Standing Issues in Environmental Rights Litigation

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SECTION 1 – Introduction

Background

Though environmental litigation is nothing new, the emergence of so-called "*climate cases*"[1] around the world reflects an increasing public demand that the courts engage with the issue of widespread environmental degradation, and its consequences for citizens and the natural environment in which they live.

These are, in reality, public interest cases which seek to vindicate not just the rights of an individual claimant, but the collective environmental rights (however described or derived) of entire communities and populations. Courts are grappling with the unique procedural and substantive issues which arise in such litigation, including how to balance access to justice requirements within the limits of national laws governing court process.

The nature of such claims can present a significant difficulty for plaintiffs seeking to mount the first hurdle of satisfying *locus standi* requirements; where the harm alleged is widespread and dispersed, or where the rights invoked are more readily perceived as collective, rather than individual, it may be difficult, if not impossible, to demonstrate the personal nexus generally necessary to establish standing[2].

This is more than just a procedural conundrum; the implications are significant where, if no standing is established, the courts are deprived of a valuable opportunity to even *consider* the merits of claims which ought to be determined in the public interest.

This paper argues that *locus standi* rules and principles in this jurisdiction are insufficient to take account of the peculiarities which invariably arise in this type of environmental litigation. It advocates for a broader legislative basis to accommodate more comprehensive participation in environmental proceedings by environmental NGOs, as the entities often best placed to make collective rights-based arguments – not just the rights of current Irish citizens, but also the rights and interests of future generations, or of the natural environment itself.

Structure

After considering some of the general ways in which standing rules can hinder access to justice on environmental matters, the paper will examine, by reference to models in other jurisdictions, three areas in which *locus standi* principles could and should be developed to accommodate the peculiarities of constitutional or rights-based environmental litigation, namely:

[1] See, for instance, database of climate change case law maintained by Sabin Centre for Climate Change Law, available at http://climatecasechart.com/climate-change-litigation/
[2] Setzer J and Higham C (2021), Global Trends in Climate Change Litigation: 2021 Snapshot. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

1. General standing of eNGOs in rights-based claims;
2. Standing to vindicate the rights of so-called Future Generations;
3. Standing to vindicate rights or interests on behalf of the natural environment.

The consideration given to models in other jurisdictions is not intended to be a comprehensive assessment of all the ways in which standing is addressed in environmental rights claims globally –the issue is approached in a variety of ways across all jurisdictions[3] – but rather to illustrate the relative feasibility of reformulating traditional *locus standi* rules in this jurisdiction and to suggest, by way of examples, the potential mechanisms and parameters through which to do so.

General Obstacles in Establishing Standing

It is worth recalling, as a preliminary point, that there is no "*environmental action*" *per se* through which the issue of standing can be neatly examined; whether a plaintiff has standing to bring an action relating to an environmental issue will be determined by the cause of action pleaded and the reliefs sought, and by reference to any relevant statutory provision or established jurisprudence.

That said, much of the environmental litigation in Ireland, as elsewhere, has developed through judicial review challenges to planning and development decisions on environmental grounds. To establish standing in such cases, an applicant need only show "*sufficient interest*"[4]; crucially, this test generally permits organisations such as environmental NGOs to challenge, on lawfulness or procedural grounds, administrative decisions impacting on the environment.

More generally, there are a myriad of ways in which standing can present a first (and often fatal) hurdle to the progress of environmental litigation.

(i) Inaccessible Legislation

The complexity of Irish environmental and planning legislation, much of which derives from EU law, is frequently cited[5]. Quite apart from the particular complexities of the statutory regime for planning, citizens with ordinary or local environmental concern might struggle to identify whether there exists a specific procedure to ventilate that concern in a court or other forum; this is because there is no obvious "*one-stop-shop*" statutory regime to which they can refer and, in many instances, remedy or enforcement mechanisms are reserved for specified authorities.

