CLIMATE BAR
COMHSHAOL

Louise Beirne BL

Louise Beirne was called to the bar in 2010. She has a general civil practice.

Her experience includes advising statutory bodies in relation to their governing legislation, drafting statutory instruments and acting for statutory bodies.

Drafting a new Environmental Code –

What it would look like and what would it do?

Cóir Environmental Code Project 2021-2022

Legislative Drafting Team:

Louise Beirne BL, Dirayati Fatima Turner and Stuart McCabe

Introduction

1. This short paper serves as a foreword to a draft Code, which was written as part of the Climate Bar Association Task Force on a Model Environmental Code. The annexed draft Code is the work product of the entire Task Force and was drafted following research by a number of teams working on specific areas of research. The purpose of the draft Code is to set out elements of a Model Environment Code, with a view to promoting legislative reform in this area.

2. Public interest litigation is a well-established means of achieving social change. However, if we listen to the stories of the people behind many of the landmark cases, we hear of the immense stress and difficulty which the litigating parties experienced.[515] Also, some of the great legal victories that had a profound positive impact on the law, did not necessarily have a corresponding impact on the lives of the individual litigants. For example, Irene Grootboom, the housing activist, who successfully invoked her Constitional right to housing to challenge South Africa's housing policy, was still living in a shack when she died some eight years after the landmark judgment, which bears her name, was delivered.[516]

3. Also, we know that a litigant's prospects of success are dependent on the wording of the legislation or Constitutional provision upon which they seek to rely. In the first instance, a claim may not be justiable. Secondly, even if it is, it may fail if it does not come squarely within the scope of available legal provisions. Thirdly, existing legislation may not envisage the remedy desired or required by a potential litigant. Moreover, issues around standing and costs may pose barriers.

4. The *"landmark ruling"* of the Supreme Court in the case of *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49 has been widely recognised as a *"significant victory for climate action"* and a *"turning point for climate governance".*[517]

[515] Paulyn Marrinan Quinn's podcast series *"Cases that Changed People's Lives"* offers an interesting insight into several of the landmark Irish constitutional law cases from the perspective of both the litigants and the parties who represented them.
[516] *Government of the Republic of South Africa. & Ors v Grootboom & Ors 2000* (11) BCLR 1169; Joubert, Pearlie (8 August 2008), "Grootboom dies homeless and penniless", Mail & Guardian. https://mg.co.za/article/2008-08-08-grootboom-dies homeless-and-penniless

[517] Áine Ryall, "*Supreme Court ruling a turning-point for climate governance in Ireland",* Irish Times, 7th August 2020

5. For our purposes, it is useful to recognise that that decision hinged upon the wording of the *Climate Action and Low Carbon Development Act 2015 ("the 2015 Act").* It is clear from the judgment in that case that the use of clear, specific and mandatory words in the 2015 Act; for example, *"achieve", "shall"* and *"specify",* were key to the Supreme Court's decision that the Government's plan to address climate change, and particularly the substance thereof, were justiciable issue.

Friends of the Irish Environment v. Government of Ireland[518]

1. The central issue in that case was:
   > *"whether the Government of Ireland ("the Government") ha[d] acted unlawfully and in breach of rights in the manner in which it ha[d] adopted a statutory plan for tackling climate change".*

2. The plaintiffs argued that the government's plan ("the Plan") was unlawful on the basis that the level of detail, which it contained, did not meet the requirements of the 2015 Act. Further, while accepting that the Government enjoys a very wide degree of discretion in determining measures required to combat climate change, the plaintiffs argued that *"in adopting in the Plan, measures which will allow for an increase in emissions over the lifetime of the Plan, the Government had acted unlawfully".*

3. The Government's position was that it had complied with mandatory requirements in the Act, identified by the plaintiffs. Moreover, while the Government accepted that *"questions concerning compliance with the provisions of the 2015 Act, concerning the procedures adopted in formulating the Plan"* were justiable, it argued that the substantive provisions of the Plan were not so on the basis that they *"involve policy choices made by the Government".*

4. Sections 3 and 4 of the 2015 Act provided:
   > *"3. (1) For the purpose of enabling the State to pursue, and achieve, the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050 (in this Act referred to as the "national transition objective") the Minister shall make and submit to the Government for approval—*
   >
   > *(a) a national mitigation plan, and*
   >
   > *(b) a national adaptation framework".*
   >
   > *"4. (1) The Minister shall—*
   >
   > *(a) not later than 18 months after the passing of this Act, and*
   >
   > *(b) not less than once in every period of 5 years, make, and submit to the Government for approval, a plan, which shall be known*

[518] *Friends of the Irish Environment v, Government of Ireland & Ors* [2020] IESC 49

as a national low carbon transition and mitigation plan (in this Act referred to as a "national mitigation plan").

