CLIMATE BAR
COMHSHAOL

Louise Reilly BL

Louise Reilly is a barrister who specialises in sports law and international arbitration. She represents clients in regulatory matters before domestic and international tribunals. Louise also sits as an arbitrator and is a member of the ICSID Panel of Arbitrators in Washington DC, and the ICC International Court of Arbitration in Paris. Louise was a member of the "Arbitration of Climate Change Related Disputes" Task Force, created by the International Chamber of Commerce in Paris. Louise is a graduate of Trinity College Dublin and Stanford Law School.

Remembering our Place in the Scheme of Things
Duties and Principles Necessary for an Effective Environmental Law[411]

Bartholomew Begley, Charlotte Rose Bishop, Mercedes McGovern & Louise Reilly BL

INTRODUCTION

This paper was drafted as part of an ambitious project undertaken by the Climate Bar Association of the Bar of Ireland to establish a Model Environmental Law. The objective of the project is to make environmental law accessible and enforceable.

Environmental law in Ireland, perhaps more than any other area of the law, is a disparate collection of regulation at domestic, European and international level, which is difficult to understand cohesively, and even more difficult to enforce. Environmental laws have so far proved futile in halting the ecological crisis in which we find ourselves. Designed to, at best, regulate the harm inflicted on the environment, these laws have enabled the development of an economic system that has put people and planet in a perilous state, so much so that we must, with great urgency, change every aspect of how we live our lives. Fundamental to this change is the restoration of humanity's relationship with nature, shifting it from one of exploitation, to one of stewardship and care. Living through Covid lockdowns and restrictions, brought about a new appreciation for our natural world and the need to protect it. This paper and the wider project aim to be part of that change.

This paper focuses on the duties and principles that the authors consider are a necessary part of a modern and effective environmental legal regime. This paper will (I) set out duties and principles, and (II) suggest principles that should be applied to drafting, interpreting, and enforcing environmental legislation.

CONTEXTUAL LENS

This paper advocates that environmental considerations should be a fundamental feature of political considerations, and that environmental protection should be a factor in all policies, programmes, activities and funding decisions of the government. A key piece in advancing environmental protection is education: learning about the environment develops skills, understandings, and attitudes which future generations can implement to protect the environment. During the drafting of this paper, the authors discussed the apparent disconnect between individuals' behaviour and their impact on the environment. One simple example is the fact that more than half of the cars bought in Ireland in 2021 were sports utility vehicles (SUVs),[412] despite the fact that on average, SUVs consume 20 per cent more energy per kilometre than a medium-sized car,[413] and were the second largest cause of the global rise in carbon dioxide emissions over the past decade.[414] The authors believe that education is key in overcoming this disconnect; it also helps us realign ourselves within the natural world and remember our place in the scheme of things.

---

[412] Geraldine Herbert, 'Our growing love affair with the SUV has a toxic side', IRISH INDEPENDENT, Jan. 14, 2022, https://www.independent.ie/entertainment/our-growing-love-affair-with-the-suv-has-a-toxic-side-41237806.html.

[413] Michael le Page, 'People buying SUVs are cancelling out climate gains from electric cars', NEW SCIENTIST, Jan. 21, 2021, https://www.newscientist.com/article/2265449-people-buying-suvs-are-cancelling-out-climate-gains-from-electric-cars/#ixzz7IFPEpMbY.

[414] Oliver Milman, 'How SUVs conquered the world – at the expense of its climate', THE GUARDIAN, Sept. 1, 2020, https://www.theguardian.com/us-news/2020/sep/01/suv-conquered-america-climate-change-emissions.

I. DUTIES AND PRINCIPLES

1. DUTY TO EDUCATE

As outlined above, the authors believe that education is key in effectively addressing the climate crisis.

International Perspective

Obligations and statements to promote environmental and climate change education (E/CC) (also referred to in this document as sustainable development education or ecological education) can be found in numerous international declarations, governmental agreements, and top-down policy guidance. Article 12 of the Paris Agreement commits parties to '*taking measures, as appropriate, to enhance climate change education…*', while Article 3 of the Aarhus Convention imposes a binding obligation on Parties to the Convention to '*promote environmental education and environmental awareness among the public, especially on [environmental procedural rights]*.' The IPCC highlights a range of education options to adapt to as well as mitigate climate change including the integration of climate change education in school curricula.[415] These, as well as numerous other declarations, agreements and guidelines,[416] have informed government-mandated E/CC education programs throughout the world. India, Brazil, Kenya, Philippines, China, Japan, Tanzania, Colombia, Italy and Finland are just some of the countries where policy exists within the federal level that formally embeds environmental education into the primary and/or secondary education system.[417]

In India, environmental education was mandated by the Supreme Court in 1991. The order required mandatory environmental education in formal education to fulfill the fundamental duties of citizens to '*protect and improve the natural environment*,' as set out in India's Constitution.

In Brazil, environmental education is a state policy. The Constitution establishes that environmental education in all levels of education is a citizenship right and a duty of the state.[418] Brazil National Policy for Environmental Education (PNEA), is coordinated by the Ministry of Environment and Ministry of Education. Article 2 states that environmental education must be present in both formal and nonformal education.[419]

---

[415] IPCC 2014, p.27

[416] The UNESCO-UNEP Belgrade Charter of 1976 established the aim of environmental education to be the development of a world population that is aware of and concerned about the environment, o. One that had the skills and motivation to work towards solutions and prevent additional problems. The Tbilisi Declaration of 1977, adopted at the world's first intergovernmental conference on environmental education, elaborated on the objectives of environmental educcuation. Principle 19 of the Stockholm Declaration states that 'Education in environmental matters...is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension.' Article 6 of the UNFCCC, whereby the 197 parties committed to 'the development and implementation of educational and public awareness programmes on climate change and its effects'. Initiatives to promote environmental education include the UNESCO Education for Sustainable Development (ESD) 2030 Framework develops on the aforementioned declarations and agreements by presenting a global and holistic framework that supports countries in developing ESD action in all areas of education and learning. UNESCO aims to make environmental education a core curriculum component in all countries by 2025. The Berlin Declaration on Education for Sustainable Development 2021 calls for urgent action to accelerate sustainability and climate action through education what about commitment

[417] https://www.earthday.org/wp-content/uploads/2020/07/World-Bank-Environmental-and-Climate-Literacy-Final-Report.pdf

[418] https://www.researchgate.net/publication/309128653_Environmental_Education_in_Brazil

[419] https://thegeep.org/learn/countries/brazil

As of 2020, climate change and sustainability education became mandatory across Italian schools as part of civics education. All state schools must dedicate 33 hours per year, almost one hour per school week, to climate change issues. Many traditional subjects, such as geography, mathematics and physics, are studied from the perspective of sustainable development.[420]

The Education (Environment and Sustainable Citizenship) Bill was introduced in the House of Lords, UK in May 2021. It would amend the Education Act 2002 so that the national curriculum includes education on the environment and sustainable citizenship. It would require schools to follow a curriculum that '*instills an ethos and ability to care for oneself, others and the natural environment for present and future generations*'.

Irish Perspective

An overemphasis on STEM in the Irish education system might prepare people for the world of work but not to live together sustainably and in an ethical way.[421] The Irish Youth Assembly on Climate,[422] has recommended '*[m]andatory sustainability education from primary level to the workplace...*' while Ireland's National Strategy on Education for Sustainable Development,[423] has highlighted the need to integrate sustainable development education in the curriculum from pre-school up to senior cycle so as to motivate and empower students to take action for a more sustainable future.

