16

Courts, Climate Action, and Human Rights

Lessons from the *Friends of the Irish Environment* v. *Ireland Case*

VICTORIA ADELMANT, PHILIP ALSTON, AND MATTHEW BLAINEY

In a July 2020 decision said to have set "a precedent for courts around the world," the Irish Supreme Court invalidated the government's climate strategy.[1] *Friends of the Irish Environment* v. *Government of Ireland & Ors* (hereafter *FIE*) is indeed a landmark decision: though Irish courts are particularly cautious and deferential to the executive, litigants succeeded in convincing the Supreme Court to quash the government's inadequate climate policy.

The 2015 Climate Action and Low Carbon Development Act, which established Ireland's commitment to transitioning to a low-carbon and environmentally sustainable economy by 2050, required the government to publish a National Mitigation Plan specifying the measures to be taken to achieve this objective. The government's Plan, published in 2017, was wholly inadequate. It outlined vague measures, deferred action in the hope that "future technologies" would come to the rescue and, crucially, envisaged increased greenhouse gas emissions.[2] Ireland's Climate Change Advisory Council assessed that the measures were "unlikely to deliver" the necessary transition.[3] Friends of the Irish Environment (FIE), a prominent civil society group, sought judicial review of the Plan, arguing that it was *ultra vires* and violated fundamental rights enshrined in the Constitution and the European Convention on Human Rights (ECHR), including the rights to life, bodily integrity, and a healthy environment.

[1] David Boyd, quoted in Brendan Montague, "Historic win for Climate Case Ireland," *The Ecologist*, August 5, 2020, <https://theecologist.org/2020/aug/05/historic-win-climate-case-ireland>.

[2] See National Mitigation Plan, Department of Communications, Climate Action & Environment, July 2017, <https://static.rasset.ie/documents/news/national-mitigation-plan-2017.pdf>.

[3] See Annual Review 2019, Climate Change Advisory Council.

Though the High Court had found the Plan to be *intra vires* and refused to engage with the fundamental rights arguments on account of the "considerable discretion" that the government enjoyed in this "policy" area, the Supreme Court reversed this decision less than a year later.[4] Noting that the Act required the Plan to "specify" measures to achieve the low-carbon transition, the court found that the Plan did not give a sufficiently "realistic level of detail." The Plan was found to be *ultra vires* and was quashed.[5]

But from a rights perspective, the judgment was actually a major setback. FIE had hoped for an authoritative judicial declaration that the Irish government had a duty, arising from international human rights and constitutional rights law, to do more to reduce greenhouse gas emissions. The litigants had taken some inspiration from *Urgenda* and indeed invoked the Dutch judgment repeatedly in their submissions. But the Supreme Court's response on this score was deeply disappointing. The decision was based on a narrow question of statutory interpretation, and the human rights arguments were not merely dismissed but belittled. FIE was not granted standing to pursue any rights-based claims, and the court made unhelpful and gratuitous additional comments denying that a right to a healthy environment could be derived from the Constitution.[6]

This was a climate case that failed to obtain a favorable ruling on human rights claims. But despite and because of these disappointments, *FIE* nonetheless holds valuable lessons for litigants. The Supreme Court's approaches to the issues of standing, deference, regional human rights jurisprudence, the right to the environment, and the choice between multiple grounds for claims may offer important insights into how to approach such issues in the future. This case highlights vital questions which litigants need to confront.

16.1 DEFERENCE AND HUMAN RIGHTS ARGUMENTS

FIE was the first and highest-profile case concerning the general adequacy of the Irish government's climate action to go through the courts. Against the background of Irish courts' conservatism, the long-held perception that climate change is "public policy more than [a] legal issue," and the High Court

[4] See *Friends of the Irish Environment* v. *Ireland* [2019] IEHC 747, 748 (H. Ct.) (Ir.) (hereinafter "*FIE* High Court decision [2019]")

[5] See *Friends of the Irish Environment CLG* v. *Government of Ireland, Ireland and the Attorney General* [2020] IESC 49, §6.45 (S.C.) (Ir.) (hereinafter "*FIE* Supreme Court decision [2020]").