(2) A national mitigation plan shall—

(a) specify the manner in which it is proposed to achieve the national transition objective,

(b) specify the policy measures that, in the opinion of the Government,

would be required in order to manage greenhouse gas emissions and the removal of greenhouse gas at a level that is appropriate for furthering the achievement of the national transition objective,

(c) take into account any existing obligation of the State under the law of the European Union or any international agreement referred to in section 2, and

(d) specify the mitigation policy measures (in this Act referred to as the "sectoral mitigation measures") to be adopted by the Ministers of the Government, referred to in subsection (3)(a), in relation to the matters for which each such Minister of the Government has responsibility for the purposes of—

(i) reducing greenhouse gas emissions, and

(ii) enabling the achievement of the national transition objective.

(3) For the purpose of including, in the national mitigation plan, the sectoral mitigation measures to be specified for the different sectors in accordance with subsection (2)(d)—

(a) the Government shall request such Ministers of the Government they consider appropriate to submit to the Minister, within a specified period, the sectoral mitigation measures that each such Minister of the Government proposes to adopt in relation to the matters for which each such Minister of the Government has responsibility,…"

…….

(8) The Minister shall, before making a national mitigation plan—

(a) publish, in such manner as he or she considers appropriate, a draft of the national mitigation plan that he or she proposes to make,

(b) publish a notice on the internet and in more than one newspaper circulating in the State inviting members of the public and any interested parties to make submissions in writing in relation to the proposed national mitigation plan within such period (not

exceeding 2 months from the date of the publication of the notice) as may be specified in the notice, and

(c) have regard to any submissions made pursuant to, and in accordance with, a notice under paragraph (b)."

5. Having conducted an analysis of the relevant statutory provisions, Clarke CJ. concluded that: *"the overriding requirement of a compliant plan is that it specifies how [the national transition objective] is to be achieved by 2050".* Further, having particular regard to section 4(1)(b), which requires that there be *"new plan at least every fifth year",* he concluded that:

   "the legislation contemplates a series of rolling plans each of which must be designed to specify, both in general terms and on a sectoral basis, how it is proposed that the NTO is to be achieved"

   as opposed to a series of consecutive plans, which the Government posited that the Act envisaged.

6. As regards the justiciability issues raised by the Government, he noted:

   "If the government of the day were to announce that, as a matter of policy, it was going to publish, after public consultation, a plan designed to achieve precisely that which is defined in the 2015 Act as the NTO and then publish a plan which arguably failed to do what it was said it should do, then such questions might well arise. ***However, the position here is that there is legislation [emphasis added]."***

7. The Chief Justice concluded that while "*there may be elements of a compliant plan under the 2015 Act which may not truly be justiciable"*, the question of whether the Plan complied with *"specificity requirements in s.4"* of the 2015 Act was *"clearly justiciable"*. Having considered the Plan, he concluded that it fell *"a long way short of the sort of specificity which the statute requires."* In so doing, he accepted that it seemed *"reasonable to characterise significant parts of the policies as being excessively vague or aspirational".* Further, in so doing, he determined that the legislation envisaged a 33-year plan, which was reviewable on 5 year basis. Finally, for our purposes, having quashed the Plan *"on grounds which are substantive rather than purely procedural",* the Chief Justice set out elements of a Plan which would comply with the 2015 Act.

Key Elements of a Model Code

8. Inez McCormack, a signatory of the McBride Principles, whose successful campaigns included the inclusion of groundbreaking human rights and equality provisions in the Good Friday/Belfast agreement, spoke about rights holders not needing lawyers and policy-makers to tell them their rights. Rather, she spoke about the need for *"technicians",* who would use their skills to assist rights holders in realising their rights.

9. Having regard to the foregoing, the starting point for any environmental legislative drafting project must be issues identified by stakeholders. It is clear from the Stakeholder Feedback Report that *"enforcement of environmental legislation [was]* a significant problem identified across all of [the] respondents". The *"piecemeal"* nature of environmental legislation was identified as a particular *"barrier to enforcement".* Additional barriers identified included the usability and accessibility of environmental law.[519]
10. It is noteable that the key issues raised by the stakeholders were the need to ensure compliance with existing legislation and make it easier for people to rely on rather than; for example, a need for more stringent penalties for breaches of environmental legislaion. Those observations chime with the findings of the Sanctions Team, insofar as that Team noted a greater emphasis on criminal, as opposed to administrative sanctions, in Ireland compared to other jurisdictions. The observations of the stakeholders and the findings of the Sanctions Team are reflected in the draft Code insofar as it provides for administrative sanctions, in addition to enforcment actions by individuals and groups.