The table below sets out just small sample of provisions (summarised, with emphasis added) illustrating the widely varied provisions on standing as they relate to different types of environmental concern. So, for instance, while complainants with water or air pollution concerns benefit from relatively broad standing provisions, issues relating to forestry or litter are generally exclusively a matter for local authorities; these distinctions only become apparent

[3] See for instance, Pring & Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals, the Access Initiative* (2009), at Section 3.6.
[4] S.50A(3)(b)(i) of the Planning and Development Act 2000 (as amended), as amended by section 20 of the Environment (Miscellaneous Provisions) Act 2011
[5] See, for instance, introductory remarks of Clarke CJ., Launch of the Planning, Environmental and Local Government Bar Association (PELGBA), July 2018, wherein he noted the "*particularly complex and sometimes highly opaque*" nature of Irish environmental law, at p.5

through a relatively comprehensive review of numerous acts a large body of (frequently amended and reamended) provisions.

Sample Table of Standing Provisions in Environmental Legislation

Act	Sections	Provision
Waste Management Acts 1996 - 2011	s.57 (1)	Any person may apply to the High Court where waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution.
Waste Management Acts 1996 - 2011	s.58	Any person may apply to the appropriate court for remedies where another person is holding, recovering or disposing of, or has held, recovered or disposed of, waste, in a manner that is causing, or has caused, environmental pollution.
Local Government (Water Pollution) Acts 1977 – 1990	s.10 (1)(a)	Where, on application by any person to the appropriate court, whether or not the person has an interest in the waters concerned, the court is satisfied that another person has caused or permitted water pollution, it may make orders directing that person terminate, mitigate, remedy and/or compensate foe same
Air Pollution Act 1987	s.28 (1)	The High Court may, on the application of a local authority or any other person, by order, prohibit or restrict an emission from any premises.
Environmental Protection Agency Act 1992	s.108(2)	Where any noise…as to give reasonable cause for annoyance to a person in any premises in the neighbourhood or to a person lawfully using any public place, a local authority, the Agency or any such person may complain to the District Court (after serving a notice) and the Court may order the person or body making, causing or responsible for the noise to take the

		measures necessary to reduce the noise …
Forestry Act 2014	s.28	Summary proceedings in relation to an offence under the relevant statutory provisions may be brought and prosecuted by the Minister.
Litter Pollution Acts 1997 – 2009	s.25	An offence under this Act may be prosecuted by the local authority in whose functional area the offence was committed.

(ii) Establishing Harm, Causation and Justiciability

Other disputes which centre on environmental matters can, in theory at least, be determined within the well-established parameters of various torts. There is nothing new, for example, in plaintiffs being granted damages or injunctive relief in respect of alleged air, noise or water pollution in nuisance or negligence actions where that plaintiff can demonstrate a personal injury or impact resulting from such pollution.

Peculiar harm is not so easy to establish however, in cases concerned with less localised issues, such as widespread biodiversity loss or harm said to arise from climate change. Even if established, the issue of justiciability (e.g., in cases where harm or rights infringements can only be remedied through government policy) may restrict, partially or otherwise, the ability of a court to provide an effective legal remedy.

Negligence principles have been invoked to progress litigation with climate change at its centre, though this has generated mixed results. In the Australian case of *Sharma v Minister for the Environment*[6], for instance, a young plaintiff was granted a declaration that the defendant owed Australian children a duty of care in respect of risk of injury from climate change when considering permissions relating to coal mine extraction.[7]

This decision can be contrasted with that of *Juliana v United States*[8], where, although the court was satisfied that the young plaintiffs could establish sufficiently particularised injuries relating to federal fossil fuel policies, it also determined that those injuries, if established, would require remedy by way of "*a host of complex policy decisions*". Thus, they were not amenable to redress which the court had jurisdiction to give[9].

Though not directly comparable with the standing regime in the United States, Ireland's own rules suggest a similar cause of action is more likely to generate findings on standing along the lines of the *Juliana* decision, more so than that of *Sharma*.

