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STRATEGIC CLIMATE LITIGATION ON THE ISLAND OF IRELAND

Building cooperation at domestic and transboundary levels

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The Project

This report is part of an Environmental Justice Network Ireland (EJNI) project exploring strategic litigation on the island of Ireland, funded by the European Climate Foundation. The report has been informed by desk-based research and an initial scoping exercise which involved a small, focused (Chatham House Rules[1]) workshop for NGOs and an event bringing together the key players in strategic litigation in Ireland/Northern Ireland with a view to ascertaining the appetite for collaboration, cooperation, and coordination in this sensitive area and whether work to translate existing EU level approaches to an Irish context would be a worthwhile endeavour. This report builds on an NGO workshop undertaken in June 2023 and will be of interest to environmental NGOs on the island of Ireland, grassroots organisations or individuals considering litigation, lawyers and legal organisations engaging in environmental litigation, and activists and academics undertaking research in this area. It will also be of interest to individuals and organisations monitoring the development of strategic litigation across Europe and internationally.

The report is divided into five sections:

1. Introduction
2. Emerging themes in strategic climate litigation
3. Developments in strategic climate litigation on the island of Ireland
4. Barriers and Opportunities
5. Recommendations

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[1] Under the Chatham House Rule, anyone who comes to a meeting is free to use information from the discussion but is not allowed to reveal who made any particular comment. It is designed to increase openness of discussion.

1. Introduction

Climate litigation is one of the key drivers for raising climate ambition, ensuring the effectiveness of climate laws and policies and raising awareness of climate change and need for urgent action (IPCC, 2023, paras 2.2.1 and 4.7). With significant gaps emerging between commitments made and targets actually being met in many countries, climate litigation has become a key tool in holding governments and corporations to account for failures to comply with international and domestic legal obligations on climate. Hundreds of cases addressing a wide range of climate governance issues have created a very substantial body of jurisprudence, with new trends and novel approaches emerging every year.

The island of Ireland represents a potentially influential staging ground for strategic climate litigation that could raise ambition and ensure implementation at both domestic and EU level. Due to the cross-border nature of climate matters and the applicable international law via the Espoo and Aarhus frameworks, there is also potential for transboundary, or multistate litigation to be used by both Irish and Northern Irish NGOs to hold Ireland and the UK governments (in the absence of or in addition to a functioning devolved government in Northern Ireland) to account for climate policy failures which impact the whole island. Significant cases like *Climate Case Ireland* (2020)[2] have demonstrated how effective litigation can be on changing government approaches and there is now growing pressure on governments from NGOs and civil society both North and South of the border to deliver on climate with a flurry of new litigation in 2023.

However, moving beyond reactionary litigation towards a coherent strategic approach which identifies key cases that can form crucial leverage points in the climate debate, and which would satisfy both aims of achieving concrete improvements in Government policy/law making as well as generating public support for those improvements is challenging. There are barriers in both Ireland and Northern Ireland which make taking litigation relating to climate difficult, and the transboundary possibilities have so far proven to be too complex to generate any major traction on a multi-state or cross-border case. In addition, strategic climate litigation, especially on a transboundary basis will require deep cooperation between the active litigating NGO communities on both sides of the border – all of whom are stretched from a capacity and resource perspective and contending with different legal systems and in the case of Northern Ireland extremely dysfunctional governance arrangements.

Despite these challenges, investment in cooperation on developing a strategic all-island approach to climate litigation could deliver significant results which resonate far beyond the island of Ireland. Well placed, high profile, strategic lawsuits have the potential to force both the UK and Irish Governments to meet their climate commitments. Carefully constructed strategic communications around the litigation could also stimulate positive public debate, help repel any coordinated backlash from lobby groups and create broader public support for climate action measures, in turn generating the mandate for more ambitious climate action.

This report represents the results of a scoping study which conducted an initial exploration of the current status of strategic litigation on the island of Ireland to identify areas where further co-ordination, leadership or resources are required to maximise the effectiveness of strategic climate litigation in raising climate ambition. The report considers wider trends emerging in strategic litigation and how these might be relevant in the island of Ireland context, recent developments in the strategic litigation landscape across the island, and barriers to, and opportunities for ambitious strategic litigation which moves towards more ambitious, multi-state litigation which can capture the public imagination and drive the island of Ireland towards a more climate ambitious future.

[2] 'Climate Case Ireland': Friends of the Irish Environment v. The Government of Ireland & Others [2020] IESC 49, Irish Supreme Court (2020), available at https://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/

2. Emerging themes in strategic climate litigation

2.1 Defining 'strategic' climate litigation

It is important before diving into the approaches to strategic climate litigation across Europe to define what we mean by 'climate change litigation', or simply 'climate litigation' and what makes a case 'strategic'.

Climate litigation refers to any case brought before administrative or judicial bodies that seeks to raise issues of law or fact regarding climate change mitigation, adaptation efforts or climate science (European Central Bank, 2021).

In the 2019 Global Trends in Climate Change Litigation Snapshot Report,[3] a distinction was drawn between 'routine' and 'strategic cases' (Setzer and Byrnes, 2019). Strategic cases are defined as high-profile cases designed to press governments to take more ambitious climate action or to enforce existing legislation and aim to have impacts beyond the parties either by advancing climate policies, driving behavioural change, or increasing public awareness. Routine cases are described as "less visible" cases where courts are indirectly exposed to arguments about climate change, for example in planning permission cases. However, this distinction is not particularly helpful as routine cases can also involve strategic choices and often have effects beyond the parties to the dispute.

An important sub-set of 'strategic' cases are known as 'framework' or 'systemic' climate litigation (Setzer and Higham, 2022). These cases can be against governments or corporations. 'Government framework' climate litigation involves legal challenges to government's policy response to climate change. Government framework climate litigation can involve "*implementation cases… to enforce existing climate protection measures to meet existing targets or implement existing plans*" and "*ambition cases [challenging] the absence, adequacy or design of a government's policy response to climate change*" (Setzer and Higham, 2022). Until now framework government climate cases have adopted strategic approaches based broadly on the *Urgenda*-model[4] of climate litigation challenging the adequacy/implementation of climate policies on human rights grounds.

'Corporate framework' climate litigation challenges corporate actors' climate plans/targets on the basis that these are inadequate in an effort to disincentivise these companies from continuing with high emitting activities (Setzer and Higham, 2023). *Lliluya v. RWE* is a good example where a Peruvian farmer is seeking financial compensation from a fossil fuel company based on its partial responsibility for the melting of glaciers in the farmer's hometown where his home and livelihood are now threatened by flooding. The *Milieudefensie v Shell*[5] case is another good example where The Hague District Court ordered Shell to reduce its emissions by 45% by 2030 relative to 2019 levels based on obligations under Dutch tort law.

The focus of this report will be mainly on government framework climate litigation.

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[3] This is an annual report produced by the Centre for Climate Change Economics and Policy (CCCEP), and the Grantham Research Institute on Climate Change and the Environment. The UN Environment Programme (UNEP) also produces periodic reports into global climate litigation, available here.

[4] '*Urgenda Case*': *Urgenda Foundation v. State of the Netherlands* (2019) Supreme Court Netherlands ECLI:NL:HR:2019:2007, available at https://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/

[5] *Milieudefensie v Shell* (2021) Hague District Court, Netherlands, ECLI:NL:RBDHA:2021:5339 available at https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/

2.2 Trends in climate litigation

The 2023 Global Trends in Climate Change Litigation Snapshot Report highlights key developments in the field up until May 2023 (Setzer and Higham, 2023). The following trends, distilled from the 2023 Snapshot Report, are potentially relevant to strategic litigation on the island of Ireland.