The redevelopment of the junior cycle programme to include themes of sustainability and climate change has faced criticism for its lack of standardised coverage and failure to provide effective teacher training. A further challenge for schools is how to reconcile the benefits of interdisciplinary sustainable development education in a curriculum that consists of separate subjects. Organisations such as Eco-Unesco, Trócaire and An Taisce (Green Schools programme) are currently left to bridge the environmental education gap. A new development in the form of the 'Climate Action Short Course',[424] developed for both students and teachers of the Junior Cycle, provides, perhaps, the key as to how Ireland might improve on its 'ecological literacy'. The 'participatory, active, engaging [and] empowering' approach to e/cc education and its emphasis on critical thinking, place-based education, deep ecology and emotional-thinking,[425] is supported by the research and literature of climate change education.[426]

Why is environmental education important? How might it/legislation look?

Climate change education literature suggests that climate change and environmental education currently prioritises knowledge acquisition (i.e., helping students understand the science of

[420] https://www.capstan.be/confronting-the-climate-crisis-one-more-21st-century-skill-for-students-to-learn/ and National Reforms in School Education | Eurydice (europa.eu)

[421] Lack of critical thinking in schools and society a concern - Higgins (irishtimes.com)

[422] Youth Assembly on Climate takes over Dáil Chamber for day of debate – 15 Nov 2019, 19.19 – Houses of the Oireachtas

[423] 2014-2020

[424] Short+Course+in+Climate+Action+-+Junior+Cycle+specification(2).pdf (squarespace.com)

[425] The approach brings together influences from different fields of education, and is based on• Holistic learner-centred education, (including starting from students intertwined feelings and thinking, students' life experiences, students participating in decision-making, and cocreating learning and action) • Democratic global citizenship; (involving critical reflection on global issues, democratic participation and informed and meaningful action) and • Place-based education (building students' sense of belonging and connection to place, nature and community through enjoyable outdoor experiences, group experiences and learning in my local community).

[426] The Role of Universities Building an Ecosystem of Climate Change Education (nih.gov)

climate change). Largely unchanged since the 1970s and 1980s, environmental/climate change education assumes that '*environmental problems [can] be adequately addressed through resource conservation and incremental changes to technology and [individual] human behaviour'*.[427] This exclusive focus - on low levels of cognition with a priority on individual action - is simplistic and inadequate in responding to climate change ('*a systemic problem of such scale and complexity')*[428] and environmental issues. Numerous studies have found no relationship between scientific knowledge and pro-environmental behaviour,[429] leading instead to a superficially informed society that is unable to act.[430] Similarly, climate change education that is didactic and siloed into a single subject as a simple add-on to the curriculum has proved unsuccessful in effecting change.

The literature emphasises the importance of going beyond equipping people with the cognitive skills to simply understand climate change.[431] It is not enough to 'green' the existing curriculum.[432] Doing so, facilitates the continuity of the existing system, one that is 'premised on the dominance of a particular subset of humanity at the expense of the wellbeing of all other humans and the wider ecology of the planet'.[433] For knowledge to impact attitudes and behaviours, for it to be transformative and transgressive, climate change/environmental education must go 'deeper'. It must be participatory, interdisciplinary, experiential, creative and emotional. It must focus on systems level change and collective action rather than individual behaviour. A 'whole school approach' rather than a singular climate change/environmental class must be adopted. Andreotti suggests that climate change/environmental education '*requires a shift, not unlike Galileo's'* that decentres ourselves so as to centre the world and recognise the interdependency of all life forms.[434] Fundamental to the facilitation of deeper learning among students is developing the capacity of teachers and schools. Teachers must be trained and supported in advancing pedagogies that foster this 'deeper learning'. The education must be designed to serve the particularities of each jurisdiction, locality and education system or school.

2. ECOCIDE

The authors advocate that the legislature must pass legislation to make ecocide a domestic offence and support the recognition of the crime of ecocide at international level.

The term 'ecocide' is generally understood to mean the mass damage and destruction of nature. Deriving from the Greek word 'oikos' meaning house or home, and 'cide' from Latin, meaning strike down, demolish or kill, it literally translates as 'killing our home'.[435] Ecocide occurs

[427] Jorgenson et al, 2019, p. 160)

[428] The Role of Universities Building an Ecosystem of Climate Change Education (nih.gov)

[429] *Rousell and Cutter-Mackenzie-Knowles 2020, p. 196* in The Role of Universities Building an Ecosystem of Climate Change Education (nih.gov)

[430] The Failure of Environmental Education (and How We Can Fix It) (nih.gov)

[431] (Rousell and Cutter-Mackenzie-Knowles 2020, p. 196

[432] ESD - full paper - pre-print (researchgate.net)

[433] ESD - full paper - pre-print (researchgate.net)

[434] *See* Sharon Todd, ''Landing on Earth:' an educational project for the present. A response to Vanessa Andreotti', Ethics and Education, 2021, Vol. 16, No. 2, 159–163, https://doi.org/10.1080/17449642.2021.1896636

[435] EJOLT, Europe: Eradicate Ecocide (ejolt.org)

where any state, individual or organisation causes or permits 'harm to the natural environment on a massive scale' and, in so doing, breaches 'a duty of care owed to humanity'.[436]

International Perspective

First used to describe the destruction of over one-fifth of Vietnam's forests by US forces during the Vietnam war in the 1970s, academics, legal scholars and activists have since pushed for the criminalisation of ecocide as an international crime, to sit within the Rome Statute of the International Criminal Court.[437]

The Independent Expert Legal Panel for the Definition of Ecocide ('IEP'), convened by the Stop Ecocide campaign, has proposed the following definition for an international crime of ecocide:

> ''Ecocide' means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'.[438]

Making ecocide a crime creates an arrestable offence. Those individuals who are most responsible for decisions and acts that lead to mass environmental harm will be liable to criminal prosecution (by States or, if nation states cannot or will not prosecute, by the ICC, as a court of last resort). The threat of facing criminal procedures (and being considered a war criminal) will act as a deterrent, shifting companies from the 'polluter pays' principle to 'the polluter doesn't pollute'.[439] The ICC has been shown to be largely effective in its deterrence objective, through both the threat of punishment and shame.

A Head of State (or more than one) must now formally propose an ecocide amendment to the Rome Statute. Two thirds of the State Parties to the Rome Statute (currently 82 out of 123) must agree to add the crime of ecocide to the Statute, making it the 5th Crime against Peace. It is enforceable for ratifying states 12 months after they submit their ratification and they must incorporate it into domestic legislation.[440]

Irish Perspective

Ecocide, by its very definition, is a 'supranational crime' that criminalises the most serious violations to the environment. Amending the Rome Statute of the International Criminal Court so as to make ecocide an international crime, while feasible, is a long-term project. In light of the urgency to respond to the crisis, Ireland must pass legislation to make ecocide a domestic offence (while at the same time, pursue the campaign to make ecocide an international crime). Ten countries have already codified ecocide as a crime within their borders. In most cases, the crime of ecocide is set down in the country's penal code and listed as a 'Crime Against Peace'. In creating legislation, we must be incredibly careful not to weaken what ecocide is intended

[436] 44 M. A Gray 'The International Crime of Ecocide' [1996] 26 Cal W Int'l LJ 215, 216

[437] Ecocide Law Alliance, 'Q&A on Ecocide Law'

<https://www.ecocidelawalliance.org/assets/files/Ecocide_Law_Alliance_QA_052021.pdf>

[438] Stop Ecocide, 'Top International Lawyers Unveil Definition of Ecocide'

