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Can Rights of Nature Contribute to Enhanced Environmental Protection in Ireland?

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At a Glance

Several sectors of Irish society have put forward rights of nature as a way to further enhance environmental protection in the country and help curb environmental degradation. In light of rights of nature developments in other jurisdictions, this piece presents rights of nature in their social, economic, and legal context, and summarises their reception by legal scholars. This portrayal will provide a basis for analysing the two main Irish rights of nature legal propositions and assess, albeit in preliminary fashion, whether these initiatives – if enacted – would further enhance environmental protection in Ireland.

Keywords: Rights of nature, Environmental law, Environmental governance, Environmental rights, Rights-based approaches, Standing for nature.

Overview

The expression 'rights of nature' has been strongly resonating in the Irish public discourse during the last two years. Many have been following news of legislatures and courts granting rights to rivers, lagoons, and rainforests in faraway places of exceptional natural beauty. These rights seek to protect these ecosystems against further degradation or restore them. Others have been actively taking part in conferences and seminars where the subject has been addressed. Ireland has been no stranger to the ripple effect of the rights of nature movement. Two major proposals are currently underway. One is the local resolutions, drafted with the assistance of environmental NGOs (e-NGOs), to include rights of nature as a key principle in local planning objectives and strategies. The other one is a constitutional reform, recommended by the Citizen's Assembly on Biodiversity Loss to include rights of nature as constitutional rights in Bunreacht na hÉireann.

This piece will briefly explore how effective a rights of nature constitutional or statutory

provision could be in improving environmental protection in Ireland. First, I will present the social, environmental, and legal context in which rights of nature have developed. Second, I will refer to the two dominant rights of nature strands which have influenced rights of nature legislation and case law around the world. And third, I will shortly address the two ongoing Irish rights of nature initiatives and attempt a preliminary assessment of their level of effectiveness in improving environmental protection.

Social, Environmental, and Legal Context of Rights of Nature

Environmental law is seeking novel ways to curb the rapidly growing environmental decay caused by human agency. This is a concern shared by all scientific disciplines in times of the Anthropocene – the current period where human agency has been dominant in the climate and the environment. Legal solutions to the impending socio-environmental crisis require a multidimensional approach. Such an approach would set out, on one hand, sustainable alternatives to the Western development model, wherein nature protection cannot be reconciled with unbridled economic growth. On the other hand, it would seek to couple environmental protection with demands of pluralism, social justice, bioculturalism, and public interest in the commons.

Consequently, rights-based environmental protection has been gaining track in international environmental law and in jurisdictions around the world. Rights-based approaches incorporate a human rights lens to environmental protection. The enhanced environmental protection afforded by a rights-based approach would address impacts of environmental degradation on constitutional and collective rights, impose upon States justiciable environmental protection duties, and expand environmental rule of law. Several types of rights-based environmental initiatives have thus been developed during the last three decades -inter alia environmental constitutionalism, environmental substantial and procedural rights, biocultural rights, and rights of nature. What all these initiatives have in common is the desire to improve legitimacy of environmental governance.

The Two Dominant Strands of Rights of Nature

Concerning rights of nature, in particular, these sets of rights are considered to be at the pinnacle of the evolution of rights-based environmental protection. Legal innovations brought forward by rights of nature would allow advocates for nature to bypass some of the hurdles imposed to the justiciability of 'claims-rights'; that is, rights entailing duties or obligations on the right-bearer vis-à-vis the right-holder. Two different strands have influenced rights of nature manifestations worldwide: the eco-theological strand, on the one hand, and the local participative governance strand, on the other hand. Some other rights of nature manifestations result from hybrid approaches that incorporate elements of both dominant strands.

The Eco-Theological Strand of Rights of Nature

Rights of nature are built upon a fiction. Like companies or incorporated bodies, nature as an

abstract and universal entity or a particular ecosystem, with intrinsic legal value, is formed by law into a separate legal personality. Therefore, the natural legal person can be further endowed with substantive rights to exist, to be conserved, and to be restored, which are adequate to protect the integrity and flux of its bio-chemical and physical cycles, non-living elements and biological diversity.

Given that direct and personal injury is experienced by the legal person itself in breach of its own substantial rights, nature can stand in court to uphold them. Legislation or case law usually appoints guardians or stewards to exercise nature's procedural rights. Some legal declarations have appointed environmental NGOs and public institutions as stewards of natural legal entities. Others have opted for setting out broad standing for nature by way of environmental popular actions. These actions permit any legal or physical person to stand in court to uphold nature's substantial rights.