11. Difficulties in enforcing environmental legislation raised by stakeholders also chime with issues around justiciability, such as those which we have discussed in the *Friends of the Irish Environment Case,* and standing, which are commonly identified by lawyers as barriers to effective environmental litigation.[520] In that regard, and as previously noted, the aspects of the 2015 Act, which were challenged in that case, were justiciable because of the wording of specific provisions contained in that particular Act. Further, while the Supreme Court concluded that the plaintiffs had standing to bring a claim to challenge the compliance of the government's climate change Plan with the Act, the Supreme Court ultimately concluded that the plaintiffs did not have standing to bring a claim under the Constitution or the European Convention on Human Rights in that case. Therefore, while the *Friends of the Irish Environment Case* was indeed a 'gamechanger' in terms of climate litigation, significant challenges in enforcing environmental rights through the courts remain.

12. With a view to addressing those types of challenges, the draft Code includes specific provisions which relax the general rules around standing for environmental litigation, to include provisions which allow for natural or legal persons to be granted standing as *amicus curiae*, in addition to provisions which allow for class action proceedings. Additional provisions aimed at increasing the enforceability and implementation of environmental legislation include statutory duties in terms of public education and decision-making, including policy-making, a proposal for a specialist Tribunal dealing with environmental law and provisions aimed at protecting those, who are acting to protect the environment, against vexatious proceedings.

13. However, rather than any one provision, it it is hoped that the key strength of an Environmental Code would be the simple act of bringing together all of Ireland's existing legislation through a single piece of legislation in order to increase its usability. The compilation of such a Code would be in keeping with projects of the Law Reform

[519] Stakeholder Feedback Report, p. 4.
[520] Model Statute for Proceedings Challenging Government Failure to Act on Climate Change: An International Bar Association Climate Change Justice and Human Rights Task Force Report, February 2020, pp. 7 – 9. The *Friends of the Irish Environment* Case, supra note 518, also contains a significant discussion on the issue of standing.

Commission to increase access to legislation through its compilation and maintenance of a series of revised Acts. The usefulness of such a legal tool is evident when the Law Reform Commission's commentary on the revised *Planning and Development Act 2000* is considered:

> *"For example, the Planning and Development Act 2000 has been amended or otherwise affected by over 160 Acts and Statutory Instruments since it was originally enacted. The costly exercise of assembling, reading and understanding the amendments made to the 2000 Act is avoided by the availability of a consolidated Revised Act version of the Planning and Development Act 2000"*[521].

14. Ideally, existing environmental law would be consolidated into a single Act, which would unify and consolidate environmental law, similar to the *Companies Act 2014* for company law, However, having regard to the significant impact which European law has on environmental law, it is not necessarily practical to seek to reduce the amount of environmental legislation, which is currently in force, to a single piece of legislation. Rather, in order to address the usability and accessibility concerns raised by the stakeholders, our key task involved finding a way to unify and increase the user-friendliness of the existing legilslation.

15. It is envisaged that an Environmental Code would exercise a function akin to the *Interpretation Act 2005*, save that it will apply to environmental legislation only. In order to achieve that aim, Part I sets out principles which apply to environmental legislation. Environmental legislation is defined in the draft Code as Acts, statutory instruments and European Regulations, which are listed in the Schedule to that Code and the Code contains a specific provision that allows for the Code to be updated by Ministerial Order.[522]

Advantages and Pitfalls of Codification

16. *"A code is a complete system of positive law, scientifically arranged, and promulgated by legislative authority."*[523] Traditionally, of course, codes form the basis of legal systems in civil law jurisdictions, while common law jurisdictions tend to lean on legal precedent. According to Byrne and McCutcheon:

> *"Since [the development of common law] depended on cases being brought before the courts by the aggrieved parties, the law responded to actual rather than anticipated problems. The law in a civil law system is now contained in comprehensive legal codes, which are enacted by legislators and which attempt to provide for every legal contingency."*[524]

[521] https://revisedacts.lawreform.ie/revacts/intro [Accessed: 3 January 2022].

[522] This mechanism for consolidating and updating an extensive list of legislation is drawn from the Food Safety Authority of Ireland Act, 1998.