[6] For a more detailed critique, see 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.

judge's characterization of the "significant policy content" of FIE's case, it was unclear how the Supreme Court would respond to the questions of justiciability and discretion.[7] The government had successfully convinced the High Court that the Plan's creation was an "exercise of discretion" in "the pursuit of policy," and the judge agreed that it was "not part of the function of the court to second-guess the opinion of Government on such issues."[8] The government argued again in the Supreme Court that the Plan "simply represents policy" and was therefore not amenable to judicial review and that the court would assume a policy-making role if it accepted FIE's arguments.[9]

Counsel for FIE accordingly took a cautious approach, emphasizing that the government has wide discretion as to how emissions are to be reduced. They took care to distinguish their demands from those in *Urgenda*: they were not asking the court to prescribe the content of a new Plan or to order specific emission reductions. And, vitally, they insisted that they were asking a legal question.

The court took seriously the government's claims that climate litigation invites judicial activism. It expressed hesitance in relation to FIE's rights arguments and the separation of powers, noting, "there clearly is a risk of the distinction between rights based litigation, on the one hand, and political or policy issues, on the other becoming blurred in cases such as this."[10] But it nonetheless rejected the government's non-justiciability arguments.

This confirmed a "legal transition" away from an understanding of climate change as being solely a matter for politics, with the Irish Supreme Court joining many other courts around the world in refusing to treat climate action as a "no-go area" in which courts have no role to play.[11] That the case concerned the complex policy issue of climate mitigation did not change the fact that "there is legislation." The Act stipulated that the Plan needed to fulfil certain requirements, and the question of whether the Plan complied with those requirements was clearly "a matter of law." The court pointed specifically to the statute's provision that the Plan must "specify" how Ireland's

[7] Jacqueline Peel and Hari Osofsky, *Climate Change Litigation* (Cambridge: Cambridge University Press, 2015), p. 316. For a more detailed analysis of the High Court's judgment, see Philip Alston, Victoria Adelmant and Matthew Blainey "Litigating Climate Change in Ireland" (2020) NYU School of Law, Public Law Research Paper No. 20-19.

[8] FIE High Court decision (2019), above note 4, at 112, 92, and 97 (H. Ct.) (Ir.)

[9] See FIE Supreme Court decision (2020), above note 5 at §6.4 (S.C.) (Ir.).

[10] Ibid. §7.12.

[11] See Laura Burgers, "Should Judges Make Climate Change Law?" (2020) 9 *Transnational Environmental Law* 55; see also *Thomson* v. *Minister for Climate Change Issues* [2017] NZHC 733 (H. Ct.) (N.Z.).

low-carbon transition would be achieved, stating that this specificity requirement was "clearly justiciable."[12]

But, in focusing particularly on this provision, the court effectively took a shortcut. It answered the justiciability question with reference to one precise statutory requirement; it then considered the *vires* issue first and, upon finding the Plan to be *ultra vires* on the basis of that provision because it did not "specify" measures in sufficient detail, stated that "any consideration of the further rights based issues which arise on this appeal would be purely theoretical."[13] Many of the difficult questions about fundamental rights and climate change, which had been argued on appeal, were thus sidestepped. FIE had made convincing arguments about causation, noting the real and genuine threat to life and that the Plan increased the risk of such harm. This seemed successful during the hearing: when the government's counsel argued that FIE could not prove that implementing the Plan would cause rights violations, the justices' questions highlighted the government's mischaracterization and simplification of the issue. There was fruitful discussion during the hearing about the relative significance of Ireland's emissions globally; and the justices engaged with temporal complexities in questioning at what point damage would have to occur before rights could be deemed violated. But these questions went unanswered in the judgment.

Sidestepping FIE's rights arguments in this way also served to sanitize the issue. The case started from the position that both parties accepted the scientific facts that deaths and other risks would arise from increased emissions, and it ended with a judgment centering around the meaning of the word "specify." What the Irish government did wrong, according to the court, was to create a Plan that was not clear enough. It was condemned for failing to enable a reader to understand how the transition objective would be achieved but not for its shameless decision to publish a Plan under which emissions would increase.