The use of international law and human rights law arguments in climate litigation

The invocation of human rights arguments has continued to grow in climate cases. This can be considered as both "*a cause and an effect of the growing international recognition of the close connection between human rights and climate change, within the broader context of human rights and the environment*"(Setzer and Higham, 2022). An example of this growing recognition can be seen in the 2019 General Comment 36 of the UN Human Rights Committee where it was stated that "*[e]nvironmental degradation, climate change and non-sustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life*". Another example includes the strong and detailed recommendations of the UN Special Rapporteur on Human Rights and Climate Change on incorporating human rights considerations into climate legislation and litigation. Similarly important developments at the international level include the recognition by both the UN Human Rights Council and General Assembly of a right to a clean, healthy and sustainable environment as a human right.

Human rights based arguments will likely continue to be at the forefront of strategic climate litigation cases as these international developments are leveraged by litigants before domestic, regional and international courts (Setzer and Higham, 2022). The rulings/judgments of the European Court of Human Rights (ECtHR) in *KlimaSeniorinnen v Switzerland*[6], *Carême v. France* and *Duarte Agosthino v Portugal and Others*[7] – cases which build and expand on the Dutch Supreme Court's ruling in *Urgenda* confirming that States have a positive obligation under articles 2 and 8 of the ECHR to prevent the real and immediate threat to life caused by climate change – are likely to be of major significance in clarifying the precise content and detail of states' positive obligations under the ECHR in this context (Pedersen, 2023).

Unlike the international climate regime, which does not have a strong compliance or enforcement mechanism, international and regional human rights regimes provide a forum, well-trodden processes and relatively clear standards against which to assess States' climate action. Human rights arguments can thus be seen as important 'gap fillers' where other areas of law do not provide remedies (Savaresi, 2021).

Seeking increased climate mitigation ambition

According to the most recent tally in the 2023 Snapshot report there are 81 government framework climate cases outside the US challenging governments' overall climate policy response – either through ambition or implementation cases (Setzer and Higham, 2023). The majority of cases focus on mitigation rather adaptation.

Government framework litigation

Actions against governments still make up the majority of framework climate cases i.e., governments tend to be the main defendant in framework climate litigation (Higham, Setzer and Bradeen, 20223). NGOs/individuals are the main plaintiff in these types of cases (Setzer and Higham, 2023). The 2022 Framework Climate Litigation Report found that up to the 31 July 2022, at least 80 framework litigation cases had been filed

[6] '*Klimaseniorinnen*': *Verein Klimaseniorinnen and Others v. Switzerland* – ECHR Application No. 53600/20 (Judgement Pending), case documents available at https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/

[7] '*Duarte Agostinho*': *Duarte Agostinho and Others v. Portugal and 32 Other States*, ECHR Application No. 39371/20, judgment pending, case documents available at https://climatecasechart.com/non-us-case/youth-for-climate-justice-v-austria-et-al/

against governments across the world (Higham, Setzer and Bradeen, 2022).[8] The number of framework climate cases against governments continues to rise.

Examples of government framework 'ambition' cases in Europe include *Urgenda* (discussed above), *Neubauer v Germany*[9] and *Klimatická žaloba ČR v. Czech Republic*. In *Neubauer*, the German Constitutional Court found that Germany's Climate Act breached constitutional rights in the absence of a clear pathway to net-zero by 2050. In *Klimatická žaloba ČR*, the NGO Klimatická žaloba ČR, took various government ministries to court alleging that their failure to adequately address climate change violated fundamental rights guaranteed under the Czech Constitution, the EU Charter of Fundamental Rights and the ECHR. The plaintiffs presented evidence that the country had a limited carbon budget to comply with its constitutional and Paris Agreement obligations, the Czech Republic's Climate Protection Policy would permit emissions 2.5 times higher than this carbon budget allows. At first instance, the Prague Municipal Court upheld such arguments and ordered the state to urgently take the necessary mitigation measures. The judgment was grounded in obligations stemming from both the Paris Agreement and EU climate law (namely that member states are obliged to have a plan of precise and complete measures in order to reach the EU's Climate target of 55% emissions reductions by 2030). However, earlier this year, the Supreme Administrative Court overturned the decision of the lower court.

Examples of government framework 'implementation' cases include *Climate Case Ireland* (discussed below) and *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy*[10] where the High Court of England and Wales quashed the UK net-zero strategy on the basis that the Minister had insufficient information before him to adopt the strategy. These two implementation cases in the UK and Ireland demonstrate a strategic approach in a line of cases in common law countries that have constructed their case around obligations set out in national climate framework legislation. For example, this strategic approach proved successful in *Climate Case Ireland* where Ireland's Climate Act ensured the Supreme Court found no infringement of the separation of powers in reaching the conclusion that "*what might once have been policy has become law by virtue of the enactment of the 2015 Act*." (Para 9.1 of the SC judgement).

The 2022 Framework Climate Litigation Report predicts that as the legal and policy landscape on climate change evolves, for example with the increasing adoption of national framework climate laws in Europe, 'implementation' cases will become more popular (Higham, Setzer and Bradeen, 2022). Similar to general strategic litigation cases, government framework climate litigation often relies on human rights-based arguments and these kinds of arguments often make a significant contribution to the success of these cases (Higham, Setzer and Bradeen, 2022). Since *Urgenda*, arguments based on domestic/ constitutional and/or international human rights have been employed in over 70% of framework litigation cases worldwide (Higham, Setzer and Bradeen, 2022). There is also a significant role for climate science – many framework cases are concerned with the ability of their government to limit global warming to no more than 1.5°C above pre-industrial levels (Higham, Setzer and Bradeen, 2022). In *Urgenda*, the Court of Appeal relied on per capita emissions data to reject the government's argument that Dutch emissions were merely 'drop in the ocean'. In *Duarte Agosthino v Portugal and Others*, the applicants rely on Climate Action Tracker's sophisticated burden-sharing methodology to define the 32 respondent states' fair share allocation of the remaining +1.5°C budget. If the ECtHR weighs in on the 'fair share' question, this could go some way to clarifying the precise nature and scope of states' human rights obligations in the context of climate change (Pedersen, 2023).

Other key observations include the fact that framework climate litigation cases often use similar tactics and rely on support from transnational networks on strategy development and resourcing (Higham, Setzer and Bradeen, 2022). In addition, the success rate of government framework climate litigation tends to be higher in apex

[8] This includes cases that were filed in national courts, the General Court of the European Union, the European Court of Human Rights, the Inter-American Commission on Human Rights, the UN Committee on the Rights of the Child, the UN Human Rights Committee, and other UN Special Procedures.

[9] 'Neubauer': Neubauer et al. v. Germany 24 March 2021, German Federal Constitutional Court, available at https://climatecasechart.com/non-us-case/neubauer-et-al-v-germany/

[10] *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy* [2022] EWHC 1841 (Admin), England & Wales High Court (2022) available at http://climatecasechart.com/non-us-case/r-oao-friends-of-the-earth-v-secretary-of-state-for-business-energy-and-industrial-strategy/

courts than in lower courts with potential for more far-reaching changes in national climate policy (Higham, Setzer and Bradeen, 2022).

Furthermore, as demonstrated by the impact of the *Neubauer* decision, framework litigation cases act a as a catalyst for further litigation (Higham, Setzer and Bradeen, 2022). The 2022 Framework Climate Litigation Report cites Germany as an example of a jurisdiction that has seen the largest increased rate of framework litigation in Europe (14 new cases between 2017-2021), an increase closely connected to the *Neubauer* decision. The authors of the report refer to these subsequent cases as 'copy-cat' cases, but found that simply because they copy the approach of other successful framework litigation cases does not guarantee favourable outcomes – 11 of the 29 cases filed in the regions of Germany following the *Neubauer* decision have had unfavourable outcomes (Higham, Setzer and Bradeen, 2022).

In Ireland, *Climate Case Ireland* and the amended Climate Act have paved the way for 'second-generation' government framework litigation including the Climate Action Plan case, the Sectoral Emissions Ceilings case and the Long-Term Strategy case (which are discussed further below).