Since 2008, around thirty one States have adopted some form of rights of nature. Most of these States have conceived their rights of nature around the model depicted in the previous paragraph. Flagship examples are Ecuador, Bolivia, Panama, Spain, and several US townships.

Eco-theological rights of nature seek to reconcile Christian theology with ecology. Under this perspective, nature is guided by unity, totality, and interrelatedness. Furthermore, nature is personalised as female – Mother Nature, Pachamama – and is thought of as nurturing and caring, as a place of perpetual creation of life and abundance of resources. Environmental law should reflect these personal qualities of nature and value nature for its own sake. So what environmental law does by endowing nature with rights is simply recognizing its pre-existing moral value. Eco-theology reflects on the substantive rights granted to nature. These are the right to exist, to be preserved, and to be restored. Philosophically speaking, these rights bear significant similarity to fundamental/human rights such as the right to life, the right to liberty, or the right to property.

The Local Participative Strand of Rights of Nature

In opposition to the eco-theological strand, there is the local participative governance strand of rights of nature. This strand has had less wide reception. It was originally conceived as a component of reparations owed by Governments to First Nations Peoples for colonialism and historic social exclusion – not for environmental protection. In this case, a particular ecosystem – and not nature as totality – is incorporated into a legal person in accordance with private or public law legal personality typologies. The choice of a particular legal entity typology depends on the legal context of a given jurisdiction. For instance, in some cases, natural legal entities have been incorporated as charities – e.g. the Whanganui River and the Te Urewera Forest in New Zealand. In other cases, local propositions have sought to incorporate local ecosystems as public law legal entities – e.g. such as the waterschap in Dutch administrative law.

The 'local participative governance' strand of rights of nature also endows nature with 'rights'. Nevertheless, these are in fact powers conferred to the natural legal entity to guarantee

its environmental governance and respect of its biocultural diversity. Natural legal entities can thus inter alia manage and protect ecosystem services, issue environmental licenses, enforce and monitor existing environmental law, arbiter differences between nature conservation goals and existing property rights over resources, and issue sanctions for breach of environmental regulations. Moreover, these powers include the possibility of ethnic and local communities depending on such ecosystems to directly and publicly participate in their environmental governance. Communities are thus able to take part in adopting action plans and to have a seat at natural entities' management councils and boards.

Praise and Critique of Both Rights of Nature Strands

Scholars have signaled that these features of dominant strands of rights of nature can either weaken or strengthen environmental protection. Eco-theological procedural rights of nature have been praised for proposing broader standing for nature. The possibility for any citizen to uphold environmental protection duties in the public interest offers wider access to environmental justice than existing environmental legislation – e.g. the Aarhus Convention in the European context. Substantive rights of nature of the eco-theological strand have introduced principles and values related to social, intergenerational, and environmental justice into legal systems with more or less pronounced deficits in environmental protection.

Moreover, the local participative governance strand of rights of nature has contributed to revalue the biocultural diversity of ethnic communities, by legally recognising the importance of traditional livelihoods and ways of life, cultural, aesthetic, and spiritual values of the environment, and ancestral ownership of lands and natural resources. This strand has, in particular, enhanced public participation of ethnic and local communities in environmental management, policy and decision-making. Several ecosystems – e.g. the Yarra-Birrarung river in Australia – are managed by councils or boards which count amongst its members different kinds of stakeholders – first nations representatives, government officials, civil society and e-NGO representatives, business and industry union representatives, and environmental defenders.

However, a common critique to both strands of rights of nature is that they add environmental protection duties, now drafted in the language of rights, without considering their integration into the existing environmental governance framework. The so-called 'right to exist', for example, refers to the duty to preserve nature's biological integrity. This would make it impossible or extremely difficult to differentiate such a right from similar obligations to achieve a certain desirable ecological quality – e.g. the EU Water Framework Directive – or to restore a population of protected species to a desirable threshold – e.g. the EU Birds Directive. Therefore, these new 'rights' would be brought into legal systems without any consideration given to the fact that they could overlap, be redundant, or enter into conflict with existing environmental protection. This conflict is also extended to clashes with other entitlements, such as property rights, State ownership of natural resources, or economic development values.

Moreover, the depiction of nature as totality has been called out as non-compatible with

evidence-based scientific information about the functioning of the Earth systems and for not providing any reasonable thresholds of environmental quality or nature restoration baselines.