[6] [2021] FCA 560, delivered Bromberg J, 27 May 2021
[7] An appeal of the decision was heard by the Federal Court of Australia 18 – 20 October 2021 and judgment stands reserved at the time of writing.
[8] 947 F. 3d 1159 (9th Cir. 2020)
[9] Ibid. at 1165

(iii) Narrow locus standi rules on rights-based claims

The primary focus of this paper is the rules on standing as they apply to rights-based or constitutional claims (which, as will be seen, is linked to the issue identified at (ii)). Ireland's own climate case has highlighted how existing rules on standing present a particular problem for those seeking to vindicate so-called environmental rights (however derived), in this jurisdiction, and for environmental non-profit organisations ("**eNGOs**") in particular.

SECTION 2 - Standing for Environmental NGOS in Rights-Based Claims

Introduction

The central role eNGOs in environmental litigation can be gleaned from even the most perfunctory review of court lists in which these disputes appear. They have played a particularly active role in the emergence, globally, of climate cases[10], as sole plaintiffs, co-plaintiffs, or in representative capacities in class action suits.

This is entirely unsurprising; the issues in such cases tend to be complex, requiring extensive resources and access to scientific evidence and expertise that may only be easily available to established organisations. More importantly, the issues involved potentially impact entire communities, or national and even international populations; as such, the true scope of the claim is really only examinable by reference to collective impact, rather than individual circumstances.

In this sense, the role of the eNGO should be regarded as particularly vital in Ireland, where we have no class action model which might otherwise offer a mechanism through which to vindicate collective environmental rights.

The importance of eNGOs securing access to justice in environmental matters is already recognized in Aarhus Convention, which confers specific (and sometimes more favourable) access provisions for eNGOs when compared to ordinary citizens[11]. This is also recognized in the jurisprudence of the EU (itself a party to the Aarhus Convention); in *Slovak Brown Bear*[12], the Grand Chamber of the CJEU made clear that even though Article 9(3) of the Aarhus Convention is not directly applicable in EU law, the courts of Member States were still obliged to interpret, to the fullest extent possible, the national procedure in order facilitate standing for eNGOs in environmental cases.[13]

Ultimately however, each jurisdiction may determine the standing of an eNGO in accordance with national law. The *Friends of the Irish Environment* decision, considered next, is

[10] Again, see, database of climate change case law maintained by Sabin Centre for Climate Change Law, available at http://climatecasechart.com/climate-change-litigation/
[11] Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters Done At Aarhus, Denmark, On 25 June 1998, at Articles 2.5, 5, 6 and 9.6.
[12] (2011), C-115/09. For further discussion, see *Can Nature Get It Right? A Study of Rights of Nature in the European Context*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 689.328- March 2021 at p.32
[13] Ibid. at para. 51

particularly relevant in this context, as it illustrates how national rules on standing can severely curtail the range of arguments an eNGO is permitted to be make in such cases.

Friends of the Irish Environment v Ireland – Decision on Standing

In *Friends of the Environment v Ireland v Ireland*[14] ("***FIE***") the Supreme Court considered whether the plaintiff eNGO had standing to argue, *inter alia*, that the adoption by the Irish government of its National Mitigation Plan failed to vindicate the constitutional rights to life and to bodily integrity (as the rights most likely to be impacted by climate change)[15].

FIE was successful in arguing that the plan as adopted was *ultra vires*, where the State had produced a plan which lacked the requisite specificity of measures required by statute. The Supreme Court also held however that FIE had no standing in relation to the rights element of the claim.

In reaffirming *Cahill v Sutton*[16] as the key authority on standing in constitutional cases; the Supreme Court held that the general rule, subject to relaxation only where the justice of the case so requires, is that an applicant must be able to adduce evidence of some impact on, or imminent threat to, his or her own rights, in respect of the impugned provision.

Where there was no dispute between the parties that FIE, as a corporate entity, did not enjoy the personal rights invoked, the issue was whether a relaxation to the general rule, entitling the plaintiff to seek to vindicate those rights on behalf of others, was justified. To this end, the plaintiff relied upon authorities including *SPUC Ltd v Coogan (No.1)*[17] and *Irish Penal Reform Trust v Governor of Mountjoy Prison and Minister for Justice*[18].