The rise of 'routine' climate change litigation

According to the 2023 Climate Litigation Snapshot Report, as of May 2023 over 200 climate cases integrating climate considerations have been filed outside the US (Setzer and Higham, 2023). These are often planning cases or environmental judicial reviews e.g., to challenge permission for fossil fuel projects or fossil fuel intensive developments. The aim of these cases includes "*stopping specific harmful policies and/or projects and making climate concerns more mainstream among policymakers*" (Setzer and Higham, 2023). Examples of 'integrating climate considerations' cases in Ireland and Northern Ireland are discussed below.

Integrating the principle of intergenerational equity (The Paris Agreement)

The concept of intergenerational equity was quite prominent in the German Constitutional Court's *Neubauer* judgment where it was stated that "*one generation must not be allowed to consume large portions of the* CO_2 *budget while bearing a relatively minor share of the reduction effort, this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom*".

The principle of intergenerational equity can therefore be a useful tool for highlighting inadequate fair share emission reductions in developed countries. That being said, a shortcoming of the *Neubauer* judgment, raised in the *Duarte Agostinho* submissions, is that an emission reduction target based on an *equal per capita* share that was compatible with well below 2°C was deemed constitutional because the resulting harm to German citizens could be alleviated through climate adaptation measures. An equal per capita share based on a well below 2°C target is a very favourable measure of what constitutes a fair share contribution from Germany's perspective. However, as the applicants in *Duarte Agostinho v Portugal and others* argue if courts in other States adopted a similar approach in assessing the adequacy of targets/measures, the aggregation of those targets/measures would be inconsistent with limiting global heating to 1.5°C (see also: Liston, 2020).

Strategic climate litigation against corporations

According to the 2023 Climate Litigation Snapshot Report, 17 corporate framework cases have been filed against corporations outside the US between 2015 and May 2023 (Setzer and Higham, 2023). In addition to the examples cited above – a growing number involve arguments about 'greenwashing' or more specifically 'climate-washing'. Examples include the recent wave of greenwashing cases against airlines challenging their sustainability claims on consumer protection law grounds (Maclaren, 2023).

A recently published working paper by scholars at LSE found that climate litigation poses a financial risk to Carbon Majors (i.e., big oil, coal and gas producers) because it lowers the share price of these companies (Sato

et al, 2023). It found that for Carbon Majors climate litigation reduced firm value on average "*by -0.57% following case filings and by -1.50% following unfavourable judgments*". For example, after the *Milieudefensie v Shell* judgment where the Hague District Court ordered Shell to reduce its emissions by 45% by 2030 relative to 2019 levels, Shell's relative value was calculated to fall by 3.8%.

3. Developments in strategic climate litigation on the island of Ireland

3.1 Republic of Ireland

Case Law

Ireland has already been an important staging ground for high-profile government framework climate litigation e.g., *Friends of the Irish Environment v Ireland* (dubbed '*Climate Case Ireland*') (2020) IESC 49 and (2019) IEHC 747. Here, the Supreme Court quashed Ireland's National Mitigation Plan because it failed to specify how the government intended to pursue and achieve the national transition objective of a low carbon, climate resilience and an environmentally sustainable economy by 2050 as required under Ireland's 2015 Climate Act.

To date, cases in Ireland have been mainly 'implementation' government framework climate (like *Climate Case Ireland*) or 'integrating climate considerations' cases. Examples of this latter category include *Friends of the Irish Environment v. The Government of Ireland, et al.* (2020), where the applicants argued that the Government failed to properly analyse its National Planning Framework's (NPF) impact on climate change when carrying out a Strategic Environmental Assessment (SEA). The High Court rejected this claim, reasoning that a quantitative assessment of the NPF's likely effect on climatic factors is not feasible because the NPF is a policy document that does not permit any specific development or project. The High Court's judgment was appealed to the Supreme Court – which has made a preliminary reference to the ECJ seeking clarification on whether this sort of plan should be subject to an SEA and on the level of detail required for all reasonable alternatives in a draft plan.

Another high profile example of an 'integrating climate considerations' case is *An Taisce vs An Bord Pleanála* (dubbed 'the Dutch Cheese Factory Case') which related to the adequacy of the Environmental Impact Assessment (EIA) report for a proposed cheese factory. The question was whether the upstream consequences of the project, a cheese factory – specifically the increased milk production to supply the factory – should have been assessed as 'significant indirect effects' of the project under Article 3(1) of the EIA Directive. The Supreme Court held that "*the proper scope of the EIA Directive should not be artificially expanded*" and it should not be "*conscripted into the general fight against climate change by being made to do the work of other legislative measures such as the 2021 Climate Act*". The Court concluded that "*wider indirect environmental consequences of projects must really be assessed at a programmatic level by national or sectoral measures in the manner provided by s.5 of the 2021 Act*". The Court's reasoning is vulnerable to criticism considering that post-2014 amendments to the EIA Directive specifically provide for the assessment and identification of the direct and indirect significant environmental effects including climate change impacts of a given project.

A more recent example again is *Coyne v An Bord Pleanála* (2023) where the Irish High Court upheld the legality and constitutionality of planning permission for a data centre in Meath. The High Court's scepticism towards the use of rights-based strategic litigation is worth noting: "*litigation inter partes is typically capable of addressing relatively immediate, acute, serious and specific threats to those rights in respect of which specific cause and effect can be demonstrated. But it is far less suitable a vehicle for addressing issues requiring wide societal, long term, complex and nuanced response – as to which policy and programmatic decisions are required*".

Jurisdictional features impacting on litigation

Ireland has some key attributes that create the potential for impactful climate litigation and constitutional arrangements in Ireland – particularly the availability of constitutional judicial review – that lend themselves well to climate litigation.

- The Irish courts have long recognised as justiciable unenumerated or 'derived' constitutional rights including the right to bodily integrity. Although the Supreme Court in *Climate Case Ireland* was not prepared to

recognise a derived constitutional right to a healthy environment, it seemed to indicate an openness to rights-based arguments in climate/environmental cases in future (McLoughlin, 2021; McIntyre, 2020).

- Despite the inherent caution and conservatism of the Irish judiciary, the Irish High Court has stood up for the rights of environmental defenders and demonstrated a high degree of respect for litigating NGOs. For example in the case of *An Taisce v An Bord Pleanala & Kilkenny Cheese* (2021) IEHC 422, (see para 34) the High Court, while finding against the NGO on the substantive climate points, called out the Government criticism of the NGO for pursuing the litigation as a breach of Article 3(8) of the Aarhus Convention which protects NGOs from persecution.
- The High Court and Supreme Court have also been cognisant of Ireland's climate commitments under EU law and under the Paris Agreement, engaging (albeit indirectly) with issues like the risk of overreliance on carbon dioxide removals by the state to achieve its climate targets (Maxwell and Glass, 2023). These characteristics combine well with the procedural environment, for example in the context of the legal costs of taking litigation, and in the costs shifting rules under the Planning and Development Act 2000 as amended by the Environmental Miscellaneous Provisions Act 2011, which after the clarification in the recent *Heather Hill* judgement ((2022) IESC 43) leave environmental litigants only liable for their 'own costs'. In Ireland 'no foal no fee' arrangements are legal (unlike in Northern Ireland), and with some significant willingness of the legal profession to engage in cases on this basis, current costs barriers while not absent are significantly ameliorated.
- Standing rules are also favourable. The current standing rules under s.50A(3) of the Planning and Development Act 2000 as amended, means that environmental organisations do not need to be incorporated/registered in order to take judicial review cases. Environmental NGOs have automatic standing in environmental cases in general and can challenge a wide range of decisions without having to demonstrate impairment of a right. However, individuals must be able to demonstrate that they are affected by the matter under challenge before they can initiate action.
- As will be discussed below in the context of transboundary litigation, the dual jurisdiction nature of the island offers an opportunity for litigation either side of the border to challenge/affect not only EU and Irish policy/legislative frameworks, but also UK frameworks. This offers environmental NGOs engaging in strategic litigation a high degree of influence above and beyond what would be expected for those based in a relatively small country like Ireland, particularly through collaborative joint and parallel legal actions with environmental NGOs in Northern Ireland or initiated by themselves in both jurisdictions.