The *FIE* case therefore raises vital strategic questions. In more conservative jurisdictions, litigants invoking rights will often be well advised to opt for a "safer" approach by bringing non-rights claims, particularly questions of statutory interpretation, alongside rights claims. Grounding claims in legislation as well as rights provisions will increase the likelihood of more traditionally deferential courts finding inadequate climate policies to be unlawful. Indeed, though there has been a proliferation of rights-based claims in climate

[12] See *FIE* Supreme Court decision (2020), above note 5 at §6.24 & §6.27
[13] Ibid. §9.5.

cases, rights arguments are generally used to "prop up" other claims; very few cases are yet argued solely on a rights basis.[14]

This was visible here: FIE won, but on the basis of a narrow statutory provision, not its rights-based claims. Commenting on the boundaries of claimed rights, Chief Justice Clarke noted that "in an appropriate case, it may well be that constitutional rights might play a role in environmental proceedings" and might "give rise to specific obligations on the part of the State." But these questions were "to be addressed in cases where they truly arise."[15] The court's approach was to start with the question with which it felt more comfortable, decide upon that basis, and deem the rest "purely theoretical." The "trickier" rights arguments could be circumvented in favor of "safer" grounds. It is easier to insist that the court is not infringing on the executive nor breaching the separation of powers when the question concerning climate policy is one of technical statutory interpretation. This was also seen in the case regarding the Heathrow airport expansion in the United Kingdom, which initially raised rights-based claims against the government's policy to permit the building of a third runway but was ultimately decided on the basis of an interpretation of the Planning Act and the Strategic Environmental Assessment Directive.[16]

All of this may suggest that where litigants seek authoritative statements of states' legal duties to reduce greenhouse gas emissions based on fundamental rights provisions, they may need to take a somewhat riskier approach. Bringing a variety of claims based on rights and on statutes may increase the likelihood of findings of justiciability and of illegality. But litigants may need to adopt bolder strategies in bringing cases that only make rights-based claims, in order to prevent courts from sidestepping the rights claims by choosing to decide on the basis of the "easier" grounds.

The *FIE* case holds another important lesson for litigants in this area: it was a glaring reminder of the need for rights-based climate litigation strategies to take a multilevel approach. At first instance, Justice MacGrath had declined to rule on the ECHR claims because the Strasbourg Court had not yet decided a case concerning climate change. As Irish courts were to follow rather than

[14] See Jacqueline Peel and Hari Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7 *Transnational Environmental Law* 37; see also Annelisa Savaresi and Juan Auz, "Climate Change Litigation and Human Rights: Pushing the Boundaries" (2019) 9 *Climate Law* 244.

[15] *FIE* Supreme Court decision (2020), above note 5 at §8.17.

[16] See *R (on the application of Friends of the Earth Ltd and others) v. Heathrow Airport Ltd* [2020] UKSC 52.

anticipate the ECtHR, it was "not for the domestic court to declare rights under the Convention."[17]

Litigants are to be commended for their careful invocation of Strasbourg case law on environmental disasters or pollution within domestic cases challenging climate mitigation policies. But this task is fraught with difficulties. First, the court's environmental jurisprudence has quite consistently afforded a wide margin of appreciation to states.[18] Second, states' failures to take steps to prevent mudslides, or to evacuate an area before releasing water from a reservoir, represent fact patterns quite removed from the polycentricity of climate change.[19] The principles and conceptions of risk and obligation arising from these cases are promising, but their facts may be unhelpful. As the Irish Supreme Court noted, these cases might be understood as "confined to situations where the pollution concerned 'directly and seriously' creates an imminent and immediate risk."[20] Indeed, a Swedish court found that Articles 2 and 8 ECHR were not infringed by the selling of coal power plants because the damage had not yet occurred: the mere "risk of damage" was insufficient.[21] And the Swiss Federal Court dismissed Article 2 and 8 claims in relation to inadequate climate policy by finding no "present" or immediate danger to the plaintiffs; the consequences of climate change would occur only in the future.[22] The Irish Supreme Court justices in *FIE* also questioned the necessary level of proximity between the effects and the Plan, as well as the required degree of imminence of the risk.

The Dutch Supreme Court is, therefore, clearly an outlier in holding that the absence of a clear answer from the ECtHR did not prevent it from providing an opinion on the scope of the state's obligations. The Irish High Court's refusal to preempt Strasbourg is representative of a crucial issue: there is a pressing need for the ECtHR to provide guidance to state parties as to the applicability of Convention rights to climate mitigation measures. Regional

[17] *FIE* High Court decision (2019), above note 4 at §139.

[18] See Sumudu Atapattu, "Climate Change under Regional Human Rights Systems," in Sebastien Duyck et al. (eds.), *Routledge Handbook of Human Rights and Climate Governance* (London: Routledge, 2018), pp. 128–44. See especially *Hatton* v. *United Kingdom*, 37 EHRR 611 (2003).