The Supreme Court distinguished these authorities on the basis that the plaintiff organisations in *Coogan* and *Irish Penal Reform Trust* were seeking to vindicate, respectively, the rights of the unborn and the rights of prisoners with psychiatric illnesses. In the case of the unborn, it was inevitable that the rights sought to be protected must be invoked by a third party in order to avail of court protection[19]. Unlike the case made by the plaintiff organisation in *Irish Penal Reform Trust*, there was no suggestion by FIE that the many individuals who could have initiated the claim suffered from any disability or vulnerability that prevented them from so doing, nor was it suggested "*that the claim would be in any way limited if brought by individuals*"[20].

That individuals might be insufficiently resourced to discharge legal costs, the main argument advanced by FIE in this regard, was not enough to demonstrate that such individuals were incapable of mounting a similar challenge to vindicate their personal rights[21]. In the

[14] [2020] 2 ILRM 233; [2020] IESC 49
[15] Ibid. at para 5.3. The plaintiff also sought to rely on corresponding ECHR rights. The Supreme Court declined to recognize a right to a healthy environment contended for by the plaintiff, where such a right was superfluous and was, in any event, too vague in terms (see para.9.5).
[16] [1980] IR 269
[17] [1989] I.R. 734; [1990] I.L.R.M. 70
[18] [2005] IEHC 305
[19] Ibid. at para. 7.13
[20] Ibid. at para. 7.18
[21] Ibid. at para. 7.22

circumstances, FIE had failed to establish that there were grounds to relax the general rule on standing as set out in *Cahill*.

Analysis

The decision has not closed the door on the general question of eNGOs raising rights-based arguments in environmental and climate change litigation. Relaxation of the general rule may be permitted where it can be established, for instance, that those prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights[22]; it is conceivable that such evidence could be adduced in a future case if, for instance, a court accepted the premise that those likely to directly suffer from the operation of current legislation could not be aware of the true potential impact on their rights in time to avail of an effective remedy.

Nevertheless, the case illustrates the need for a broadening on the rules of standing as they apply to eNGOs.

In *Irish Penal Reform Trust*, considered at some length by Clarke CJ. in *FIE*[23], the plaintiff organisation, IPRT, was joined by two individual prisoners as co-plaintiffs. The essence of the claim was that the rights of prisoners with psychiatric illnesses were infringed by the prison conditions they endured. IPRT argued, successfully, that their claim of *systemic* deficiencies in services for such prisoners could not be adequately addressed by reference to the experience of the individual co-plaintiffs alone. On that basis, it was granted standing to make those claims on behalf of all such prisoners.

Though the Supreme Court in *FIE* queried why individual plaintiffs could not have been joined to make the rights-based arguments advanced, it is difficult to see how the claim so constituted would have assisted FIE to make the similar argument of systemic rights infringements, impacting the general public, caused by inadequate climate change provisions. Climate change presents a harm that is, by its nature, indeterminate in scope and severity, yet it is also widely acknowledged as a genuine and serious threat to lives and livelihoods; the true nature of that harm cannot be examined adequately by reference to individualised claims.

This anomaly has already been identified already in our own jurisprudence. In a dissenting judgment in *Lancefort Ltd v An Bord Pleanála, Ireland and Attorney General (No 2)*[24], Denham J (as she then was) cited the *Cahill* and *Coogan* as demonstrating, on the test for constitutional validity of statutes, a "*development from the concept of locus standi as victim related to a jurisprudence where public interest parties have been adjudged to have standing"*[25].

This was, she noted, of particular relevance to environmental issues where an approach is needed which is "*just, aids the administration of justice, would not permit the crank, meddlesome or vexatious litigant thrive, and yet enables the bona fide litigant for the public interest establish the necessary locus standi* in the particular area of environmental law where

[22] [1980] IR 269 at 285
[23] [2020] 2 ILRM 233 at paras. 7.15 – 7.17
[24] [1999] 2 IR 270
[25] Ibid. at 286-287

the issues are often community rather than individual related. *The administration of justice should not exclude such parties from the courts*.'[26] [emphasis added]

Though this assessment was made prior to the amendments to planning legislation which broadened the rules on standing for eNGOs, the observation remains relevant for more recent rights-based claims such as those advanced in climate cases; requiring evidence of personal harm risks distorting the true nature and scope of the claim which, however couched, is really one of public interest.