However, these positives must be balanced against some points of caution:

- In Ireland archaic legal rules dating back to the 1600s prohibit crowdfunding or donations to cover legal costs (as was used in a high profile manner to support the *Duarte Agostinho case*). These are known as the rules against "Champerty" and "Maintenance" and their continued applicability was reaffirmed by the Supreme Court in a 2017 ruling in *Persona Digital* ((2017) IESC 27).
- There is also the notable tendency of the Irish judiciary to duck thorny issues or political "hot potatoes" by hiding behind the doctrine of the separation of powers (Constitution 1937 (Art 6)). This doctrine divides the powers of the state into the executive, the legislature and the judiciary, and the bodies are not supposed to trespass on each other's functions. This means the courts should not make policy for example, as this is the role of the executive. The argument was deployed in *Climate Case Ireland* in the High Court judgment that it would be trespassing on the policy making function for the Court to declare the government's climate policy unlawful/unconstitutional. This was also visible in the Supreme Court judgment in the *'Dutch Cheese Factory' case* (*An Taisce v An Bord Pleanála and Kilkenny Cheese* (2022)).
- Environmental NGOs are viewed as lacking standing to assert human rights arguments e.g. in *Climate Case Ireland* (Supreme Court judgment para 7.24), the Supreme Court held that the NGO litigant lacked standing to assert a personal right to a clean and healthy environment. This argument could only be advanced by individuals (who conversely would struggle to demonstrate they were personally affected in a manner sufficient to trigger individual standing requirements).
- Costs remain a barrier despite the improvements brought about by the 2011 amendments to the Planning and Development Act 2000, with the funding of claimant costs remaining an issue and leading to

overreliance on law firms to act unpaid for many years on very labour-intensive litigation, and perhaps never to be paid. The exclusion of NGOs from legal aid provision in Ireland was established clearly by *FIE v Legal Aid Board* ([2020] IEHC 454). Legal aid does not currently cover environmental cases.

Current considerations and recent developments

The landmark ruling of *Climate Case Ireland* has influenced judgments elsewhere including the *Neubauer* judgment in Germany and the *Net Zero Strategy* case in the UK (discussed below); this is particularly noteworthy considering the barriers to strategic litigation in Ireland.

Ireland's climate targets do not constitute a fair share contribution to the 1.5°C temperature goal of the Paris Agreement (Anderson, 2020). What is more, even with full implementation of current climate measures and policies, Ireland is projected to exceed its first two carbon budgets by a "*significant margin*" (EPA, 2023). Up to now, the Irish's government approach to climate action and nature conservation within the EU has frequently had a dampening effect on climate ambition and the stringency of conversation measures at EU level. Public debate on climate change mitigation measures is often lacking due to lack of nuance and the failure to adequately capture an equity-based approach and rural concerns in government policy with concerns being articulated by diverse bodies such as CLM, IHREC, FORSA, Social Justice Ireland and others.

National climate framework laws have already provided, and will continue to provide, a strong statutory hook for government framework climate litigation (Higham, Setzer and Bradeen, 2022). *Climate Case Ireland* provides a good example of this. Another recent example that "*gratefully adopted*" the reasoning of the Irish Supreme Court in *Climate Case Ireland* was the ruling of the High Court of England and Wales in *R (Friends of the Earth & ors) v. Secretary of State for Business Energy and Industrial Strategy* [2022] where the UK's Net Zero Strategy was deemed unlawful on the basis that the Secretary of State had insufficient information before him to adopt the strategy, in breach of the requirements of the UK Climate Change Act 2008 (as amended).

The Climate Action and Low Carbon Development Act 2015 (as amended) makes provision for a 2030 target and a net-zero by 2050 target; long term and short-term climate plans; a programme of carbon budgets and sectoral emissions ceilings. Failure to comply with these statutory obligations is already opening up avenues for future climate litigation.

- The *Climate Action Plan* (CAP 2023) case is being taken by Friends of the Irish Environment, represented by Community Law and Mediation (CLM)'s non-profit Centre for Environmental Justice. The applicants argue that the CAP 2023 and its Annex of Actions breach Ireland's recently amended Climate Act because the Plan fails to set out the detail necessary to show how exactly the government plans to reduce emissions in line with the legally binding carbon budgets.
- The *Sectoral Emissions Ceilings* (SECs) case is being taken by Friends of the Irish Environment. Here, the applicants are seeking an order from the High Court quashing the SECs on the basis that it has delayed setting a ceiling for the LULUCF sector for 18 months and has included 26 $MtCO_2eq$ in 'unallocated savings' for the second carbon budget in breach of the amended Climate Act.
- The *Long-Term Strategy* case is also being taken by Friends of the Irish Environment. Here, the applicants initially sought an order requiring Ireland to prepare and submit its long-term strategy (LTS) to the European Commission in accordance with the requirements of the Governance Regulation. The government submitted a draft Strategy to the Commission in April 2023. However, the draft LTS has been the subject of significant criticism, namely that it is weak on climate, housing and transport justice issues and just transition; it is poor on fossil fuel phase-out; and it is lacking in detail, particularly on the scale of the planned future reliance on negative emissions technologies to meet Ireland's 2050 target (Kelleher and Daly, 2023).

3.2 Northern Ireland

Background

Similar issues arise in the context of Northern Ireland, with historic poor implementation of environmental laws (Brennan et al, 2023) being exacerbated by the governance difficulties and problems created by Brexit, not least the removal of the EU Commission enforcement and oversight mechanisms. The political and historical context, lack of a co-ordinated strategy for cross-border environmental governance and crime management in addition to inadequate complaints and enforcement mechanisms, has allowed cross border environmental crime to thrive and placed obstacles in the way of environmental management (Brennan et al, 2017). Recent reports have concluded that Northern Ireland is now one of the most nature-depleted areas in the world with 12% of species assessed across NI under threat of extinction. This report was published alongside the growing media attention concerning the pollution crisis at Lough Neagh (Ireland's largest lake that provides 40% of drinking water in Northern Ireland).

Abuse of climate mitigation as a vehicle for corruption (the Renewable Heat Incentive (RHI) Scheme or "Cash for Ash" Scandal) led to the prolonged collapse of the Stormont executive with restoration of government in 2020, only for executive deadlock to arise again in 2021 (Brennan et al, 2023). The role played by climate mitigation measures in the RHI scandal has not assisted in the development of public support for more ambitious climate measures in Northern Ireland, and the ongoing poly-crises of political deadlock, Brexit, and then Covid-19 has pushed debates around climate action low down the agenda. This is additionally complicated by the fact that environment is a partially devolved competence meaning that in the current political vacuum effectively none, or very little action can be taken on significant environmental issues. The route of Westminster direct action/decision-making around these issues is fraught with political complications and is unlikely to result in positive changes given the current deregulatory agenda being pursued by the Conservative UK government.

Recent research indicates that climate action (and environmental protection more generally) is an issue with immediately obvious cross-border implications, and that there is huge unexplored potential for cross-border climate action between Northern Ireland and Ireland. One potential route for cross-border climate action stems from the new obligations laid out in NI's Climate Act. The Northern Ireland Climate Act was adopted in June 2022 legislating for emissions reductions targets for the years 2030, 2040 and 2050 (Net-Zero target) along with a requirement for a carbon budgeting programme. According to the section titled "*Requirements for proposals and policies under section 29 (Carbon Budgets)*", article 30(1)(a) proposes that NI:

> "*have regard to the desirability of co-ordinating those proposals and policies with corresponding proposals and policies in other parts of the United Kingdom, in the Republic of Ireland (recognising that the island of Ireland is a single biogeographic unit) or elsewhere*".

This provision is particularly pertinent considering the transboundary nature of environmental issues concerning air, water and land. For example, reports indicated serious cross-border pollution concerning ammonia emissions and that ammonia emissions from cross-border movements of livestock manure are not accounted for by either UK or Irish authorities. Northern Ireland accounts for 12% of the UK's total emissions despite only having 6% of the land area and 3% of the UK population. In addition, critical ammonia levels are exceeded in 90% of NI's protected habitats (Brennan et al 2020). Earlier this year, the Office for Environmental Protection (OEP) announced that it will carry out an investigation into the advice given by the Department of Agriculture, Environment and Rural Affairs (DAERA) on ammonia emissions in Northern Ireland. The first investigation of its kind in Northern Ireland, the OEP seeks to determine whether DAERA's 'Operational Protocol' has failed to comply with environmental law.