[19] See *Budayeva* v. *Russia*, 15339/02 Eur. Ct. H.R. at §129 (2008); see also *Kolyadenko* v. *Russia*, App. Nos. 17423/05 *inter alia*, §157 (2012).

[20] *FIE* Supreme Court decision (2020), above note 5 at §5.11.

[21] See *PUSH Sverige, Faltbiologerna and others* v. *The Government of Sweden* [Stockholm District Court] 2017 T 11594-16 (Swed.).

[22] See *Verein KlimaSeniorinnen Schweiz et al v. Federal Department of the Environment, Transport, Energy and Communications (DETEC)* [Federal Administrative Court] May 5, 2020, 1C_37/2019, §5.4 (Switz.).

human rights courts have been at the forefront of developing environmental rights; they must, soon, take up the challenge of climate change.[23] Litigants seeking authoritative statements from domestic courts on the human rights implications of weak climate policy, such as FIE, will benefit hugely from legitimation from the ECtHR.

Litigation in domestic courts must therefore be complemented by efforts within regional and international monitoring mechanisms and courts. These bodies can help to clarify and reinforce the scope of states' rights obligations. Cross-references among human rights bodies – such as the Human Rights Committee's reference in its General Comment on the right to life to the IACtHR's statement that there is an "irrefutable relationship" between the environment and the ability to effectively enjoy human rights – could help bolster states' duties to reduce emissions.[24] Legal strategies that take seriously the need to address regional and international human rights mechanisms can thereby help create an "increasingly coherent . . . body of law" in this area and assist domestic climate litigation.[25]

There is also a need for caution in invoking rights jurisprudence from outside the relevant jurisdiction. Counsel for FIE relied quite extensively on *Urgenda* in making its Convention claims, effectively urging the Irish courts to follow the Dutch courts' approach. But this may, with hindsight, have served to "scare off" this more traditional court, so wary of judicial activism. FIE had worked to distinguish its case from *Urgenda* in relation to the relief sought, in light of likely skepticism from the Irish courts as to the propriety of courts ordering the government to reduce emissions by a particular percentage point. But its reliance on *Urgenda*'s reasoning in relation to its rights claims may have left these claims vulnerable to the government's attack that these rights arguments could not apply within the Irish constitutional order. Irish judges display a preference for looking predominantly to common law systems, and the difference between Irish dualism and Dutch monism also played a role during the hearing. A better approach may have been not to invoke *Urgenda*, instead focusing on convincing the Irish courts on their own terms. Litigants must be prepared to make forceful and convincing arguments as to why courts must not ignore human rights arguments and the urgency of such consideration in the climate change context. Now is the time to be frank: in shying

[23] See Atapattu, "Climate Change under Regional Human Rights Systems," above note 18.

[24] See UN Human Rights Committee, General Comment no. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, at ¶ 62 (2018).

[25] "The Status of Climate Change Litigation: A Global Review'" (2017) UN Environment Programme 26.

away from grappling with such issues, courts are failing to engage with the most pressing rights issue of the century.

16.2 THE RIGHT TO A HEALTHY ENVIRONMENT AND DEVELOPING THE LAW IN CLIMATE CHANGE LITIGATION

As part of its challenge to the Plan on human rights grounds, FIE asserted that the right to a healthy environment should be recognized as a derived right under the Irish constitution. Although the right had previously been recognized in dicta of the High Court,[26] this case presented the first opportunity for the Supreme Court to consider this issue. The Court ultimately concluded that the right did not warrant recognition, primarily on the basis that its content and scope were "impermissibly vague."[27]

This finding may have resulted from the way in which the case was argued. When asked to explain how the right to a healthy environment affected the case, counsel for FIE conceded that it would not add anything beyond the protection offered by the rights to life and bodily integrity.[28] Similarly, when pressed regarding the precise content of the right, counsel did not rely on the extensive body of jurisprudence from jurisdictions that had considered this issue, instead referring to the relationship between human dignity and a healthy environment and suggesting that the right covers much of the same ground as the rights to life and bodily integrity. While this was likely a strategic decision informed by a desire to rely on accepted rights in a historically conservative court, these submissions enabled the court to easily sidestep recognizing the right. In outlining its reasons for refusing to do so, the court observed that "the beginning and end of this argument stems from the acceptance by counsel for FIE that a right to a healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity whose existence is not doubted."[29]

Climate change litigants seeking recognition of the right to a healthy environment must therefore be cognizant of the need to articulate what the right entails and the specific impact that it will have in the case before the court. Jurisprudence of other courts concerning the right will assist in this task, as will the analytical reports regarding states' human rights obligations in