Approach in Other Jurisdictions

General

It is difficult to draw a clear comparison on standing rules with other jurisdictions; many, for instance, permit representative and class actions through which through which eNGOs have established standing to invoke the personal rights of their members to bring substantive merits-based actions as distinct from administrative review proceedings. Others, including the civil law jurisdictions of France and the Netherlands, have codified laws which contain specific provisions governing the standing of eNGOs.

All jurisdictions, however, are now dealing with similarly broad themes of widespread environmental harm and climate change, and eNGOs in these jurisdictions are battling, to greater or lesser extents, standing rules which threaten to restrict the scope of the examination undertaken by courts.

United States

Public interest environmental litigation in the U.S. has a lengthy history. Article III of the U.S. Constitution, which established the Supreme Court and also gave Congress the authority to create additional courts, conferred the Judicial Branch of the federal government with authority over certain types of cases. While the Art.III "*Case or Controversy*" clause of the U.S. Constitution[27], does not specifically mention standing, the Supreme Court has, over a long period, developed a system for determining when a person has standing to bring a claim in federal court based on the authority granted by Article III and federal statutes.

Over twenty years ago, in the leading case of *Friends of the Earth Inc. V Laidlaw Environmental Services*[28], the U.S. Supreme Court confirmed that to satisfy general standing requirements of Article III, a plaintiff must show "*(1) it has suffered an "*injury in fact*" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision*[29]."

Associations, such as the three eNGOs who had issued the petition in the case before the court, were additionally required to demonstrate that "*its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted, nor the relief requested requires the participation of individual*

[26] Ibid. at 297
[27] Art. III, Section 2, Clause 1
[28] 528 U.S. 167 (2000)
[29] Ibid. at 180 - 181

members in the lawsuit"[30]. Sworn statements from individual members of the plaintiff eNGOs, detailing, for instance, how their interests and hobbies were curtailed by apparent pollution on specific stretches of water were sufficient to grant the eNGOs standing where they "*adequately documented injury as to fact*"[31].

The same test was recently applied in favour of the petitioner eNGO in *Natural Resources Defense Council v. Wheeler*[32], where evidence from its members that their coastal properties was vulnerable to climate change was sufficient to establish the standing of NRDC to challenge a permit regime affecting emissions."[33]

Though these cases appear to grant broad standing in environmental suits, they ultimately still relied on evidence of individualised harm; yet, in many ways is difficult to imagine that the same cases would have been made and/or succeeded if only those individual claims (and not a broader eNGO-supported claim, or a class action) had issued in the first instance.

Canada

In *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*[34], at issue was the standing of a rights group, as co-plaintiff with one directly impacted individual, to mount a constitutional challenge to legislation criminalizing prostitution.

In recognizing the standing of the rights group, the Supreme Court of Canada affirmed that to establish the public interest standing asserted, the court must consider whether the case raised a serious justiciable issue, whether the plaintiff had a real stake in the proceedings or was engaged with the issues it raised; and whether the proposed suit was, in all the circumstances, a reasonable and effective means to bring the case to court[35].

Given that this test for public interest standing appears reasonably broad, it is interesting and somewhat surprising that this model of representative action does not appear to have found favour in environmental litigation in Canada. The Supreme Court of Canada has not yet had to determine public interest standing in the context of a constitutional environmental dispute and, as such, the extent to which eNGOs might be permitted to invoke personal environmental rights is still an unknown[36].