[523] *The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed*. [Online]. What is CODE? Available at: https://thelawdictionary.org/code/ [Accessed: 6 October 2021].

[524] Byrne et al (2020), *Byrne and McCutcheon on the Irish Legal System*. (7th edn). London: Bloomsbury Professional. para. [1.12]

17. This dichotomous view is not entirely true. Legal historian Masferrer clarifies that it was not the intention of the original drafters of the French *Code Civil*, regarded as the first modern code, to provide *"for every legal contingency".*[525] The most prominent of the drafters of the *Code Civile*, Portalis, stated that:

> *"The possibility of supplementing the law by natural truths and the right directions of common sense should be left to the judges. Nothing could be more childish than to endeavor to take necessary steps in order to provide the judges with strict rules."*[526]

Further, he stated that his Code did not pretend *"to govern all and to foresee all,"* because *"whatever one does, positive law can never completely replace the use of natural reason in the affairs of life."*[527]

18. A code can provide more legal certainty and easier access to law, and it does not strictly have to be in the same model as European civil codes. Some common law jurisdictions, notably Australia,[528] have implemented codes as part of their legal system. Indeed, Australian law students are taught in their first-year law curriculum that legislation is today the main legal source.[529] As Masferrer says:

> *"[t]he time is ripe for legal historians to admit that codification neither belongs to the civil law tradition nor constitutes a peculiarity of the civil law tradition, as if it was incompatible with common law tradition unless common law itself is abrogated altogether."*[530]

19. It should be noted that codification does not always yield positive results. Meiners and Yandle suggest that the rise of codification in the United States in the 1970s may have undermined their environmental law regime, due to its focus on meeting legal limits instead of avoiding damages to a person. They observed that: *"[a]t common law, there were no EPA permits or uniform technology requirements that sanctioned the action of the polluter."*[531]

20. While we must, of course, be alive to these dangers, it is suggested that an Environmental Code, if drafted properly, would complement the existing common law system and create a more robust environmental law regime.

---

[525] Masferrer, A. (2019) French Codification and "Codiphobia" in Common Law Traditions. *The Tulane European and Civil Law Forum, 34*.
[526] Portalis, J. (1803) *Code Civil*. Quoted by Wienczyslaw J. Wagner, *Codification of Law in Europe and the Codification Movement in the Middle of the Nineteenth Century in the United States*, 2, 1952, *St. Louis U. L.J.* 335, pp. 350-351.
[527] Portalis, J. (1827; reprinted 1968) *Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement*, P.A. Fenet, Recueil Complet des Travaux Préparatoires du Code Civil 469.
[528] Australian Capital Territory: Crimes Act 1900 and Criminal Code Act 2002; Northern Territory: Criminal Code Act 1983 (NT); Western Australia: The Criminal Code; Queensland: The Criminal Code Act 1899 (Qld); Tasmania: Criminal Code Act 1924 (Tas).
[529] Hall, K. (2002) *Legislation*. Butterworths. "*Our common law system has two main sources of law, cases (law made by judges through judicial decisions) and legislation (law made by parliament). Traditionally, case law was considered the most important source of law in our common law legal system. Today, however, legislation has overtaken case law as the most prolific and significant source of law."*
[530] supra note 525
[531] Roger Meiners & Bruce Yandle (1999) *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L Rev.

Conclusion

21. Our draft Environmental Code is, of course, not the first such initiative. For example, in Germany in the 1990s, the "Group of Professors" developed a draft Code. That project was in turn taken on by the Ministry of Environment during Angela Merkel's tenure in that role. Ultimately, the project's aim to develop a *"uniform Environmental Code for the whole of Germany"* was not realised. However, *"four so-called Environmental Code Replacement Acts* (the Act on the Consolidation of Environmental Law, the Act on the Revision of Water Legislation, the Act on the Revision of the Federal Nature Conservation Act and the Act on the Protection against Non-Ionizing Radiation)*"* were achieved.[532]

22. The International Bar Association has also developped a "Model Statute for Proceedings Challenging Government Failure to Act on Climate Change".[533]

23. The annexed draft Code is but a draft document, which sets out in broad brushstrokes what the Taskforce has concluded that a comprehensive Environmental Code ought to contain. However, we hope that it starts a conversation to the effect that an environmental Code is not only a moral imperative, but desirable and achievable.

[532] https://www.umweltbundesamt.de/en/environmental-code-0#development-of-the-environmental-code;

[533] supra note 520