<https://www.stopecocide.earth/press-releases-summary/top-international-lawyers-unveil-definition-of-ecocide>

[439] The Guardian, 'The Earth is Our Business'

<https://www.theguardian.com/law/2012/jun/04/ecocide-earth-business-extract>

[440] Ecocide Law Alliance, 'Q&A on Ecocide Law'

<https://www.ecocidelawalliance.org/assets/files/Ecocide_Law_Alliance_QA_052021.pdf>

to address. It cannot be used loosely; doing so would mean arriving at a 'perspective so partial that it becomes a barrier to understanding and to action'.

i) The purpose of domestic ecocide legislation

The purpose of creating domestic ecocide legislation is to make it a criminal offence to act in a way which causes severe and either widespread or long-term damage to parts of the environment both in Ireland and abroad. An ecocide law will hold those in a position of superior responsibility (e.g. CEOs of Irish corporations or decision-makers within government) criminally liable for severe environmental damage such as deforestation, ocean damage or pollution of waters.[441] Making ecocide an arrestable offence, acts as a deterrent, shifting perpetrators away from the 'polluter pays' principle (via fines and suing, for which they have often budgeted) towards the 'polluter doesn't pollute'.[442] A duty of care towards the environment will guide companies and decision-makers, rather than a duty to profit.[443]

Language dictates how we see and therefore act in the world. The addition (and removal) of words to a language expands (and reduces) how and what we see. Failure to explicitly name and speak to the crime of mass destruction of nature within our legal arsenal, hampers our ability to fully see and acknowledge the gravity of such an act.[444] Creating ecocide legislation has an expressive function; beyond establishing and enforcing rules, it expands our moral spectrum, establishes a new baseline, helping us discern what is acceptable and unacceptable regarding our relationship with nature. Transforming our relationship with nature and cultivating one of care rather than exploitation, becomes the new norm.[445] It is not unrealistic to predict that this shift will have a butterfly effect, transforming and improving how we engage with and enforce the plentiful and impressive international, European and domestic environmental laws that do already exist (but are weakly applied).[446]

ii) How legislation might look

Legislation that prohibited ecocide in Ireland might be informed by the definition proposed by the IEP. Additionally, it would benefit drafters of a proposed ecocide bill, to look to the UK, Belgium, Mexico and others and their current efforts to legislate for ecocide as a domestic offence. They, in turn, are being guided by the IEP definition. Thus, those who caused harm or risked causing harm to the environment, that was considered severe and either widespread or long-term, would face criminal proceedings.

It is important that ecocide legislation criminalises both 'legal' and 'illegal' acts that lead to ecocide. The ecocide carried out may be illegal: perhaps that of setting fire to our ancient forests. But it might also be legal and carried out under the guise of regulation. Should that act

[441] Ecocide Law Alliance, 'Q&A on Ecocide Law'
<https://www.ecocidelawalliance.org/assets/files/Ecocide_Law_Alliance_QA_052021.pdf>

[442] The Guardian, 'The Earth is Our Business'
<https://www.theguardian.com/law/2012/jun/04/ecocide-earth-business-extract>

[443] Anastacia Greene, 'The campaign to make ecocide an international crime: Quixotic Quest or Moral imperative?'
(2019) 30(1) Fordham Environmental law review,

[444] Thomas McGinn, 'The Expressive Function of Law and the lex imperfecta' <
https://as.vanderbilt.edu/history/docs/McGinn2015ExpressiveFunctionofLaw.pdf>

[445] Rachel Killean, email exchange

[446] National Biodiversity Action Plan 2017-2021
<https://www.npws.ie/sites/default/files/publications/pdf/National%20Biodiversity%20Action%20Plan%20English.pdf>

though cause severe and either widespread or long-term damage to the environment, it is ecocide, regulated or otherwise.[447]

Important too is that legislation would have extraterritorial provisions. It might be the case that an Irish registered company is sourcing their material from, for example, a mine in Columbia that is known to be contributing to the severe destruction of natural and human communities living close to the mine. Legislation prohibiting ecocide would ensure that the CEO of the company could be charged with ecocide.

Finally, Ecocide legislation must be grounded in restorative justice, which is dealt with below.

3. RIGHTS OF NATURE

The authors advocate that nature should have a status and a right to exist independent of its benefits to humans.

The *Dejusticia Case* was a Colombian lawsuit based on the rights of future generations, linking deforestation and climate change.[448] The Colombian Supreme Court's ultimate recognition of the Colombian Amazon as a rights-bearing subject follows a global trend of both judicial and legislative actions granting legal rights to natural elements.[449] Alongside the Amazon and the Atrato river in Colombia, other examples are the Vilcabamba River in Ecuador;[450] the Te Urewera forest and the Whanganui river in New Zealand;[451] and the Ganges and Yamuna rivers in India.[452] In fact, the idea of the 'rights of nature' was first advanced by Christopher Stone in 1972,[453] and has been the subject of academic and legal commentary since.[454] The recognition of nature's legal subjectivity not only enhances environmental protection but also constitutes a potential solution to the issue of legal standing which would be easier to claim without having to prove any specific harm to people.[455]

The *Dejusticia Case* stands as an example of a national court engaging with existing or new legal concepts to promote climate justice from the perspectives of intergenerational and

[447] Kate Mackintosh, '200 Words to Save the Planet'

<https://legal-planet.org/2021/07/13/guest-contributor-kate-mackintosh-200-words-to-save-the-planet-the-crime-of-ec

ocide/?fbclid=IwAR1y5RTYb4xY8Xodi02u-STzdIBFsvHuNCMOIq7PvHKSCb8eWANdsZcbWNo>

[448] Dejusticia, 'The Colombian government has failed to fulfil the Supreme Court's landmark order to protect the Amazon' (Dejusticia, 5 April 2019) https://www.dejusticia.org/en/the- colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect- the-amazon/; ESCR-Net – Caselaw Database, 'STC 4360-2018' https://www.escr-net.org/caselaw/2019/stc-4360-2018; Tigre A M, 'Brazil's First Climate Case to Reach the Supreme Court' (Opinio Juris, 13 October 2020) http://opiniojuris.org/2020/10/13/brazils-first-climate-case-to-reach-the- supreme-court/.

[449] Acosta Alvarado P A, Rivas-Ramirez D, 'A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court' (2018) 30 J. Environ. Law 519.

[450] *Wheeler* et al *v Director de la Procuraduria General del Estado* [2011] Provincial Court of Justice of Loja 11121-2011-0010 [2011].

[451] *See* The Te Urewera Act (Public Act 2014 No 51) and the Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017.

[452] *Mohd Salim v State of Uttarakhand & others* [2014] WPPIL 126/2014 [2014]. These examples are particularly common in places influenced by local indigenous perspectives in light of their distinctive relationship with nature. Calzadilla (n 3) 58; Alvarado, Rivas-Ramirez (n 3) 119-120; Pelizzon (n 7) 38-39.

[453] Christopher Stone, 'Should trees have standing? -Toward Legal Rights for Natural Objects' (1972) 45 S Cal L Rev 450.

[454] Pelizzon A, 'An Intergenerational Ecological Jurisprudence: The Supreme Court of Colombia and the Rights of the Amazon Rainforest' (2020) 2 Law, Tech & Hum 33.