[26] *Merriman* v. *Fingal County Council* [2017] IEHC 695 (H. Ct.) (Ir.).
[27] *FIE* Supreme Court decision (2020), above note 5, §8.11.
[28] Ibid. §8.10.
[29] Ibid.

relation to the environment developed by the UN Special Rapporteur on human rights and the environment.[30]

More broadly, the court's decision regarding the right to a healthy environment raises the issue of legal innovation in climate change litigation. As Fisher and her co-authors have noted, climate change is a unique, polycentric problem that "requires a 'break' in the continuity of existing legal practices and doctrinal 'business as usual,'" particularly for adjudicative processes.[31] In light of this challenge, litigants should not be reluctant to urge courts to innovate and develop the law in response to the threat posed by climate change. Where they do so, they should be ready to acknowledge that they are asking the bench to break new ground rather than work within the confines of existing doctrine. Such an approach will likely be met with strong resistance from judges and opposing parties, each of whom will raise arguments regarding the need for legal certainty and stability that are invariably used to justify adherence to precedent or existing practice.

But these arguments need to be responded to by cogent reasoning by way of rebuttal. To begin with, arguments in favor of legal certainty and stability are inherently grounded in a desire to uphold the rule of law. But the protection of fundamental human rights, the ability to obtain a remedy when harm is suffered, and the need for states to comply with international obligations are arguably equally important.[32] When courts refuse to adapt legal doctrine in response to climate change, the risk of human rights violations increases, those who have suffered harm are left without access to a remedy, and states are permitted to disregard their climate commitments. Taken together, these outcomes seriously undermine the rule of law rather than maintain it, and litigants should not hesitate to draw the attention of judges to the practical consequences of their decisions. Moreover, the role of precedent in fostering legal certainty is often overstated. Both parties to any litigation will present the court with reams of authorities that they claim support their position and will often argue extensively over the correct interpretation of the same precedent, such that the final outcome can be impossible to predict. Litigants should

[30] See, e.g., John Knox and David Boyd, "Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment," UN Doc. A/73/188 (2018).

[31] Elizabeth Fisher et al., "The Legally Disruptive Nature of Climate Change" (2017) 80 *Modern Law Review* 174.

[32] See Tom Bingham, *The Rule of Law* (New York: Penguin Books, 2011), pp. 37–110.

therefore be prepared to argue that the proposition that legal certainty is guaranteed by respect for precedent is only a part of the overall picture.[33]

It is also important to recall that respect for precedent is not intended to be absolute. Although the precise test for overruling precedent will vary and can change over time,[34] courts in many jurisdictions are reluctant to follow existing precedent if there has been a change in underlying social conditions.[35] Given that an adequate response to the climate crisis will require societal transformation on a historically unprecedented scale,[36] climate change is arguably a paradigmatic example of an underlying social condition that justifies departure from precedent. In making this argument, litigants can point to cases where courts have developed legal doctrine in response to changing attitudes toward nonmarital relationships and homosexuality[37] or formulated a new test for causation in asbestos litigation.[38] Historical examples of instances where courts played an active role in protecting the environment may assist in persuading courts to take a more active role.[39] Because most human rights–based cases in domestic legal systems will arise in a constitutional context, arguments that suggest that courts should give less weight to constitutional precedents may also be effective.[40]

The Irish court's refusal to recognize the right to a healthy environment is perhaps the most retrogressive aspect of its decision, and it is a clear example of a court failing to take the opportunity to develop legal doctrine in response

[33] See E. W. Thomas, "A Return to Principle in Judicial Reasoning and an Acclamation of Judicial Autonomy" (1993) 23 *Victoria University of Wellington Law Review* 11.

[34] See James Lee, "Fides et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court" (2015) 21 *European Journal of Current Legal Issues*, <https://webjcli.org/index.php/webjcli/article/view/410/521>; see also William Eskridge Jr., "Overruling Statutory Precedents" (1988) 76 *Georgetown Law Journal* 1361; see also Matthew Harding and Ian Malkin, "Overruling in the High Court of Australia in Common Law Cases" (2010) 34 *Melbourne University Law Review* 519.

[35] See James Moore and Robert Oglebay, "The Supreme Court, Stare Decisis, and the Law of the Case" (1943) 21 *Texas Law Review* 514; see also Benjamin Cardozo, *Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 150–52.