Instead, so-called climate litigation has largely been instituted by named individuals (often young people) as plaintiffs, an approach reduces the risk of needing to meet *acto popularis/jus tertii* arguments such as those raised in FIE, but which have tended to fail, in large part, on justiciability or procedural grounds.[37]

The Netherlands

[30] Ibid. at 181
[31] Ibid. at 182
[32] No. 18-1172 (D.C. Cir. 2020)
[33] Ibid. at 77
[34] [2012] 2 S.C.R. 524
[35] Ibid. at para. 2
[36] For further discussion, see *Standing in Environmental Matters*, The Environmental Law Centre (Alberta) Society, December 2014 at p.19
[37] See, for instance *La Rose v. Her Majesty the Queen* (2020) FC 1008 and *Environnement Jeunesse v Procureur General Du Canada*, District of Montreal, Superior Court, 11 July 2019

Standing of eNGOs in civil law jurisdictions such as the Netherlands is still the subject of judicial consideration but has tended to be a less controversial issue. This is because the relevant provisions of the Dutch Code contain specific standing requirements for eNGOs to bring certain claims which, if met, bypass many of the typical standing arguments raised in the common law jurisdictions considered thus far.

In *Urgenda*[38] the Hoge Raad (Supreme Court of the Netherlands) held that the Dutch Government had violated ECHR rights by failing to meet more ambitious targets of GHG emissions. The court accepted that the plaintiff, as an eNGO said to be acting on behalf of the current generation of Dutch nationals, was entitled to make rights-based arguments pursuant to Article 3:305A of the Dutch Civil Code, which permitted class actions by interest groups.

Article 3:305A(1) of the Dutch Civil Code[39] provides as follows:

"*A foundation or association with full legal capacity may institute legal proceedings aimed at protecting similar interests of other persons, insofar as it promotes these interests pursuant to its articles of association and these interests are sufficiently safeguarded*."

The provision goes on to provide that the interests of such other persons are deemed to be sufficiently safeguarded if the legal person is sufficiently representative and meets a number of other criteria, including, *inter-alia*, appropriate and effective mechanisms for participation in or representation in the decision-making of the persons whose interests are pursued by the legal action; sufficient resources to ensure control over the claim, and sufficient experience and expertise with regard to instituting and conducting legal proceedings. Similarly, the organisation must have a non-profit motive and the claim must be one with a sufficient nexus to the Netherlands.

Article 3:305A was also invoked by the plaintiff foundations in *Milieudefensie et al. v Royal Dutch Shell*[40], in an action seeking to compel Royal Dutch Shell to reduce its emissions in accordance with the Paris Agreement targets. Here, the court noted that claim, as a public interest action, was seeking to "*protect public interests, which cannot be individualized because they accrue to a much larger group of persons, which is undefined and unspecified*[41].

Although the court made these comments in the context of the class action before it, this statement captures the essence of the problem of this type of environmental action; where claims cannot be individualised – or, more accurately, must be individualised in order to satisfy the *locus standi* rules in jurisdictions such as Ireland – there is a real risk that the public interest aspect of the claim is side-lined.

The Dutch approach to standing for eNGOs in rights-based claims is, in this sense, far more pragmatic, in recognizing that certain environmental claims cannot be individualised and that eNGOs are the best placed plaintiffs to progress such claims on a representative basis.

[38] *State of the Netherlands v Stichting Urgenda* (ECLI:NL:HR: 2019:2007). English translation available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf
[39] Unofficial English translation available at http://www.dutchcivillaw.com/legislation/dcctitle331111.htm
[40] ECLI:NL:RBDHA:2021:5337 (Dutch version) and C/09/571932 / HA ZA 19-379 (English version)
[41] Ibid. at 4.2.2

France

Similarly, France does not appear to restrict the scope of the arguments that might be made by an eNGO once that organisation is appropriately certified and otherwise complies with the relevant provisions of the *Code de l'environnement*[42].

In *Notre Affaire à Tous and Others v. France*[43], four eNGOs sought to hold the State responsible for its failure to meet commitments on emissions. They relied in part on human rights arguments, including that the State's action (and inaction) constituted a violation of Articles 2 and 8 of the ECHR.

Standing was established on the basis of Article L.142-1 of the Code, which provides that a lawfully declared association, with a primary objective being the protection of the environment (either generally or in a specific domain), and which has been working towards that aim for three or more years, can benefit from so-called administrative certification.