Another objection to rights of nature legal declarations is their entrenchment without a coherent and comprehensive reform of other substantial and procedural associated legislations. To accommodate environmental popular actions, for instance, law reform of rules applicable to civil, criminal, and judicial review proceedings is required to incorporate claims in the public interest of nature. And, last but not least, neither strand of rights of nature addresses lack of enforcement. Lack of enforcement has been singled out in international and national contexts as detrimental to environmental rule of law and, thus, to environmental law's role in curbing environmental degradation.

The Two Ongoing Irish Rights of Nature Initiatives

Irish rights of nature initiatives have been met with support from different sectors of the public. One has been supported by Northern Irish e-NGOs, within local grassroots platforms, with support of an American environmental advocacy group. The other one has been put forward by a Citizens' Assembly, a group of randomly selected citizens selected to deliberate on an issue.

Rights of Nature as Key Principles in Local Development Plans

The first one is an initiative to pass motions in border city and county councils to insert rights of nature as a foundational principle into local planning frameworks. The incorporation of rights of nature in such context is a four-tiered process. First, a non-prescriptive motion will be approved to introduce public discussion about rights of nature. Second, a formal rights of nature declaration will be passed to identify nature's constitutional rights and processes required to render them effective. Third, county councils will engage in promotion of public participation into proposal development and raising awareness within the community about rights of nature. And finally, a work programme would embed rights of nature into environmental management strategic frameworks.

Currently, this initiative is at the first stage. Derry-Strabane, Fermanagh-Omagh, Belfast City, and Donegal councils have passed motions recognising the need for rights-based approaches to nature and wishing to explore rights of nature in a border community context. However, their legal effectiveness to enhance environmental protection is currently none. These motions are non-prescriptive and do not constitute law. Although inspired by the eco-theological strand of rights of nature, they do not endow nature, nor particular ecosystems, with any substantive or procedural rights of nature. Moreover, the possibility of inserting rights of nature into local planning frameworks is yet to be consolidated. Even though current legislation allows for that integration, the Planning and Development Bill 2022 could exclude it. Due to new rules imposing a duty to align local development plans with national and regional strategic planning frameworks, there would be no room for rights of nature as a key principle within that context.

Substantive and Procedural Rights of Nature in The Irish Constitution

The second rights of nature initiative is a recommendation by the Citizens' Assembly on Biodiversity Loss to incorporate rights of nature as constitutional rights in the Irish Constitution. This would be done by a referendum where the constitutional amendment would be subject to popular vote. The proposal summarily stated the need to grant nature 'rights-holder status' and endow it with substantive rights – the right to exist, to perpetuate, to be restored, and to not be polluted – and procedural rights – the right to be part of administrative decision-making and judicial proceedings. The proposal is clearly influenced by the eco-theological strand of rights of nature and modelled after the Ecuadorian rights of nature constitutional provisions.

Nevertheless, the current drafting of the proposal provides for low effective environmental protection. The Assembly failed to provide specific content to substantive and procedural rights of nature. This could lead to legal interpretations that could hinder their effectiveness. The judiciary might read these provisions not as constitutional rights but as symbolic or aspirational legislation not cognisable by the courts. Irish courts might deny their realisation on the basis of established case law that refuses to make it the judiciary's business allocating resources for socio-economic rights. Moreover, they might also decide to grant these rights a restricted scope in judicial review challenges against planning or environmental decisions.

Regarding broader standing for nature, it has not been specified what would be the type of sufficient interest required to stand in court for nature. If rights of nature are constitutional rights, to claim a breach of these rights requires a direct and personal harm caused to nature, which would be impossible to prove unless an express provision would waive the requirement in favour of nature's stewards. But if the intention is to allow environmental popular actions, then an explicit provision creating an action to uphold rights of nature in the public interest is required. Unfortunately, the issue was left unaddressed by the Assembly's recommendations.

Conclusion

The ongoing discussion about the incorporation of rights of nature initiatives into the Irish jurisdiction positively contributes to raise environmental awareness within the Irish public. Environmental protection could benefit from further enhancement – and greater legitimacy – on grounds of rights-based approaches such as rights of nature. Wide public support, from academia, children and youth organisations, environmental advocacy groups, and lay audiences is strongly desired for a consensus around the importance of effective environmental protection in Ireland. However, current Irish rights of nature initiatives are either at an exploratory stage – where they lack any binding value – or risk becoming ineffective or interpreted by courts as aspirational provisions – if enacted. The Irish public needs to closely monitor and actively discuss these initiatives to avoid future disappointment.

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Declaration of Interests

Nothing to declare.

Author Bio

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