[36] See Philip Alston, "Report of the Special Rapporteur on Extreme Poverty and Human Rights," UN Doc. A/HRC/41/39 at ¶7 (2019).

[37] See Michael Willemsen, "Justice Tobriner and the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change" (1977) 29 *Hastings Law Journal* 73.

[38] See Steven Wasserman et al., "Asbestos Litigation in California: Can It Change for the Better?" (2007) 34 *Pepperdine Law Review* 893.

[39] See *Attorney General* v. *Birmingham Corporation* [1858] 4 K&J 528 and *MC Mehta* v. *Union of India* [1998] 6 SC 63, cited in Lord Carnwath, "Judges and the Common Laws of the Environment: At Home and Abroad" (2014) 26 *Journal of Environmental Law* 177.

[40] See Oona Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2001) 86 *Iowa Law Review* 656.

to climate change. The judgment provides a timely reminder of the need for litigants to make arguments that outline why doing so is both necessary and especially appropriate in climate change litigation.

16.3 STANDING IN CLIMATE CHANGE LITIGATION

Contrary to the approach adopted in the High Court, the Supreme Court held that FIE did not enjoy standing to bring rights-based claims, in essence because it is a corporate entity that does not itself enjoy the protection of the rights it sought to assert.[41]

As a preliminary matter, the court's holding highlights the importance of choosing prospective plaintiffs carefully in rights-based climate litigation. Although some prominent environmental NGOs have been able to commence such cases,[42] others have suffered a fate similar to FIE.[43] Environmental organizations contemplating climate litigation should therefore give careful consideration to naming individuals as plaintiffs, particularly if there is any risk that courts will construe the applicable standing rules unfavorably.

Even if an appropriate individual can be found, there is still a risk that standing will be an issue for those seeking to initiate rights-based litigation in common law jurisdictions. This is because public law standing rules tend to require plaintiffs to show that they have suffered a particularized, concrete injury in order to challenge the relevant law or government action. Given those most likely to be affected by climate change have often not yet suffered any particular harm or loss, these rules can prove to be an insurmountable barrier. Litigants might therefore consider arguing in favor of a more progressive approach to standing in climate cases. Several specific arguments can be made.

First, a more liberal standing regime in climate cases will serve to uphold the rule of law by ensuring that those most affected are able to challenge inadequate government action that is almost certain to result in a violation of

[41] See *FIE* Supreme Court decision (2020), above note 5 at §7.22.

[42] See HR 20 december 2019, 41 NJ 2020, m.nt. J.S. (Urgenda/Netherlands) (Neth.) ("Urgenda v. Netherlands"); *Greenpeace Nordic Ass'n* v. *Ministry of Petroleum and Energy* [2018] Case No. 16-166674TVI-OTIR/06.

[43] See "Tout comprendre sur l'audience de l'Affaire du Siècle au tribunal," L'Affaire du Siècle, January 19, 2021, <https://laffairedusiecle.net/tout-comprendre-sur-laudience-de-laffaire-du-siecle-au-tribunal/>.

their rights in the future.[44] In the absence of such a regime, there is a high likelihood that such groups will be left without a remedy until it is too late to be meaningful. As Limon argues, legal disagreements regarding links between global warming and irreparable harm are unlikely to convince "the Inuit of North America who every year see their lands eroding, their houses subsiding, their food sources disappearing."[45] Lord Diplock's famous observation that "it would be a grave lacuna in our system of public law if a pressure group . . . or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped"[46] would likely carry particular weight with a court in this context.

Second, traditional approaches to standing are particularly harmful to those most likely to be affected by climate change, who often lack the time, resources, or expertise necessary to commence litigation.[47] A liberal standing regime would enable NGOs to litigate on behalf of those who are not well placed to do so themselves. These organizations will be better equipped to present relevant arguments to a court and will have more resources and greater access to experts who can provide the necessary expert evidence.

Third, many jurisdictions have already moved toward open standing regimes, particularly in relation to environmental cases. In Canada, rules permit public interest standing,[48] while in the United Kingdom, courts are assumed to have a particular responsibility to develop standing principles that meet the needs of modern society.[49] The Philippines Supreme Court has authorized citizen suits brought by any citizen on behalf of others, and similar approaches have been adopted in Latin America, where both constitutional and statutory provisions allow courts to expand standing in environmental cases to those who cannot prove a direct injury.[50]

[44] See Elizabeth Fisher and Jeremy Kirk, "Still Standing: An Argument for Open Standing in Australia and England" (1997) 71 *Australian Law Journal* 374.