[455] *Sierra Club v Morton* [1972] 405 US 727, Justice Douglas dissenting opinion.

ecological equity, but also of the recognition of a free-standing right held by an element of the natural world itself in its own right.[456]

International Perspective

Almost three quarters of States' constitutions around the world provide for the protection of nature in some fashion. [457] This may be through committing to environmental stewardship or enabling procedural environmental rights.[458] These provisions may, however, participate in the traditional 'environmental law' discourse that renders the world as property thus suiting the needs of market and state. Imbuing nature with its own rights, on the other hand, reflects a paradigm shift, whereby an ecocentric approach is adopted.[459] The concept of the rights of nature - or at least elements of the concept - have found their way into instruments such as the 1982 UN Charter for the Rights of Nature that declared rights for all living things.[460] This was affirmed in the Stockholm Convention, which declares that 'man is both creature and moulder of his environment.'[461] Such inclusions give strength to Oliver Houck's assertion that nature rights 'are already boarding the ark' at an international level.[462] They lay a foundation for the development parameters of rights-holders to include non-human entities.[463]

New Zealand, Bolivia and Ecuador all demonstrate how the rights of nature could be formulated and exercised.

The New Zealand *Te Urewera* Act (2014)[464] and the *Whanganui* River Claims Settlement Bill (2017)[465] are informed by indigenous philosophies and recognise nature's intrinsic worth. Native peoples recognise an equitable relationship between nature and humans reflected in the indigenous saying '*Ko au te awa, do to awa ko au*' which translates as 'I am the river and the river is me'.[466] The concept of 'legal personhood' is expanded to include parts of nature. Te Urewera land has the rights, powers, obligations as well as liabilities of a legal person. The *Whanganui* River has also been ascribed the status of legal personhood and is a 'rights-bearing entity'. The Acts are explicit and establish that nature is a rights-holder, grants it personhood, and clearly names those who are meant to represent the interests of the river and land.[467]

---

[456] Pelizzon A, 'An Intergenerational Ecological Jurisprudence: The Supreme Court of Colombia and the Rights of the Amazon Rainforest' (2020) 2 Law, Tech & Hum 33.

[457] Lael K. Weis, "Environmental constitutionalism: Aspiration or transformation?" International Journal of Constitutional Law (2018), Vol. 16 No. 3, 836–870, 837.

[458] Tamlyn Jayatilaka, 'Rights of Nature: The Right Approach to Environmental Standing in the EU?' (2016) Ghent

[459] Sam Adelman, 'Rethinking Global Environmental Governance' in Tabios Hillebrecht, Anna Leah and Berros, María Valeria (Eds). *Can Nature Have Rights? Legal and Political Insights,* (2017) 6 RCC Perspectives: *Transformations in Environment and Society* <doi.org/10.5282/rcc/8164

[460] Oliver A. Houck, 'Noah's Second Voyage: The Rights of Nature as Law,' 31 Tul. Envtl. L.J. 1 (2017)

[461] Principle 21 Stockholm Convention (1972) http://www.worldservice.org/stockholm.html

[462] Houck op cit n.56.

[463] Karen Morrow, The Continuing Need for Innovation in Erinn Daly, Louis Kotze, James May, Caiphas Soyapi, Arnold Kreilhuber, Lara Ognibene and Angela Kariuki (eds): New Frontiers in Environmental Constitutionalism (2017) United Nations Environment Programme (UN Environment)

[464] Te Urewera Act (2014) < http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183601.html

[465] Whanganui River Claims Settlement Bill (2017) <https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL68939_1/te-awa-tupua-whanganui-river-claims-settlement-bill>

[466] Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' (2018) 7 (1) (Resources) 13

[467] Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' Resources (2018) 7 (1) 13

Since 2008, Ecuador has recognised the rights of nature in its Constitution. The concept of *Buen Vivir* – a multidimensional form of well-being, integrating strong cultural and ecological aspects based on indigenous communities' knowledge[468] – presents a new model of development whereby people live and fulfil their obligations in harmony with nature.[469] Informed by indigenous peoples, this concept cultivates a new understanding of nature – *Pachamama* – that embraces an ecocentric,[470] rather than anthropocentric, concept of rights. Nature is offered 'the right to integral respect, to existence and to the maintenance and regeneration of life cycles, structure, functions and evolutionary processes,' and 'All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.'[471] In the case of *Wheeler* c. *Director de la Procuraduria General Del Estado de Loja*, in an Ecuadorian provincial court, the *Vilcambamba* river was granted the right of legal standing and subsequently received recognition of the violation it suffered during the construction of a road. The Court confirmed nature's right to 'exist, to be maintained and to the regeneration of its vital cycles, structures and functions'.[472]

Bolivia's new Constitution in 2009 saw a move away from a dominant anthropocentric worldview to one that was more ecocentric. It addresses the importance of 'intercultural understanding', and "intercultural dialogue" [473] between the different cultures (indigenous and otherwise) that share Bolivian territory. Bolivian law is informed by indigenous knowledge of *Vivir Bien* or *Suma Qamana*, a worldview that embraces a harmonious way of living in and with nature. A statutory framework of the Law of the Rights of Mother Earth was created that drew on this reframed discourse.[474] The right to a 'healthy, protected, and balanced environment' is 'granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way.'[475] The rights to which Mother Earth is a titleholder - to life, to equilibrium, to restoration, to exist pollution free - are considered inherent rights.[476] There is a responsibility placed on individuals, the state, and collectives to ensure that the rights of nature are respected.[477]

---

[468] Marchand L and Hérault M, 'The Implementation of Buen Vivir in Ecuador: An Analysis of the Stakeholders' Discourses', European Journal of Sustainable Development (2019) Vol. 8 No. 3.

[469] Natalia Greene, Pachamama Alliance, Ecuador Rights of Nature Symposium (2017)

[470] Ecocentrism finds inherent (intrinsic) value in all of nature. It takes a much wider view of the world than does anthropocentrism, which sees individual humans and the human species as more valuable than all other organisms.

[471] The Constitution of Ecuador, Article 71 <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>

[472] Pecharroman

[473] The Constitution of Bolivia, Articles 79, 80, 91, 98, 394, inter alia <https://www.constituteproject.org/constitution/Bolivia_2009.pdf.>

[474] Villavicencio Calzadilla and Louis J. Kotze, Environmental constitutionalism and the ecocentric rights paradigm: the rights of nature in Ecuador and Bolivia in Erinn Daly, Louis Kotze, James May, Caiphas Soyapi, Arnold Kreilhuber, Lara Ognibene and Angela Kariuki (eds): *New Frontiers in Environmental Constitutionalism* (2017) United Nations Environment Programme (UN Environment) < http://tinyurl.com/y4m43xyf>

[475] Law of the Rights of Mother Earth (Bolivia) http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html, Article 33

[476] Article 7 of the Law Of The Rights Of Mother Earth (Bolivia)

[477] Article 2(4) of the Law of the Rights of Mother Earth (Bolivia)

In outlining its commitment to the rights of nature, the Ecuadorian Constitution refers to the importance of the Precautionary Principle as guiding the implementation of the rights of nature. Article 73 states "The State will apply precaution and restriction measures in all the activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles" *in* 'Rights for Nature Articles in Ecuador's Constitution' (The Rights of Nature) < https://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf>

Irish perspective

The proposal that nature has rights and the State recognise that ecosystems have a status and a right to exist independent of their benefits to humans, might seem like a radical idea. However, this principle was long recognised in Brehon law before the imposition of the common law system in Ireland. According to Brehon Law, penalties were imposed for harming trees that were not dissimilar to the penalties for mistreating other humans.[478] Furthermore, the basic unit of value was one milk cow (*bó mlicht*), with the term *sét* (precious object) used to denote a unit of value equivalent to half a cow.[479] Specific rights of nature were addressed under this system, including trees being categorised into four classes, with penalties for harming or killing them.