Litigation

The first case of its kind in Northern Ireland to raise climate issues in a strategic policy context was the *No Gas Caverns Ltd & Anor* [2023] NIKB 84 case, which challenged the grant of consents for the construction of seven

skyscraper sized underground gas storage caverns to be built under Larne Lough. Friends of the Earth NI and No Gas Caverns Ltd brought the challenge against the DAERA over concerns about the impact of the project on protected species, the seabed, the marine environment and its climate change implications.

In March 2021, the Minister of the Environment at the time was presented with the option of delaying the decision to approve the application for the marine licence until further information was available from the outcome of the Department for Environment Energy Strategy. This would arguably have provided a more definitive conclusion on the role of gas or storage caverns on the NI path to net zero emissions. Instead, the Minister approved the EIA consent decision and draft marine licence prior to the publication of the strategy, on the basis that appropriate controls were put in place to mitigate environmental impacts. On the 31August 2023 the High Court dismissed the judicial review, rejecting all seven grounds of challenge. For example, the applicants argued that DAERA had failed to consider the impact on climate change in accordance with the UK Marine Policy Statement. Furthermore, the applicants argued that the ministerial submission that *"[c]limate change considerations were considered, and it appears while the UK plans to reduce its reliance on fossil fuels, transition will take a significant time. Gas will continue to play an important part in the UK fuel mix for some years to come"* was irrational. However, the Court found that considering the words in question were directly lifted from Para 3.3.11 of the UK Marine Policy Statement, the Minister acted in compliance with the statutory duty. With regard to the Court's engagement with the substantive argument of whether the gas caverns would undermine Northern Ireland's efforts to meet its climate targets the Court stated:

> "*In any event, an analysis of the role to be played by fossil fuels in the UK's future energy requirements and how this may interact with the route to net zero is quintessentially a matter for policy makers and not the courts. There is, of course, a debate around the future use of oil and gas but it could not be classified as irrational to hold the view expressed in these documents*."

The Court referred to the decision made in *R (Packham) v Secretary of State for Transport* [2020] with regard to its refusal to adjudicate on this issue owing to the doctrine of separation of powers.

There are certain practical and procedural limitations for applicants using judicial review as a legal tool to combat environmental failures including but not limited to short deadlines, limited scope of judicial review and, specifically in NI, the significant risk of costs without Cost Protective Orders or No Fee Rules. In fact, the *No Gas Caverns case* has relied solely on crowdfunding, highlighting the serious cost implications of taking on a case like this. The applicants have chosen to appeal the decision by the High Court to the Court of Appeal. One of the principal grounds of appeal concerns the failure to refer the applications to the Executive Committee. The applicants argue that developments that drastically impact the local environment and climate change objectives should have been referred to the Executive Committee. A preliminary hearing took place on the 15November that will consider the next steps needed to progress the case ahead of the substantive hearing early next year.

The *Diesel Emissions Case* taken by Friends of the Earth NI and the Public Interest Litigation Support Project (PILS) is a landmark Clean Air judicial review concerning the failure of the Department of Infrastructure to give legally compliant exhaust emissions tests to hundreds of thousands of diesel cars and therefore breaching its duties to protect public health, biodiversity and wildlife, and it also marks the first case in Northern Ireland to rely on NI Climate Change Act adopted last year. It is anticipated that the new legislation will provide opportunities for potential framework climate law litigation and/or that we will see cases being taken for lack of implementation. The application for leave for judicial review was made in February and a record two days later was granted on all grounds. The judicial review was partly heard in September 2024 with the remaining evidence to be heard in January 2024.

The High Court allowed the Northern Ireland Commissioner for Children and Young People (NICCY) to intervene with the *Diesel Emissions Case*, to raise human rights concerns and highlight the adverse impact that poor air quality has on children's health specifically, demonstrating that the nature of direct effect is changing in regard to environmental and climate cases in Northern Irish courts. NGOs in this case were able to rely on the PILS for financial support via cost indemnities, court fees and a pro bono legal team to supplement the work of FOE NI's solicitor.

3.3 Transboundary/cross-border litigation

There is potential and need for transboundary strategic climate litigation on the island of Ireland. As a single biogeographic unit, climate plans and policies (and any respective failings) also affect the populations on the opposite side of the border. However, research and 'in-practice' discussions about the legal basis for this litigation and the practical logistics involved in navigating the two legal systems present on the island are under-developed. There is growing interest on both sides of the border in developing cross-border cooperation in this arena.

Anything that potentially affects the whole island's environment also has potential for transboundary strategic litigation with the goal of forcing policy change in either or both jurisdictions. This can include, for example, emissions litigation in relation to the significant ammonia issue mentioned above which is impacting the environment and threatening the health of the population in both jurisdictions. Potential litigation also includes climate policy challenges by residents in one jurisdiction to policy in the other jurisdiction, and challenges to large scale infrastructure e.g. Ireland currently has large oil storage facilities and refineries in Northern Ireland.

Enforcement failures in the border region tie into the post-conflict history of the region, with the peace settlement amnesties creating a perception of tolerance for a certain level of illegal activity. Authorities have failed significantly to police cross-border flows of agricultural and residential waste which are routinely moved cross border for illegal disposal (Brennan, 2016) and do not engage in monitoring the flow of emissions and pollution cross-border resulting in large accounting gaps. There are also significant failures in both jurisdictions by authorities to comprehensively or accurately monitor emissions and pollution in their own jurisdictions (e.g. see information on Northern Ireland here and here showing a local authority routinely not monitoring large scale raw sewage discharges into water bodies in sensitive sites, and on Ireland here where the water monitoring carried out by Environmental Protection Agency shows that significant pollutants like Dioxins are not routinely monitored for, and that monitoring for pesticides is only infrequent in most water bodies).

There is a strong international legal framework supporting the rights of those residing in one jurisdiction to participate in climate decision making and litigation in the other jurisdiction, that is under-utilised. The Belfast/Good Friday Agreement 1998 (the 1998 Agreement) provides explicit support for cross-border and all-island environmental cooperation, nominating it as one of the twelve areas of cooperation. It mandated the establishment of several bodies with environmental remits including the NSMC, the BIC, the Loughs Agency, Waterways Ireland, and SEUPB. It required the implementation of the European Convention on Human Rights in both jurisdictions, which provides a strong basis for climate litigation (Hough, 2019). This cross-border cooperation is reaffirmed and supported by the Protocol on Ireland/Northern Ireland to the Withdrawal Agreement between the UK and EU as a result of Brexit, and the later amending Windsor Framework. The Espoo Convention on Transboundary Impact Assessment applies in both jurisdictions and requires this to be considered in any environmental policy making, and where a significant effect is likely a public consultation should be initiated with the affected public. There is evidence of non-compliance with this requirement (e.g. *Hinkley Point Case*).

The Aarhus Convention also applies in both jurisdictions and its procedural environmental rights and protections can be availed of without discrimination as to citizenship or domicile, so the full set of environmental procedural rights should be available and exercisable by any person in a cross-border context. This provides cross-border rights of access to information, rights of environmental public participation and rights of access to justice. Standing should be available for persons to invoke before the courts of either jurisdiction regardless of their nationality or where they live. It also provides for protection of environmental defenders. This creates a supportive international law framework that is assisted by strong EU implementation in relation to those developments and programs that require environmental impact assessment under the EIA Directive or Appropriate Assessment under the Habitats or Birds Directives carried over residually after Brexit (but not

keeping pace with new developments post-Brexit). The EU legal framework also provided for extensiveaccess to environmental information rights, which were implemented domestically in both jurisdictions.