The four eNGOs had demonstrated that their primary objectives lay in the protection of the environment and there appeared to be no controversy that the eNGO was permitted to make human rights arguments where those bodies otherwise met the criteria set out in the Code.

Article 142-1 of the Code provides that certified associations benefit from a presumption of legitimate interest ('*intérêt pour agir'*) in administrative proceedings where they can demonstrate that the challenged decision (i) directly and certainly harms the association's interests due to a fault committed by the administration (ii) has a direct link with the association's purpose (iii) impacts the environment within the territory in which the association acts and (iv) was made after the certification (of the association) was granted.

Article 1248 of the French Civil Code now also specifically provides for ecological prejudice ("*préjudice écologique"*) as a category of damage, and further provides:

"*An action for compensation for ecological damage may be brought by any person that has the capacity and interest to act, such as the State, the French Agency for Biodiversity, local authorities and their associations in which their territories are impacted, public institutions, and associations approved or created for more than five years before the institution of proceedings and whose purpose is the protection of nature and defence of the environment."*[44].

In France, like the Netherlands, establishing standing for an eNGO first and foremost requires close scrutiny of on the objects and nature of that organisation. If an eNGO satisfies all requirements of the relevant provisions for certification, it enjoys broad standing to make

[42]Available at : https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074220/LEGISCTA000006143735/#LEGISCTA000019280521

[43] http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/ . English translation available at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210203_NA_decision-1.pdf

[44] Biodiversity Law n°2016-1087 of August 8, 2016. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038846675/. Unofficial English translation available at https://ec.europa.eu/environment/legal/liability/pdf/Annex-I_France.pdf at p.10

whatever arguments are relevant to those objects as appropriate to the proceedings in which they participate.

The Case for Broadening eNGO Standing

Risk of Distortion of Claim

It can readily be gleaned from the emergence of climate cases. i.e., claims which in effect seek to prevent or to remedy widespread environmental harm such as largescale biodiversity loss or other adverse impacts of climate change, that at issue are collective environmental rights and interests, however described or derived, rather than personal rights in the traditional sense.

These decisions have garnered significant attention precisely because of their impact on wider populations; that these claims sometimes involve named individuals who have sought to challenge national climate policies can seem somewhat incidental when the claim is, in reality, concerned more so with public rather than private interest. To restrict plaintiffs in such claims to making rights-based arguments by reference to the individual is to lose the essence of the claim and the genuine (and public) interest matters it seeks to ventilate.

It also presents the real risk that the appropriate plaintiffs (i.e. those in a position to demonstrate real or imminent risk to themselves) will only be in a position to vindicate those rights when it is too late; in other words, by the time plaintiffs can easily point to the adverse impacts peculiar to them, the prospect of a court being in a position to provide an effective remedy, for instance, by striking down inadequate climate policy legislation, is remote.

Though there is a possibility of a hybrid model of an eNGO joined by individual co-plaintiffs such as that adopted in *IPRT*, an approach which appeared to find some favour with the Supreme Court in *FIE*, the same problem arises; without granting standing to the eNGO to make claims of *systemic* harm, the scope of the rights-based arguments risks being severely curtailed by reference to the experiences of the individual plaintiffs.

Prohibitive Costs

The Supreme Court in *FIE* was not satisfied that a fear of costs orders rendered individual plaintiffs incapable of bringing the same type of environmental claim in their own name. It has been acknowledged however that "[l]*itigation costs are one of the main reasons why the public concerned in Europe rarely take direct action in court against operators of activities hazardous to the environment*[45].

In Ireland, where high litigation costs are the subject of frequent public and political discourse, it might be particularly difficult to persuade individual plaintiffs to assume a costs risk, particularly in cases likely to be defended by the well-resourced State or semi-State agencies.

Increased Efficiency in Litigation

In holding that the plaintiff association had standing to invoke the rights of psychiatrically ill prisoners in *Irish Penal Reform Trust*, Gilligan J. stated:

[45] EU Report at p.54

[I]f the I.P.R.T. were to be denied standing, those it represents may not have an effective way to bring the issues before the court. A potential plaintiff would not be in a position to command the expertise and financial backing at the disposal of the I.P.R.T., a less well-informed challenge might ensue, and justice may not be done"[46].