The authors advocate that Ireland follow the example set by countries such as New Zealand, Ecuador and Bolivia in relation to rights of nature, and draw inspiration from Brehon law to restore rights to nature. Councils in Northern Ireland have already begun the process to recognise the rights of nature.[480]

4. RIGHT TO A HEALTHY ENVIRONMENT

The authors advocate for the express right to a healthy environment in which human life and biodiversity are preserved.

Conscious of the Supreme Court's judicial reticence in this regard,[481] this paper sets forth a basis for the Irish legislature to adopt which would facilitate the inclusion of this right. The authors believe there is scope for the legislature to base the right to a healthy environment on existing Constitutional and human rights. This will be detailed below: first, by examining the existing Irish basis and second, by examining the European basis.

Irish Perspective

In *Friends of the Irish Environment v. The Government of Ireland & Others*, ("*FIE Case*") FIE invoked the constitutional right to life (in particular, 'the obligation of the State to seek to protect persons against a future threat to life arising from climate change'); the unenumerated right to bodily integrity (due to the fact that 'the consequences of climate change will significantly impact on the health and bodily integrity of persons'); and the emerging unenumerated right to an environment consistent with human dignity.

The Supreme Court denied FIE, a corporate entity, standing to invoke such constitutional rights, on the basis that Irish constitutional law does not permit a so-called *actio popularis, i.e.*, an action brought on behalf of the public. The Court considered that this aspect of the challenge ought to have been brought by natural persons who would undoubtedly enjoy the right to life and the right to bodily integrity. While one reading may suggest there is an opening to such natural persons seeking to rely upon these established constitutional rights in the future, it is notable that the Court distanced itself from recognition of an unenumerated right to a healthy environment. The Court stated '[l]est by not commenting on those matters it might in the future be argued that this Court had implicitly accepted the position'. In addition to concerns regarding a possible 'blurring of the separation of powers', the Court doubted that such a

[478] Fields T R, 'Trees in Early Irish Law and Lore: Respect for Other-Than-Human Life in Europe's History', (2020) Ecopsychology Vol. 12, No. 2.

[479] Fields T R, 'Trees in Early Irish Law and Lore: Respect for Other-Than-Human Life in Europe's History', (2020) Ecopsychology Vol. 12, No. 2.

[480] FOE-NI-Briefing-Rights-of-Nature-and-Councils-sept-2021.pdf (ejni.net) and Microsoft Word - Sharing Rights with Nature PD and RK.docx (ssrn.com)

[481] Friends of the Irish Environment v. The Government of Ireland & Others, [2020] IESC 49.

purported right would provide any protection additional to the established rights to life and bodily integrity, and also described it as 'impermissibly vague', suggesting that 'there needs to be at least some concrete shape to a right before it is appropriate to identify it as representing a standalone and separate right derived from the Constitution'. In a further justification of its approach, the Court noted that, with the exception of India, 'no such right has been recognised in countries within the broad common law family'.

The authors consider that, following the *FIE Case*, the Supreme Court has opened the possibility for the Irish legislature to build a foundational basis for the express right to a healthy environment. It was not possible for FIE to succeed on this point given it was denied standing, and *obiter* comments from the Court suggest that a natural person might also face a challenge here. However, the starting point has been marked for the legislature to act and recognise this fundamental right. The authors believe that the legislature may also draw on the existing rights to life, bodily integrity and property to support the right to a healthy environment.

The authors consider that the right to life may act as a springboard for an express right to a healthy environment on the basis that a healthy environment is a prerequisite for the preservation of human life. The right to bodily integrity may encompass a right to a healthy environment, which cannot be protected without a recognition of the interconnectedness of all of life. Furthermore, the right to property cannot be protected in an Ireland experiencing the effects of the climate crisis. In the case of *Duarte Agostinho v Portugal*,[482] the litigants pleaded the right to property to support their asserted right to a healthy environment. This case is awaiting a hearing and subsequent judgment before the European Court of Human Rights ("ECtHR").

European Perspective

In the *FIE Case*, citing the Netherlands Supreme Court's judgment in the *Urgenda Case*,[483] FIE sought to rely on Articles 2 (Right to Life) and 8 (Right to Private and Family Life) of the European Convention on Human Rights ("ECHR"). The *Urgenda Case* was the first time a court gave human rights norms a central role in defining the greenhouse gas ("GHG") emission standards that governments are obliged to uphold. The Advisory Opinion cites existing jurisprudence from the ECtHR which sets out States' positive obligations in cases of environmental disaster and serious environmental harm.[484] The ECtHR confirmed that such jurisprudence is applicable to the obligations of the State to protect its population from long-term risks of harm attributable to climate change. Similarly, it is not necessary for prospective victims of climate-related harm to be individually identified, nor to identify immediate risks of harm to the general population, provided there is evidence of long-term risks.[485] Greater still, the ECtHR held that the existence of scientific uncertainty does not render a risk of harm irrelevant for the purpose of the State's positive obligations.

5. PRINCIPLE OF INTERGENERATIONAL EQUITY

The goal of the Model Environmental Law is to protect humans, the environment and biodiversity for future generations.

[482] Application No. 39371/20 Cláudia DUARTE AGOSTINHO and others v. Portugal and 32 other States

[483] Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs], June 24 2015 Urgenda Foundation v The State of the Netherlands, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands).

[484] Oneryildiz v Turkey App no 48939/99 (ECtHR, 30 November 2004). Budayeva and other v Russia App nos. 15339/02. 21166/02, 20058/02. 11673/02 and 15343/02 (ECtHR, 29 September 2008).

[485] Taskin and others v Turkey App no 46117/99 (ECtHR 30 March 2005).

Climate change is often viewed as an issue of intergenerational equity: consumption today has a cost for future generations. The principle of intergenerational equity is arguably the basis of sustainable development. It supports a concept of fairness between generations in the use and conservation of the environment and its natural resources. It encapsulates the concept that '...every generation holds the Earth in common with members of the present generation and with other generations, past and future.'[486]

International Perspective

In the *Dejusticia Case*, the Columbian Supreme Court recognised future generations as a subject of rights.[487] This fundamentally changes how rights are understood, since it implies that constitutional provisions of protection can be used to protect future generations. Furthermore, the ruling confirms the right of future generations to participate in the adoption of policies that will affect them. In *Dejusticia*, the plaintiffs – a group of 25 children and young people – submitted that given their average life expectancy of 78 years, they expected to experience most of their adult lives in the period 2041- 2070 when the annual temperature is projected to increase by 1.6°C, and part of their old age from the year 2071 when it will increase by 2.14°C.

In Canada, the Quebec Superior Court rejected Environnement Jeunesse's ('EnJeu') – a Montreal-based non-profit focusing on raising awareness and encouraging advocacy among Quebec youth on environmental issues - request to bring a class action lawsuit against the Canadian government on behalf of all Quebecers under the age of 35.[488] The Court held that EnJeu did not meet the requirements to proceed as a class action lawsuit, and found the cut-off age of 35 to be arbitrary and therefore inappropriate. The Court also held that EnJeu did not have authority to act on behalf of persons under the age of 18, and the Court was uncomfortable with the theoretical nature of the violations in question and whether a class action was the appropriate vehicle for such an issue. EnJeu appealed the Superior Court's decision to the Quebec Court of Appeal which is pending.