Recent research indicates that there are significant issues with implementation of the Aarhus Convention in both Ireland, Northern Ireland and on a cross border basis – this includes issues with access to justice in the context of cross-border pollution, access to cross-border information and participation in environmental decision making. Additional barriers are created by procedural discrepancies and differences between the two jurisdictions, creating significant barriers to access to justice in both jurisdictions.

Brexit has exacerbated these issues, particularly in civil legal matters with the UK automatically departing the Brussels Convention on Recognition and Enforcement of Judgements when Brexit happened. This has created many additional procedural hurdles for cross border civil litigation between Ireland and Northern Ireland. No additional replacement agreement has been entered into by the UK, with their attempt to join the Lugano Convention being blocked by the EU. It seems likely they will enter the Hague Convention 2019, but this agreement is not yet fully in force in any country and does not fully replace the Brussels Convention arrangements. The application of the Cross-Border Legal Aid Directive was also lost after Brexit, which gave the citizen of one country the right to avail of the legal aid regime applying in the other country when litigating there.

Finally, access to justice is under attack in both jurisdictions as it is in many countries across Europe and the world, with regular and significant attempts by governments in both jurisdictions to restrict access to justice rights further (e.g. in Ireland see here, here and O'Neill et al. (2022), pg. 29, and in Northern Ireland see here and here).

There is scope for litigation which could positively impact climate policy to be taken by NGOs or individuals from Ireland before the Northern Irish courts challenging policy failures or procedural failures there, and vice versa. The benefits for NGOs of litigation outside of their usual base of operations means that they are potentially "immune" from some of the negative impacts attendant on such actions in their own jurisdiction, such as targeting by affected business or individuals, or political threats.

However, as mentioned above, regulatory procedural divergences as well as navigating a different legal system may act as barriers to such action, and create difficulties for the NGO operating in a jurisdiction where they do not have established contacts. Some of this may be overcome by strong cooperation between NGOs in each jurisdiction who can share "insider" knowledge and professional networks with their counterparts (Brennan et al, 2023).

4. Barriers and opportunities for strategic climate litigation on the Island of Ireland

4.1 Legal barriers to Strategic Climate Litigation

Standing

Governments often raise the issue of standing when defending strategic climate litigation. Standing rules usually require litigants to demonstrate that their personal interests are directly affected or that their rights have been impaired in a tangible sense. The complex causal nexus and the diffuse and indirect impacts of climate change makes it difficult to identify an ideal or obvious litigant (Kelleher, 2021).

By way of example, in *Armando Carvalho and others v Parliament and Council* ten families brought a direct challenge against the EU's then 2030 climate target (of a 40% reduction in GHG emissions by 2030, compared to 1990 levels) arguing that it was insufficient to avoid dangerous climate change and threatened their Charter rights including the rights to life, health, occupation and property. However, the ECJ dismissed the case on the basis that the plaintiffs were not 'directly and individually concerned' by the EU's 2030 climate target. The court concluded that the plaintiffs did not have standing to bring the case because climate change affects every individual in one manner or another and the 'Plaumann test' requires that plaintiffs are affected in a manner that is "*peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually*."

NGOs have faced challenges in litigating on behalf of the general public in Ireland. In *Friends of the Irish Environment v Government of Ireland,* the Supreme Court held that as FIE did not enjoy the rights in question (i.e. the right to life and bodily integrity) it did not have standing to litigate these grounds nor did it come within the exceptions that would allow a corporate body to have standing to maintain a claim based on the rights of others. Expansive standing rules under the Dutch Civil Code entitled *Urgenda* to represent the interests of current generations of Dutch citizens; the Dutch Supreme Court sidestepped the question of whether they had standing to represent the interests of future generations. The issue of litigating on behalf of future generations and child/youth climate litigation is starting to be considered by international human rights bodies like the UN Committee on the Rights of the Child (see for example, the Sacchi case).

Exhaustion of national remedies

Before an applicant can bring a case to the European Court of Human Rights (ECtHR), article 35 requires the claimant to exhaust all domestic remedies. However, domestic remedies must be accessible and effective.

In *KlimaSeniorinnen v Switzerland* the applicants, a group of Swiss women over the age of 70, argue that Swiss climate policy – and the impacts it fails to prevent – violate the applicants' rights to life, respect for private and family life, to a fair trial and to access an effective remedy (under articles 2, 8, 6, and 13 of the ECHR). The applicants' claim was rejected by the Swiss Supreme Court, which found that the women were not particularly affected compared to the general public and that there was still time to prevent global heating exceeding the well below 2°C temperature goal. The applicants therefore exhausted all domestic remedies and filed an application with the ECtHR. In March 2023, the ECtHR heard oral arguments in the case and a judgment is pending. This will be an important ruling in regard to what constitutes an 'effective remedy' for applicants seeking accountability for inadequate climate action in national courts.

In *Duarte Agostinho and Others v Austria and 32 other Member States,* 6 youth applicants from Portugal aided by Global Legal Action Network filed a case against 33 state parties alleging that the inadequacy of their climate policies violate their rights to life, respect for private and family life and non-discrimination under

articles 2, 8 and 14 of the ECHR. The applicants had not exhausted domestic remedies and argued that it was not possible to do so due to the costs and the time it would take for the applicants to pursue claims against the 33 countries in the domestic jurisdictions and also the remedies presently available in domestic courts are not effective. This case was heard in September 2023 and a decision/judgment is expected in the first half of 2024.

In *Sacchi v Argentina and Others*, the youth petitioners argued that respondent states had failed to take the necessary preventive and precautionary measures to respect, protect, and fulfil the petitioners' rights to life (Article 6), the highest attainable standard of health (Article 24), and to enjoy culture (Article 30) under the Convention on the Rights of the Child. The Committee deemed the complaints inadmissible due to the non-exhaustion of domestic remedies.

Separation of powers

The issue of whether it is appropriate for judges to rule on complex and politically fraught questions like the adequacy of a government's climate policies has frequently come up in litigation. It is generally seen to be a significant, but not insurmountable hurdle in strategic litigation (Kelleher, 2020).

Separation of powers arguments have been used to dismiss tort-based climate cases. For example, in *Sharma v Minister for the Environment* and *Smith v Fonterra* the Court of Appeal in Australia and the Court of Appeal in New Zealand respectively raised concerns about the appropriateness of the judiciary resolving polycentric issues relating to climate change in tort-based actions.

Respect for the doctrine of the separation of powers can also be seen in how the courts have crafted remedies. For example,in *VZW Klimaatzaak v. Kingdom of Belgium et al* the Brussels Court of First Instance held that the federal state breached its duty of care under Belgian tort law and ECHR law by failing to take necessary measures to prevent the harmful effects of climate change, but it stopped short of granting a mandatory order to compel the government to reduce emissions by a specific amount on separation of powers grounds. However, on 30 November 2023 the Brussels Court of Appeal upheld the judgment of the Court of First Instance but also imposed a binding minimum emissions reduction target of at least a 55% reduction by 2030, relative to 1990 levels. As has been explained by Belgian scholars commenting on the case, the Court of Appeal reasoned that the principle of the separation of powers does not prohibit the Court from imposing binding emission reduction targets as such, but the principle does limit the *level* of targets the court can impose. (Briegleb and De Spiegeleir, 2023; Petel and Vander Putten, 2023).

Difficulties arguing rights-based arguments including proving causation in strategic cases

In the Czech climate case *Klimatická žaloba ČR v. Czech Republic*, the Supreme Administrative Court stated that the applicants are required to specify in which specific areas the defendants inaction directly breached their human rights obligations.

Similarly, in *R (oao Friends of the Earth) v. Secretary of State for Business Energy and Industrial Strategy*) the applicants argued that s.13 and 14 of the UK's Climate Change Act should be read consistently with the Human Rights Act 1998 in light of the threat to human health caused by climate change and the UK's duty to protect such a right. The judge rejected those grounds for being "*too ambitious in a number of respects*" [para 263]. That said it is worth pointing out the High Court still found that the Net Zero Strategy had been unlawfully adopted as the minister had legally insufficient information before him to adopt the strategy and the strategy itself lacked vital information which meant that Parliament and the public were unable to properly scrutinise it.

