concerns in the face of economic development.

Reasonableness Review and Standing in South African Environmental Jurisprudence

[78] *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Others* (3491/2021) [2021] ZARCGHC 118, at par. 32.
[79] (3491/2021) [2022] ZAECMKHC 55 at par. 125.

The positive duties imposed upon the State are to be achieved through "reasonable legislative and other measures". The inclusion of 'other measures' implies that the achievement of said duties is to be done through a combined effort of the three spheres of government. This was reaffirmed by Yacoob J in *Grootboom* where he states:

> "The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive."[80]

Yacoob J goes further to hold that any legislation or executive action must be reasonable in both formulation and implementation.[81] This gives rise to the reasonableness review test, a standard of review which allows the courts to assess government action and adjudicate claims of infringement of fundamental rights, where positive duties exist. This is significant given the absence of the 'progressive realisation' clause within the environmental right. The lack of the qualifying phrase implies that the environmental right has both a 'minimum core' content which behaves as a baseline, rather than a goal to be worked towards progressively, and that resource constraints are not an excuse for any infringements of the right nor non-achievement of the imposed positive duties. Without going into the substantive content of the test, it has been praised as a flexible tool which the courts use to scrutinize governmental conduct, as well as a standard by which legislation can be devised in accordance with the Constitution.[82] Liebenberg argues that it derives its validity due to its similarities to the general limitations clause contained in Section 36 of the Constitution, which is used to assess negative rights, as well as being inspired by various constitutional principles, such as dignity and social justice.[83] The connection to constitutional principles means that 'reasonable' actually means

[80] *Government of the Republic of South Africa v Grootboom* (CCT11/00) [2000] ZACC 19.
[81] Ibid.
[82] Du Plessis, "South Africa's Constitutional Environmental Right" 24.

[83] Sandra Liebenberg, "South Africa's evolving jurisprudence on socio-economic rights,' (Socio-Economic Rights Project, University of the Western Cape 2002) http://hdl.handle.net/10566/4890.

*constitutionally reasonable*. However, the test has been criticised on a number of grounds, namely that it fails to define the line at which courts can intervene in socio-economic policy without disrupting the separation of powers and that contrary to previous assertions, it has been rejected that the environmental right implies a minimum standard of achievement. It therefore does not require the government to justify infringements based on resource constraints.[84] This is particularly detrimental to the S24 right, as it has not allowed the courts to flesh out the substantive content of the right, leaving much of its application undeveloped and inapplicable. This has led commentators to regard the right as the 'silent right' – both in terms of content as well as number of cases heard.[85]

It would be remiss to not address standing within fundamental environmental rights litigation in South Africa, particularly since standing is one of the biggest obstacles facing climate litigants in Ireland. The rules regarding standing are contained in Section 38 of the Constitution, which was interpreted in *Ferreira v Levin NO.*[86] Chaskalson P held that effective enforcement of the Constitution, in particular the provisions of the Bill of Rights, required broader standing rules, despite acknowledging the risk of entertaining hypothetical arguments. He states:

> "It is in my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled."[87]

This approach is reflective of the historical circumstances in which the 1996 Constitution was created. However this approach is not without its limitations. Firstly, the broad approach only applies to cases where an infringement of a Bill of Rights provision (right) is alleged. In these circumstances, S38 would apply directly to give standing.[88] This provides a safeguard against

[84] Ibid.
[85] Ruth Krüger, "The Silent Right: Environmental Rights in the Constitutional Court of South Africa' (2019) 9 Constitutional Court Review 473, 475.
[86] *Ferreira v Levin NO* [1995] ZACC 13.
[87] Ibid.
[88] Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (5th edn, Juta Law 2005) 85.

hypotheticals, whilst still allowing for serious constitutional cases to be heard. Secondly, there is a plethora of rules which are used to determine whether the applicant has sufficient interest. An example of this can be found in the class action *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape,* where it was held that in order for a person acting behalf of a group or class to obtain standing, they must identify all class members and show that although they are not individually bound, each member benefits from the outcome of the judgement.[89] There are further rules governing each type of litigation: public interest litigants must demonstrate not only their own interest, but that the public is sufficiently interested in the result as well.[90] Additionally, the *Ferreira* categories dictate that the nature of the relief sought, the extent of the remedy in terms of people affected and the avoidance of constitutional issues principle, are all considerations which must be taken into account. That is to say, you cannot simply come to court for fun. There must be imminent harm to the right and the applicant must demonstrate that all other forms of relief were exhausted. Underlining all these requirements as set out by S38 of the Constitution and caselaw addressing standing, is the doctrines of ripeness and mootness, which ensure that not only is the issue fit to be tried, but also it is a prevalent and operating issue at the time of litigation.[91] The point of this is to demonstrate that there is a method for providing standing, which protects the sanctity of the Court's limited time, but does not narrow it to an unreasonable and unattainable set of factual circumstances. It appears to me that Irish climate litigants will not have the opportunity to argue for the right to a healthy environment if the existing standing rules are not relaxed or adjusted to allow for a wider range of litigants beyond those who can establish personal infringements. Thus, the South African model of standing presents a balanced approach to the most important cases, those which concern fundamental rights, that allows for access to the courts with the necessary safeguards to prevent frivolous usage.