The Supreme Court of the Philippines considered the principle of intergenerational equity in a case concerning a class action seeking the cancellation and non-issuance of timber licence agreements.[489] The plaintiffs advanced the argument that such licences infringed upon constitutional right to a balanced and healthy environment. This landmark decision recognised the doctrine of intergenerational responsibility applicable to the environment in the Philippines legal system.

European Perspective

There is a case pending before the ECtHR, *Duarte Agostinho and Others v. Portugal and Others* - 39371/20, in which the applicants, six Portuguese children, allege the failure by thirty-three signatory states to the 2015 Paris Agreement to comply with their commitments in order to limit climate change, thus contributing to global warming and affecting the applicants' living conditions and health. The applicants emphasise the absolute urgency of taking action in favour of the climate and the States' shared responsibility, and the case has been fast-tracked for hearing.

---

[486] Oxford Public International Law available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1421 accessed on 21 November 2021 at 11:17.

[487]Dejusticia, 'The Colombian government has failed to fulfil the Supreme Court's landmark order to protect the Amazon' (Dejusticia, 5 April 2019) https://www.dejusticia.org/en/the- colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect- the-amazon/

[488] Environnement Jeunesse (ENJEU) v. Attorney General of Canada no. 500-06-000955-183, July 11, 2019.

[489] Oposa et al. v. Fulgencio S. Factoran, Jr. et al. (G.R. No. 101083)

Irish Perspective

The authors advocate that the legislature draws on international jurisprudence and recognise the principle of intergenerational equity. Support for this proposal can be found in Article 42A of Bunreacht na hÉireann, to include with the natural and imprescriptible rights of all children, the duty to prohibit actions that will have possible or probable long-term effects on the environment.

6. PRINCIPLE OF THE DUTY OF CARE

The authors submit that the State has a duty of care to exercise its powers with reasonable care so as not to cause harmful environmental effects.

The concept is not novel and already in 2007 the need was recognised for an extension of traditional negligence concepts to climate change litigation.[490]

International Perspective

In *the Federal Court of Australia case Sharma and others v. Minister for the Environment,*[491] the plaintiffs claimed to represent all Australian youths under 18, and argued that the Minister for the Environment had a common law duty of care towards young people. The Federal Court of Australia held that, in principle "the applicants have established that the Minister has a duty to take reasonable care to avoid causing personal injury to the Children when deciding [whether to approve the mining project in question]" In establishing the duty of care, the Court drew on the precautionary principle and found that if the foreseeable risks were to manifest, it would be "catastrophic", and therefore children should be considered persons who would be so directly affected that the Minister ought to consider their interests when making the approval decision. However, in declining to issue an injunction, the Court found that the plaintiffs had not established that it was probable that the Minister would breach the duty of care in making the approval decision, and had not established that they would have no further opportunity to apply for an injunction. While the plaintiffs failed to establish a breach of the duty of care, the principle was recognised by the Court.

In *the New Zealand case of Thomson v. Minister for Climate Change*, the court addressed the principle of the duty of care through a separation of powers lens, noting: "It may be appropriate for domestic courts to play a role in Government decision making about climate change policy..."[492]

European Perspective

When the District Court of the Hague ordered the Dutch government to commit to a greater cut in emissions, by a minimum of 25 per cent as opposed to the projected 14-17 per cent – it became the first court in the world to do so, applying Dutch Tort Law to this end.[493] The

[490] David Hunter & James Salzman, 'Negligence In The Air: The Duty Of Care In Climate Change Litigation,' University of Pennsylvania Law Review, Vol. 155, No. 6, Symposium: Responses to Global Warming: The Law, Economics, and Science of Climate Change (Jun. 2007), pp. 1741-1794

[491] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560

[492] Thomson v. Minister for Climate Change Issues [2017] NZHC 733.

[493] Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs], June 24 2015 Urgenda Foundation v The State of the Netherlands, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands)

Urgenda case,[494] indicated that a state has a duty of care to reduce GHG emissions in line with human rights obligations.

Irish Perspective

The authors propose that a similar duty of care may derive from Irish tort law. This duty would apply to the government and other authorities to exercise their powers with reasonable care so as not to cause harm to those affected by their decisions through environmental effects. This duty would also apply to companies to act with reasonable care so as not to cause environmental harm. The precautionary principle may also inform the application of the duty of care in an environmental context.

7. PRINCIPLE OF RESTORATIVE JUSTICE

As mentioned above, Ecocide legislation must be grounded in restorative justice.

A restorative justice approach to environmental proceedings recognises that to truly prevent the continuous cycle of violence and destruction (of people and planet), a judicial system should challenge the adversarial paradigm of criminal law and move beyond its own destructive practices of condemnation and punishment. To reduce reoffending, to help victims recover and to cultivate relationships of care between people and planet, principles of participation, harm reparation and healing must play a pivotal role in the legal proceedings. The restorative justice process is voluntary and brings perpetrator and victim(s) into direct communication in the hope that meaningful dialogue can occur. The perpetrator listens to the victim(s) recount the harm suffered and participants aim to come to a common understanding on how such harm can be repaired and justice achieved.[495]

Victims within the restorative justice process can be people affected but can also include future generations and ecosystems. Environmental NGOs act as surrogate, providing a voice for those who cannot speak.[496]

The European Forum for Restorative Justice ('EFRJ') presents the possible outcomes of a restorative justice process. These include action plans or restorative contracts whereby a range of commitments to prevent or repair ecological damage, are contained. Restorative outcomes might include 'apologies, restoration of environmental harm, prevention of future harm, compensatory restoration of environments elsewhere if the affected environment cannot be restored to its former condition….'.[497]

Using restorative justice in the environmental domain, raises particular questions that are worth considering. 'How can we identify the victims of environmental harm and who should have a voice in the restorative processes? Who can speak on behalf of future or past generations and of other-than-human (animals, plants, rivers, land, places)? What kind of expertise is required to speak adequately for the non-human? What are the criteria by which judgements around

[494] Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs], June 24 2015 Urgenda Foundation v The State of the Netherlands, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands)

495The International Journal of Restorative Justice, 'Inhabiting a vulnerable and wounded earth: restoring

response-ability' <https://www.elevenjournals.com/tijdschrift/TIJRJ/2021/1/TIJRJ-D-21-00004> and Femke Wijdekop, Great Transition Initiative, 'Author's Response to GTI Roundtable "Against Ecocide"'<https://greattransition.org/commentary/author-response-against-ecocide>

[496] Bryan Jenkins, 'Environmental Restorative Justice: Canterbury Cases'

<https://conferences.iaia.org/2018/final-papers/Jenkins,%20Bryan%20-%20Environmental%20Restorative%20Justic

e.pdf>

[497] European Forum for Restorative Justice, <https://www.euforumrj.org/en/environmental-justice>

repair and restoration are to be made? Can irreversible and irreparable environmental degradation be healed and repaired, and if so, how? How can we ensure that the ones that harm and damage the environment participate voluntarily in restorative processes?'[498]

International Perspective

Best practice is provided by New Zealand;[499] the legal framework facilitated the adoption of restorative justice processes with the passing of the Sentencing Act 2002,[500] and the Resource Management Act 1991.[501] The Land and Environmental Court of New South Wales has also experimented with using restorative justice conferences and sentencing. [502]

Irish Perspective

In Ireland, restorative processes have been used in the criminal justice system since the late 1990s. It appears in the Children's Act 2001,[503] and in the Criminal Justice (Victims of Crime) Act 2017,[504] which outline what the process should look like and how to provide safeguards for participants. Ireland has also remained at the forefront of research on the use of restorative justice in cases of sexual abuse. The Council of Europe Recommendation CM/Rec (2018), emphasises that restorative justice should be a 'generally available service' (Rule 18).[505]

II. PRINCIPLES AND DUTIES IN DRAFTING, INTERPRETATION AND ENFORCEMENT

This section sets out principles the authors advocate should be applied to drafting, interpreting, and enforcing environmental legislation.