In *KlimaSeniorinnen v Switzerland*, the Supreme Court held that no violation of rights would occur until the 'well below 2°C target had been surpassed or harm has occurred. If the Swiss Supreme Court's interpretation of when a breach of human rights occurs is correct – and the appropriate legal standard is an ex-post analysis of harm rather than the existence of a known real and serious risk, and a failure to meet the due diligence

requirement – this would render fundamental rights a completely ineffective tool for securing climate accountability (Kelleher, 2021).

The question of collective causation for climate change is a live issue in the *Duarte Agosthino* case. Scholars have suggested that collective causation issues can be resolved both through recourse to a 'contribution to risk of harm' test (rather than a 'but for' test) and with the assistance of attribution science (Nedeski and Nollkaemper, 2022)

Costs

Climate litigation is a lengthy and expensive process. The availability of funding has significant bearing on applicants' ability to pursue and develop litigation strategies. Rules on 'champerty' in some jurisdictions have limited the possibilities for crowdfunding.

4.2 Extra-legal barriers to Strategic Climate Litigation[11]

Capacity issues

As strategic litigation is an extremely resource intensive activity, a high level of capacity is required for NGOs/lawyers to be able to engage in climate litigation. Capacity issues have been highlighted for both lawyers and NGOs as a barrier to strategic litigation on the island of Ireland. For example, there is only one solicitor specialising in environmental law matters attached to an environmental NGO across the whole of Northern Ireland.

In terms of capacity-building for lawyers, more training for solicitors and barristers on environmental and climate cases, including on the connections between human rights and the environment/climate would be helpful. Building up a better pro-bono culture, particularly among solicitors, is seen by NGOs as important for supporting strategic climate litigation. Environmental/human rights law clinics where environmental/human rights law academics supervise law students to use their research/advocacy skills to support grassroots campaigns (e.g., through research, drafting public consultation responses, guide writing, newspaper/blog writing) could also make a positive contribution.

From an NGO perspective, there is scope for better co-ordination in light of the limited capacity/resources of all organisations. This could involve information sharing to avoid duplicated efforts and to foster potential collaborations e.g., through a shared database of strategic cases, resources, and funding opportunities. The existing Manual of Environmental Justice (created in 2022 by Community Law and Mediation and Environmental Justice Network Ireland) could provide a platform for this. There is also a need to pool resources in terms of PR usage/strategies etc. and lessons learnt from past cases. This would allow for the support infrastructure needed to build a climate case (e.g., communication strategies etc.) to be shared and built upon over time.

Strategic communication

One of the biggest practical challenges to strategic litigation in Ireland is strategic communication. A robust communication strategy is required to raise public awareness about a strategic climate case and to mobilise support. Two good examples of effective communication campaigns include *Climate Case Ireland* and the *No Gas Caverns Case* where a strong emphasis was placed on having a clear PR strategy. Dr Andrew Jackson, the

[11] These barriers/challenges were identified during a workshop with representatives from NGOs from across the island of Ireland in Dublin in June 2023.

solicitor in *Climate Case Ireland* described public campaign in support of the case as being based on a strategy that "*win or lose the formal legal proceedings, the case could serve as a focal point around which the climate movement in Ireland could coalesce, diversify and grow, and more generally help to apply pressure to secure improved climate action in Ireland*" (Jackson, 2021).

Without a clear and well-thought through communications strategy, there is a danger of backlash, negative narratives and simplistic/reductive framings in the media (e.g., the ostensible need for a news story to have a hero, villain and victim). This can detract from the complexities of the issues at hand. It also creates a risk of NGOs being scapegoated as 'villains' when they are fulfilling an important environmental law enforcement role that has effectively been outsourced to them by government.

Concerns have been raised about the costs associated with hiring communications experts to help with the framing of strategic litigation. Avenues for PR experts to lend their expertise on a pro bono basis (e.g., like the pro bono pledge for lawyers) and information exchange between NGOs about running successful communications campaigns could help overcome some of these costs challenges.

An important consideration is how to frame not just big framework climate cases but also the cases involving 'integrating climate considerations', or challenges to more mundane procedural deficiencies by the state. These cases can also play an important role even where they do not 'win' in building resistance against environmentally harmful activities. The narrative in these types of cases can sometimes be more challenging than in telling a story in framework climate cases. In framework climate cases, especially those that rely on more abstract human rights arguments, it can be easier to build public support. In project-based cases e.g., challenging planning permission for fossil fuel infrastructure, the media narrative may focus more on the lost job opportunities rather than on broader environmental/climate justice issue. Procedural/administrative based cases should be viewed within the wider climate governance framework to demonstrate their significance. Communication tactics could be better coordinated to increase the visibility of these types of cases; to build a coherent narrative about why NGOs are pursuing these cases (e.g., why a case raises a particular environmental justice issue); and to avoid duplication. Greater diversification of litigation could potentially be pursued if there were greater co-ordination.

Movement-building and collaboration building

In terms of movement building, important questions that have been identified include:

- How do you build a wider climate movement around/alongside a strategic climate case?
- What is the strategic objective of a case?
- What is an NGO hoping to achieve through a case? What do you do if you win a case?
- What is the communication strategy if you win?
- How to you keep up the momentum to achieve that strategic objective?
- How do you ensure compliance with a judgment in a timely fashion?
- How do/should NGOs respond to losses/defeats?
- How do NGOs learn lessons from defeats and can those lessons be applied to future cases in the same or other NGOs?
- Is it better to approach this on a case-by-case basis or should you have a strategy in place for defeats?

Losses in the courtroom can still play a role in ensuring implementation of climate policies or raising ambition, if NGOs can keep the momentum going and garner more support and greater visibility to the issues in a case. There is scope for better coordination and lesson sharing on this sort of movement building. A related issue is how NGOs can lend support to, speak up for, and show solidarity with other NGOs engaged in litigation. There is scope for better coordination on this sort of collaboration and solidarity building too.

Organisational/personal toll of taking litigation for NGOs and individual litigants

A major concern for lawyers and NGOs is the personal/emotional toll of litigation on NGOs and individuals taking a case. An issue identified with attaching an individual to a case is a fear that they will face abuse and harassment for taking a legal challenge. There is a similar fear for NGOs and their staff. The risk of exposure to costs adds to the stress. There is an additional fear for NGOs that being involved in litigation could impact their funding, especially if they are in receipt of government funding. This is a significant barrier for strategic environmental litigation. Another concern is exposure to strategic lawsuits against public participation (SLAPP) litigation for those who engage in strategic environmental/climate litigation. Awareness raising and education around SLAPP litigation and updates to the Legal Services Regulatory Authority's Code of Ethics to allow lawyers to withhold their services in respect of SLAPP cases could be explored as ways of tackling SLAPP cases.

4.3 Opportunities

This research project has identified a range of possible types of strategic litigation/legal challenges which could be relevant in the context of the island of Ireland. Further research is required on all areas – particularly in relation to transboundary challenges. Key elements which should be explored are considerations around the potential backlash/unintended consequences and wider impact of challenges. These factors would depend on the specifics of the challenge but are of vital importance in ensuring the strategic nature of litigation taken.

The six areas identified are as follows:

1. Challenges to climate plans/strategies (domestic, and in the case of Ireland EU plans);
2. Challenges to compel Irish/UK governments/Northern Ireland Executive to meet climate mitigation targets or to increase the level of ambition of their climate targets;
3. Challenges to compel remedial action where there has been a failure to manage transboundary pollution;
4. Challenges surrounding breaches of procedural rights;
5. Challenges on the basis of transboundary climate action failures e.g. challenge to the lack of mechanisms or policies to achieve alignment of climate policies and prevent regulatory divergence;
6. Challenges based on intra/intergenerational equity issues, or intersectional identity issues like heightened exposure of minorities to both climate harm and negative impacts of climate action.