## A Comparison: South Africa as a Model for Ireland

The construction of the right to a healthy environment in the South African Constitution can serve as a model for the potential Irish derivation for several reasons. Firstly, the environment is defined within the right as anthropocentric, protecting not only the natural environment,

[89] *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (10) BCLR 1039 (SCA).
[90] Currie and De Waal, "The Bill of Rights Handbook' 85.
[91] Ibid.

but the complex interrelationship between humans and their surroundings, the socio-economic dimensions, and the cultural and spiritual implications. This encompassing definition allows for broader protection and recognises that the interactions between humans and their environment are those of a connected nature, which is reflective of the growing admission of the dependency of other human rights on the state of the environment. On the other hand, the anthropocentric view has been criticised as only valuing the environment for the benefits it brings to humans, rather than finding value in the environment alone.[92] It could be argued that 'rights to nature' may be more sustainable long-term and less dependent on the human relation. Having said that, the right is balanced between positive and negative duties – which complement each other. Each aspect of the Section 24 right would allow a minimum level of protection of the environment and human life, although it should be noted that South African courts have rejected the 'minimum core' approach, as well as allowing resource constraints to dictate government' environmental policy despite the Constitution's clear intention that resources should not be considered an acceptable hindrance to the achievement of the environmental right. Therefore, the constitutional construction of the environmental right is limited by its practical application within the courts, which have to balance those rights with realistic fiscal and social concerns. The inclusion of both 'health' and 'well-being' protects both physical and mental health, and extends the protections beyond those of the right to life or bodily integrity, by appreciating an actualized form of fundamental rights, in that it pays regard to the importance of spiritual and psychological ease. Further, the positive duties imposed upon the State are defined specifically and the method by which they are to be achieved is set out explicitly. This addresses the fundamental concerns expressed by Clarke CJ, which is that the right to a healthy environment is impermissibly vague or superfluous. By confining the positive duties to a narrow set of obligations, the right gains a concrete shape in its parameters and applicability. This is even more the case when considering the requirement to take into account socio-economic considerations, as shown through *BP Southern Africa.* It additionally sets the boundaries for the right's dominion in relation to the previously mentioned rights to life and bodily integrity. Finally, the negative and positive duties are underscored by the concept of intergenerational equity which provides that all environmental activities (whether it be legislation or litigation) be considered with the

[92] Carmen G. Gonzalez, "Environmental Justice, Human Rights, and the Global South' (2015) 13(1) Santa Clara Journal of International Law 151.

generations to come in mind. Some have argued that the inclusion of 'future generations' may give rise to litigants obtaining standing to argue on behalf of future citizens, which would extend the right in both its fundamental and procedural protections.[93]

Legal procedure in South African Constitutional jurisprudence also sheds light on different mechanisms which could be used to allow climate litigants access to courts, without sacrificing standards devised to keep hypothetical lawsuits at bay. The reasonableness review test serves as a standard of review akin to that of the Irish proportionality test – this suggests that the litigation of a constitutional right to the environment would fit the Irish legal and procedural mould. The test is additionally flexible, and takes into regard economic and social concerns. Above all however, the courts have demonstrated that, while there are in instances in which socio-economic and environmental concerns will need to be balanced against each other, the protections of the environmental right often take precedence and have the same strength as other fundamental human rights, if not more due to their characteristic dependency. Beyond the construction of the S24 environmental right, the South African approach to standing is recommendable for application in the Irish jurisdiction due to its careful creation which allows for climate litigants to obtain standing despite the complex issues surrounding causation and interest, while still protecting the courts from hypothetical arguments. This is done through the requirement of interest, the consideration of the nature of the rights infringed, and the use of the doctrines of ripeness and mootness. The approach is underlined by the deep commitment to the enforcement of fundamental rights, not unlike that of the Irish judiciary.

## Conclusion

After the shocking blow delivered by the Supreme Court to the status of the right to a healthy environment in Ireland, it seemed that there was little hope for future climate litigants, despite their narrow statutory win which resulted in the quashing of the inadequate Climate Plan. But the tide is turning, with international pressure from the recent UN recognition of the right and its firm stance on the importance of the environment for the realisation of other human rights,

[93] Louis J. Kotzé, 'Human Rights and the Environment through an Environmental Constitutionalism Lens' in Anna Grear and Louis J. Kotzé (eds), Research Handbook on Human Rights and the Environment (Edward Elgar Publishing 2015).

as well as the internal pressure from the Citizen's Assembly Recommendations on Biodiversity, which advocated for amongst a number of things, the recognition of the right to a healthy environment.[94] Although not bound by the recommendations, the report is submitted to the Oireachtas for further debate and has the potential to begin the long road to referendum on a constitutional right to the environment. Therefore, the right, although ambitious, could be implemented in Ireland in a manner which addresses the concerns expressed by Clarke CJ in *Friends of the Irish Environment v the Government of Ireland.* This essay has demonstrated that it can be done by adopting an approach in line with the South African' Section 24 environmental right. There are several key aspects of its construction which are recommended for adoption – the anthropocentric approach as a starting point for how we regard the human-environment connection, the breadth of protection stemming from the inclusion of both 'health' and 'well-being' which extends both rights to life and bodily integrity, and the future-focus of the right as indicated by the incorporation of intergenerational equity, which reflects the very nature of climate change. Moreover, legal procedure needs to adapt to allow climate litigants access to the court's ear, most importantly rules around locus standi and justiciability, whose narrow construction is unsuitable for the nature of both climate change, and climate litigation. It should be noted that many of the aspects discussed above were identified by the Citizen's Assembly in their recommendation on biodiversity – of which the expression of participatory democracy supported even more radical changes, such as the inclusion of substantive and procedural rights to nature, and a call for more public participation in environmental matters. It would be difficult to speculate whether or not these recommendations will come to fruition through referendum or application of the derived rights doctrine, but their existence is a positive step forwards in the long struggle for the constitutional right to a healthy environment.

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