Drafting Rules for Legislators

1. INTEGRATION PRINCIPLE

The integration principle seeks to apply environmental considerations across all policy areas.[506]

This is perhaps the lynchpin of our efforts in the draft Model Environmental Law. Since the 1972 Stockholm Declaration, of the United Nations Conference on the Human Environment, it has been understood that if states want to protect and improve the environment, environmental considerations must inform all areas of policy making. It has since been

[498] European Forum for Restorative Justice (EFRJ)

[499] John Verry Felicity Heffernan, Richard Fisher, Restorative justice approaches in the context of environmental prosecution

[500] Sentencing Act 2002, Section 7 <https://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html>

[501] Resource Management Act 199 <https://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>

[502] Land and Environment Court of New South Wales, Land and Environment Court of New South Wales (nsw.gov.au)

[503] Children Act, 2001 (irishstatutebook.ie) Sections 26, 29-43, 78-87

[504] Criminal Justice (Victims of Crime) Act 2017, Section 6 and 26 <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>

[505] *in* Ian Marder, 'Restorative Justice as the New Default in Irish Criminal Justice', IRISH PROBATION JOURNAL Volume 16, October 2019

[506] Stuart Bell et al., *Environmental Law*, Oxford, oxford University Press, 2013, 57.

included as Article 11 of the TFEU, that "environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development." While the authors advocate elsewhere in this paper for the rights of nature, at the very least, we must not see environmental legislation as isolated from any other area of legislative activity. Legislators must consider environmental impact in every piece of legislation.

This necessary integration of environmental protection into the development and implementation of EU policies and activities could be understood to mean that already any member state has an obligation to respect the principle when implementing EU policies and activities,[507] but, to be effective, it needs to be binding in all areas of law.

Integration means that all the other principles and duties which are discussed above, from the rights of nature to intergenerational equity and the precautionary principle, must be an integral part of the development of our policies and activities, in their drafting, interpretation and enforcement.

2. Proportionality of Economic Activity and Environmental Protection

The integration of environmental considerations into legislative activity, will not *per se* protect the environment. Integration must take place against a background of the weighing of interests to prioritise environmental requirements. Proportionality in this context is the principle that an activity having potentially adverse environmental effects must be effective, necessary and appropriately weighed against those effects.

The first step in such an assessment is to ensure that the action is effective and necessary, and cannot be substituted with a better alternative. There must be a requirement on decision-makers to ask if the given action is the best option for the environment. This is already a relatively uncontroversial but effective way to weigh the environment heavily in the balance, and to give substance to the integration principle.

Once this is done, there remains the requirement for balancing of interests, a weighing between a socio-economic gain (be it private gain or public) and protection of the environment. This is often a comparison between two essentially incomparable values. As has so often been pointed out, it is not for a court to second-guess the weight which the legislator may decide to place on any given criterion of good government. This is why legislation must lay out the methods by which the needs of the environment are to be weighed. This is required for the legislature itself in its methods, and also for courts in assessing the method of that decision-making.

Recognising the need to find that balance, but recognising also the imperative of protecting the environment, legislators must give added weight in their considerations of proportionality to the needs of the environment. As a form of strict precautionary principle, when the environment weighs in the balance, and there is any doubt as to the decision, the environment must take precedence in all but the case of the strongest public need. If the socio-economic gain is overriding, then compensatory environmental measures must be required.

We have said that this is often a comparison between incomparable values. But there is often intrinsic connection between the methods of tackling environmental harms and such economic issues as fair access to housing, energy, and food, both nationally and internationally, so that economic imperatives, energy requirements, or other socio-economic concerns, cannot be allowed to be drawn as always inimical to environmental care and allowed outweigh the need

[507] Massimiliano Montini, 'The principle of integration,' *Principles of Environmental Law* (eds. Ludwig Krämer & Emanuela Orlando), Cheltenham: Edward Elgar, 2018, 139, 145.

to maintain and preserve the environment. [508] This means that legislators must bind themselves to consider in all cases the benefits accrued by us all when we protect the environment.

Nonetheless, that incomparability of economic gain with environmental protection remains, so that in such a proportionality-weighting, recognition must be given to the status of nature in its own right, aside from human ends. To return to the issue of effectiveness and necessity, the argument that, if a person, company or group is prohibited in its activities, competitors will take them up instead, cannot absolve any individual company, group or country of its individual partial responsibility to do its part over what it can control and influence. Moreover, it is not to be taken for granted that any reduction in activity by one entity will be replaced by another such that pollution prevention would be ultimately unavailing.

It may be necessary also for government to impose restrictions on land use by landowners or impose certain actions, if we are to protect our environment, for example agricultural or industrial landowners being required to offset some of the effects of their agricultural or industrial activities, or restricted in their interventions on the land. There is always a balance to be struck between the individual's peaceful enjoyment of her possession and the public interest. Some restrictions or impositions may face challenge on the grounds of property rights under Article 43 of the Constitution. However, the proportionality principle, long recognised in Irish courts, should be considered to allow state intervention in property rights where required, as long as the legislation in question is clear and clearly meets the requirements of Article 43. [509]

All other things being equal, the interest in environmental protection must be understood to outweigh, proportionately, commercial or personal interests of individuals, companies or countries, so that they may be required to make financial and other sacrifices to prevent environmental damage.

Court Powers and Interpretation

3. INTERPRETATION OF LEGISLATION

Given that the ultimate purpose, or at least a primary purpose, of legislation with an environmental aspect is the attainment of improved environmental protection, courts should interpret provisions generally in a manner that gives the greatest possible environmental protection.

4. POWERS AND PROCEDURES OF LEGAL REPRESENTATION BEFORE THE COURTS

Some of the rights described here, because they are held by non-human beings, cannot be defended by means of the traditional understanding of legal standing, so allowance would have to be made through legislation for vicarious representation before the courts and administrative bodies.

Because situations will arise in which a large number of persons can be harmed or may be harmed by the same practices, and the possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court, there should be in

[508] Cf the Paris Agreement preamble, with particular reference to climate-change actions.

[509] Cf the decision of the Supreme Court in *Albatross Feeds Limited v. Minister for Agriculture* [2007] 1 I.R.

221, which held that the exercise of a power depriving a citizen of his property rights would need to be justified by clear legal authority. See also *In the Matter of Linen Supply of Ireland Limited (formerley CWS-Boco Ireland Ltd) & Companies Acts* [2010] IEHC 28, applying this decision.

place collective redress systems, allowing for both group actions and representative actions in injunctive and compensatory actions. Such group and representative actions should not be under the auspices of state actors but should allow for freedom of action for those harmed or potentially harmed.

5. COURT POWERS OF SCRUTINY

The authors advocate that in any proportionality weighting by a court, tribunal or public body, economic imperatives and energy requirements cannot outweigh the need to maintain and preserve a healthy environment for all persons and nature.

If any of the principles outlined above are to be binding on legislators, courts must have the power and duty to uphold and enforce them, understanding that such action is not an encroachment of executive powers. Concomitantly, it is not the role of courts to make decisions for the democratically elected legislator. However, in guaranteeing the protection of the rights and principles outlined in this paper, courts do have the power when necessary to review the merits of an administrative decision, as with any governmental action, to the extent that they infringe upon those rights and principles. This protection of agreed binding principles is not an encroachment on the legislative domain, but proper judicial scrutiny of it, on strictly democratic principles.