Within some of these general areas there are already cases in progress, and in other areas discussions are developing around how to take forward potential challenges on the island of Ireland. There are also important lessons that can be learned from jurisprudence from other jurisdictions, as described above. This is a potentially fruitful area for future work and continued collaboration, as reflected in our recommendations below.

5. Recommendations

Based on the analysis above, we have identified 5 key recommendations:

1. **Funding should be sought by the academic/legal/NGO community across the island of Ireland to develop initial legal opinions on the opportunities set out above in Section 4.3**. Developing legal opinions from barristers with expertise in the relevant areas would be a good first step to scoping the feasibility of the potential actions outlined above and would provide a starting point for discussions on coordinated NGO action. Once viable actions are identified, selection of litigation actions would ideally need to be conducted within a framework of strategic priorities developed and refined through discussions within the NGO community on an ongoing basis, which are influenced by determinations around strategic value and impact as well as the PR/strategic communications considerations that will determine impact. Cases for priority consideration could include:
    a. Inter-generational equity cases involving youth plaintiffs which offer the greatest potential for good climate storytelling and presenting a human and sympathetic face to climate impacts and inequalities. However, there are attendant ethical issues that need to be addressed and potential issues for non-legal NGOs. Intersectional climate justice cases also offer potential to personalise the storytelling around impacts of climate change, but again offer up ethical issues and potential limitations on NGO involvement.
    b. Transboundary, multi-state litigation should be explored as this is the area with one of the highest potential returns in terms of systemic and wide-reaching policy change and broad actionability by a wide range of NGOs. Additionally, it appears to have the potential to capture climate justice issues relating to intergenerational and intersectional justice and participation. It is perhaps also the most complex and un-tested area, and successful utilisation would depend in large part on the capacity for cross-border NGO cooperation and the successful establishment of coordination mechanisms.

2. **Research is needed to precisely pinpoint the grounds which NGOs have standing to litigate on in each jurisdiction, to ensure that joint or parallel litigations are successful.** As noted, the Irish courts have limited NGO standing to advance certain fundamental rights arguments in Ireland. Joint, parallel, or multi-jurisdictional legal action needs to be based on the practical realities of what is possible. However, challenging the status quo and moving the dial should also be a key element of strategic litigation approaches. Therefore, it is submitted that NGOs should work together to develop a framework for identifying areas suitable for joint actions where standing is already clear, and strategic benefits are obvious, and areas suitable for individual/single jurisdiction action but with high strategic benefit, such as those improving NGO standing to take fundamental rights-based cases on public interest grounds. NGO capacity for litigation should be assigned based on a mix of both types of cases, with sufficient flexibility built in for unexpected shifts in the legal landscape that need to be reacted to. Ideally any joint approach would reflect these considerations.

3. **Development of a coordination mechanism and framework on cross-border strategic litigation.** This could involve quarterly update meetings (in-person or via zoom) with interested parties from both north and south of the border (e.g. lawyers, academics, NGOs) and would ensure the conversation on potential cooperative and collaborative approaches continues to develop. These meetings could include brief updates from partners working on monitoring climate litigation in other countries to feed in trends and highlight emerging opportunities/approaches, help set strategic priorities, share best practices, and prevent duplication of effort. Through this process, a joint framework for prioritising joint/parallel and individual strategic litigation priorities could be developed, that still allows sufficient flexibility for unexpected demands on litigation capacity.

a. An immediate need is an exploration of the issue of costs of strategic litigation via a dedicated workshopwith partners from the legal profession, academia and NGOs. This was one of the key barriers highlighted throughout this research project (although the challenges are different in each jurisdiction) and requires urgent attention. This workshop should explore practical aspects of funding strategic climate litigation, including the potential development of a 'legal fighting fund' drawing from international examples, while navigating the complexities of the different approaches to funding litigation in each jurisdiction.

4. The reality is that Irish and Northern Irish NGOs typically operate with a small base of extremely hardworking, dedicated, and talented staff members who are usually over capacity. NGO staff as a result often do not have the luxury of stopping to reflect on their experiences, and document the meta data about these experiences, and this information is lost to the organisation when staff retire or move on. Consideration should be given to the **development of an NGO-led toolkit for cyclical review of past experience of environmental and climate litigation caseloads taken by individual NGOs, and for capturing the achievements and strategic benefits of these, as well as the barriers, challenges and negative impacts experienced**. This would enable institutional/organisational learning from experience that can be longer lasting, for cyclical improvement of strategic approaches over time. It would also enhance capacity for sharing of best practice experience and of pitfalls/mistakes to avoid. This would be of benefit to the entire NGO community. This could be modelled on Health and Safety cyclical review practices and should be simplified in order to minimise any reporting burden on staff. This ideally would be a digital tool, and this would offer the potential to extract trends/carry out analysis.

5. **Development of a strategy for maximising the impact of strategic litigation including a communications toolkit for organisations containing PR templates and a systematised approach for maximum impact during the life cycle of a litigation event, as well as databases of contacts in media and politics who can assist with such initiatives, and a skills database for communications across the NGOs/litigants in the grou**p. Targeted communication training for NGOs engaged in litigation would also enhance capacity. Strong PR approaches are crucial to realising the strategic potential of any litigation, as it is key that is has an impact on public policy and debate to ensure lasting gains. They also help communicate the benefits of the litigation and minimise the impacts to organisations of public or interest driven backlash or misinformation campaigns designed to negatively influence public opinion or outcomes.

6. **Development of dedicated sections of the existing EJNI-CLM Environmental Justice Manual reflecting the development of these resources for NGOs** (or the elements that are appropriate to put in the public domain).

Further Reading

- https://www.iiea.com/publications/taking-governments-to-court

  This Institute of International and European Affairs paper offers a detailed assessment of three landmark European cases: the Urgenda case (2019), taken in the Netherlands; the Friends of the Irish Environment case in Ireland (2020); and Neubauer et al in Germany (2021).

- https://academic.oup.com/jel/advance-article/doi/10.1093/jel/eqac016/6724178?login=false

  This case study in the Journal of Environmental law sheds light on practical limitations of court-imposed climate targets that may justify the greater restraint that other courts have exercised in comparable cases.

- https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/

  The fourth instalment of the Grantham Institute's annual report on global trends in climate change litigation takes stock of developments over the period May 2021 to May 2022, and draws on a number of recent case studies from around the world. It also identifies areas where climate litigation cases are likely to increase in the future.

- Global_trends_in_climate_change_litigation_2023_snapshot.pdf (lse.ac.uk)
  The latest edition of the Grantham Institute's annual report on global trends in climate litigation takes stock of developments over the period 1 June 2022 to 31 May 2023, providing a synthesis of the latest research and developments in the climate change litigation field.

- https://www.lse.ac.uk/granthaminstitute/publication/challenging-government-responses-to-climate-change-through-framework-litigation/

  This paper from the Grantham Research Institute at LSE explores a subset of climate litigation in which governments' policy responses to climate change are challenged, - 'government framework litigation'.

- Environmental Justice in Ireland: New research and resources by DCU and Community Law & Mediation Environmental Justice in Ireland: New research and resources by DCU and Community Law & Mediation - Community Law (communitylawandmediation.ie)

- EPA Ireland's Greenhouse Gas Emissions Projections 2022-2040 Monitoring & Assessment: Climate Change: Air emissions Publications | Environmental Protection Agency (epa.ie)

Websites

- http://climatecasechart.com/

  This site provides two databases of climate change caselaw. The Global database includes all cases except those in the U.S. Cases in the databases are organized by type of claim and are searchable. For many cases, links are available to decisions, complaints, and other case documents.

- https://www.urgenda.nl/themas/klimaat-en-energie/climate-cases-international/

  Urgenda has set up a project 'Climate Litigation Network' as an international project of the Urgenda Foundation. The project supports organisations, communities and individuals who are suing to force national governments to step up their climate mitigation ambitions.

- https://www.friendsoftheirishenvironment.org/court-cases/court-cases-information

  Friends of the Irish Environment have compiled a database of their Irish cases, available at the link above.