[45] Marc Limon, "Human Rights and Climate Change: Constructing a Case for Political Action" (2009) 33 *Harvard Environmental Law Review* 468.

[46] *R (NFSE)* v. *IRC* [1982] AC 617, at 644.

[47] See Fisher and Kirk, "Still Standing: An Argument for Open Standing in Australia and England," above note 44 at 375.

[48] See Gwendolyn McKee, "Standing on a Spectrum: Third Party Standing in the United States, Canada, and Australia" *Barry Law Review* 16(1) (2011) 129.

[49] See *AXA General Insurance Ltd* v. *HM Advocate* [2012] 1 AC 868.

[50] See Erin Daly and James May, *Global Environmental Constitutionalism* (Cambridge: Cambridge University Press, 2014), p. 131.

Fourth, open standing may improve government decision-making in relation to climate change.[51] If members of the legislature and the executive know that courts will scrutinize their emissions-related decisions, they may be motivated to take more effective action.

Each of these arguments is likely to be met with the familiar response that an open standing regime would be contrary to the separation of powers. But courts can use a number of legal mechanisms to address these concerns, including the political question doctrine,[52] adverse costs orders, and their inherent power to dismiss claims that are vexatious or an abuse of process.[53] They can also develop criteria for assessing the bona fides of NGOs taking advantage of open standing rules, including by evaluating their qualifications and experience and requiring them to file evidence that demonstrates that they have a mandate from those they claim to represent.[54] Moreover, open standing may actually enhance rather than diminish the democratic legitimacy of judicial oversight of legislative and executive action in relation to climate change. Democratic governance is predicated on the notion that people have the right to participate in public life and the way in which society is governed.[55] Granting standing in climate cases can facilitate this process by allowing citizens to participate in important decisions regarding an existential threat to society, thereby increasing the range of inputs into democratic decision-making processes concerning this issue. This is particularly pertinent in the context of modern democracies, as traditional assumptions that legislative bodies are truly representative are undermined by the pervasive influence of lobbyists and the level of dysfunction currently exhibited by many legislatures.[56]

The oft-raised argument that standing rules prevent courts from considering hypothetical legal arguments is also less convincing in the context of climate change. Courts can require parties to file evidence that provides factual underpinnings for their legal arguments and, due to the rise of class action

[51] See Fisher and Kirk, "Still Standing: An Argument for Open Standing in Australia and England," above note 44 at 375.

[52] See Aparna Polavarapu, "Expanding Standing to Develop Democracy: Third-Party Public Interest Standing as a Tool for Emerging Democracies" (2016) 41 *Yale Journal of International Law* 140.

[53] See Matthew Groves, "The Evolution and Reform of Standing in Australian Administrative Law" (2016) 44 *Federal Law Review* 168.

[54] See Peter Cane, "Open Standing and the Role of Courts in a Democratic Society" (1999) 20 *Singapore Law Review* 44.

[55] See Fisher and Kirk, "Still Standing: An Argument for Open Standing in Australia and England," above note 44 at 381.

[56] See Polavarapu, "Expanding Standing," above note 52 at 139.

regimes in many jurisdictions, can draw on a growing body of jurisprudence that analyzes how to make use of common evidence to prove harm to a wider group of people.

Strict standing rules are, in at least some respects, a relic of an earlier era. Climate change challenges the foundations on which these rules are based and necessitates a new and more responsive approach from courts. Litigants in future cases should not hesitate to make arguments that outline why such an approach is appropriate.

16.4 CONCLUSION

FIE is yet another example of a failed attempt to have courts declare inadequate climate strategies a violation of human rights in the way that the *Urgenda* litigants achieved. However, this Irish judgment yields some important lessons. FIE's success in having the Plan quashed is undoubtedly a victory to be celebrated. But the multiple ways in which the Supreme Court's judgment fails to engage, or takes steps backward, with respect to the human rights arguments leave much to be desired. This disappointing result raises questions as to whether litigants should adopt a "safer" approach of pursuing many grounds for their claims; it provides lessons as to how litigants might approach issues such as standing and the right to a healthy environment; it highlights the urgency of making strategic use of regional and international mechanisms in addition to domestic courts for climate cases; and it lays bare the need for litigants to be up front about the necessity of innovation in legal reasoning when it comes to climate change.