Enforcement

6. PRINCIPLE OF STRICT LIABILITY

Irish law already allows for strict liability in environmental legislation, but not absolute liability, so therefore allows for a defence of reasonable due care. Given "the virtual impossibility in many regulatory cases of proving wrongful intention, [i]n a normal case, the accused alone will have knowledge of what she or he has done to avoid the breach and it is not improper to expect the accused to come forward with the evidence of due diligence." [510]

This strict, but not absolute, liability should extend within group company structures, dependant on the relationship between the businesses and the concomitant duty of care, and to the personal liability of managers and directors of the undertaking responsible for environmental damage, including fall-back orders, even absent fraudulent or improper purpose, in order to give real effect to the polluter-pays principle. [511]

Any new statute which provides for strict liability should be clearly worded as such. Older statutes should be interpreted to make provision for strict liability when the creation of strict liability would be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

[510] *R v City of Sault Ste Marie* 1978 2 SCR 1299, 1325. This was a seminal case in the area. It was approvingly cited by keane J, dissenting, in *Shannon Regional Fisheries Board v Cavan County Council* [1996] 3 IR 267.

[511] Cf *EPA v Neiphin Trading Ltd and Others* [2011] IEHC 67, where Edwards J held that the Waste Management Act 1996 did not transpose the Waste Framework Directive 2008/98/EC so as to give full application to the polluter-pays principle and allow the lifting of the veil of incorporation to allow fall-back orders against directors when a company is unable to comply with an order made against it under the Act, rather than leave it to an innocent party or the community to pay for environmental pollution.

Regarding the intent of the Oireachtas to give full application to the Directive in this regard, it is notable that two of the three primary references to the polluter-pays principle in the Act which Edwards J refers to, in section 5, defining it, and in section 22(6)(d), have since been deleted by Statutory Instrument (see *EPA v Neiphin Trading Ltd and Others* paras. 6.47-48).

7. LEGAL STANDARDS AIMED AT RECTIFICATION AT SOURCE, RATHER THAN MONITORING ENVIRONMENTAL QUALITY[512]

It is not possible to stop all pollution, but, as a general principle, it is clearly preferable to stop pollution happening rather than monitor and control its effects. In the prevention of climate change, for example, it is recognised in the Paris Agreement that we must stop GHGs at source. In 1973, the EEC laid down as the first principle of its environmental action programme: "*The best environmental policy consists of preventing the creation of pollution or damage at source; rather than subsequently trying to counteract their effects* …" and TFEU article 191 continues to hold to it.

If this method is to work, it requires clear identification of the pollutants in question, the limits applicable, and, crucially, the sources of those pollutants and the limits to be placed on them. It also requires such limits to apply to both individual sources and to all such sources taken as a whole. This is a method which can be well-targeted and proportionate, where compliance can be easily monitored, and through which the polluter pays principle can be relatively easily applied. It is a relatively cheap and sustainable measure by which to limit many environmental harms.

However, under pressure from various quarters, this emission-limit approach has often been replaced by a quality-objective approach. However, this cannot be as effective as a means of really limiting pollution and in any case, is impossible to enforce properly. Similarly, emission-limit values, under pressure from industry, have often been replaced with best-available-technology requirements, which, again, cannot be as effective and are almost impossible to enforce in practice.

To meaningfully tackle climate change, provision must be made in legislation for controlling of the levels and standards of emissions and other by-products, rather than measuring the effects of such by-products.

8. THE RECOGNITION OF THE CUMULATIVE NATURE OF POLLUTION AND THE MULTIPLICITY OF ITS CAUSES

The authors advocate that it is better to limit potential pollution at source rather than to monitor their effects. However, when monitoring or estimating the effects of pollution, it must be done holistically. In assessing the environmental impact of any activity, and therefore in legislating to reduce the pollution at source, the cumulative effect of the entirety of processes involved in any activity, upstream and downstream of that activity, must be taken into account.

Secondly, environmental damage will rarely be traceable to one sole cause. Therefore, partial causes can be considered legally liable for environmental harm due to that cause among others. Irish legislation should continue to make provision for joint and several liability when an incident or situation involving multiple, concerted or unconcerted, causes occurs and pollution damage results or may result therefrom.

This recognition of the totality of the effects of any activity, and the difficulty of tracing the sole cause of pollution, imply a necessarily systemic view of causes and effects, in the drafting of legislation and in its enforcement. Such an understanding is also part and parcel of the integration principle, such that decision-makers understand that activities and policies have wide-ranging effects, and are bound to explicitly take them into account.

[512] Drawing on Ludwig Krämer, 'The principle of fighting environmental harm at source,' *Principles of Environmental Law* (eds. Ludwig Krämer & Emanuela Orlando), Cheltenham: Edward Elgar, 2018, 186.

9. THE USE OF ADMINISTRATIVE PENALTIES IN ENVIRONMENTAL LAW[513]

The authors advocate that Irish law should allow for administrative sanctions in environmental law. Administrative fines are sanctions imposed by a body other than a court. A regulator is empowered to impose the sanction directly on the offender. Criminal prosecutions are thereby reserved for the truly criminal. The law should allow for the use of administrative sanctions to deal with cases where there is no evidence of intention or recklessness, but where, equally, a caution or warning is not a sufficient response.

The proposal for the application of administrative sanctions is compatible with ECHR art. 6(1). *Ozturk v Germany* 8544/79 21 February 1984 held that a system for civil/administrative penalties in road traffic offences is criminal, but a right to appeal satisfies ECHR art. 6(1)

The aim of administrative sanctions is to improve environmental outcomes and should, therefore, meet the following principles, often called the Macrory principles as they were first appeared as a unit in a 2006 review on sanctions in environmental law by Richard Mcrory. [514] They should:

1. Aim to change the behaviour of the offender [*i.e.*, punishment per se is not the objective] e.g., through awareness courses (as for driving offences);
2. Aim to eliminate any financial gain or benefit from noncompliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, so that regulators have discretion, [this can include punishment and the public stigma that should be associated with a criminal conviction];
4. Be proportionate to the nature of the offence and the harm caused [and thus flexible];
5. Aim to restore the harm caused by regulatory noncompliance, where appropriate; and
6. Act as a deterrence to others

The possible penalty options under an administrative penalty regime could include monetary penalties; enforcement undertakings (offender would give an undertaking of steps that would be taken, e.g. retraining of staff or investment in new equipment, to avoid non-compliance in the future); third party undertakings (where the offender promises to compensate those affected by pollution); and restoration notices requiring specified steps within a stated period to ensure that things are restored, as far as this is possible, to the situation before pollution took place.

CONCLUSION

In *Don't Look Up*, a film using an imminent meteor strike as a metaphor for climate change, President Orlean, played by a brilliant Meryl Streep states, "*The timing is just, it's atrocious. OK, at this very moment, I say we sit tight and assess."* The duties and principles outlined in this paper are far-reaching and arguably, aspirational in part. However, the time to sit tight and assess is over. It's time to act.

[513] These points are drawn to a large extent from Richard Macrory, *Irresolute Clay: Shaping the Foundations of Modern Environmental Law*, Oxford: Hart, 2020, Chapter 11.

[514] Richard Mcrory, *Regulatory Justice: Making Sanctions Effective*, London, Cabinet Office, 2006. For a full reprint of this report, see Richard Mcrory, *Regulation, Enforcement and Governance in Environmental Law* (2nd edition), Oxford: Hart, 2014, 21.