In purely practical terms, plaintiff eNGOs are likely to have available to them significant resources and expertise. Those with even a modest history of participating in litigation are also more likely to mount a focused challenge, compared with those which might be issued by individual citizens, that seeks to engage the court on the most substantive issues of public environmental concern.

Further, there is a certain inevitability about an increase of climate and environmental litigation in the coming years. At least from the perspective of court time and resources, facilitating eNGO-led litigation might have the net effect of decreasing the number of claims which come before the courts seeking determination on the same general environmental rights-based issues; if the eNGO is entitled to raise all relevant arguments including those which are, at present, generally reserved to the individual, individual claims based on similar grounds, which might otherwise issue, could fall away.

Conclusions

It may be that existing *locus standi* principles will, one day, be applied to eNGOs more broadly than they are today. Until then, a legislative amendment granting broad standing for eNGOs in environmental disputes with a public interest element provides the best guarantee that rights-based environmental litigation develops in a resource-conscious and well-managed way, focusing on the real (public) issues for determination.

The broad parameters for this standing are already set out in our existing jurisprudence and would require little legislative creativity. Thus, an organisation seeking to vindicate the rights of others may do so only having established a *bona fide* concern and interest for the protection of the rights invoked[47].

The provisions of the Dutch Civil Code and the French *Code de l'environnement* could be looked to for the more precise requirements for an eNGO to establish standing; so, statutory provisions might specify that only eNGOs with objects or a constitution with a sufficient nexus to the issues raised (whether geographical or in terms of specialist experience or expertise) are permitted to litigate.

Membership requirements, incorporating a specific geographical nexus, could also be considered. In *R. v. Pollution Inspectorate, ex p Greenpeace (No. 2)*[48], in a passage cited in *Irish Penal Reform Trust*, the High Court of England and Wales identified the following factors as relevant in granting standing to the plaintiff eNGO seeking to challenge an authorisation to discharge nuclear waste in Cumbria:

The fact that there are 400,000 supporters [of Greenpeace] *in the United Kingdom carries less weight than the fact that 2,500 of them come from the Cumbria region. I would be ignoring the*

[46] [2005] IEHC 305 at para. 46
[47] *SPUC v Coogan (No.1),* [1989] I.R. 734 at 742
[48] 1994 4 AER 239

blindingly obvious if I were to disregard the fact that those persons are inevitably concerned about (and have a genuine perception that there is) a danger to their health and safety from any additional discharge of radioactive waste even from testing. I have no doubt that the issues raised by this application are serious and worthy of determination by the court.

In short, there are a number of parameters which the legislature might set to meet the concerns that a broadening of standing provisions might result in "*floodgate*" or frivolous environmental litigation. Such an approach, if adopted, would improve access to justice on environmental matters and strike an appropriate balance with the need to manage court procedure.

SECTION 3 - Standing for "Future Generations"

Introduction

Part of the widely recognised problem of climate change is that the most severe impacts will be felt by younger and future generations. This recognition is reflected in the composition of plaintiff groups in recent climate cases, and in increasing references in international litigation to the concept of intergenerational equity.

With this recognition should come an acknowledgement that the rights of those future generations merit consideration and some basic protection in current environmental disputes which are likely to have a direct impact on those generations (and possibly *only* on those generations) in time to come.

That consideration can only be given where a party is entitled to invoke those rights on behalf of future generations who, as persons not yet born, are unable to do so themselves. Again, the eNGO is likely to, and should, play a significant role in any such development.

Young Plaintiffs in Future Generations Litigation

The proliferation of climate change litigation instituted by young people, with or without an eNGO as co-plaintiff, can be seen throughout common law and civil law jurisdictions; *Sharma* in Australia, and *Juliana* in the United States, considered above, are two such examples.

Theoretically at least, there is no reason why similar claims could not be instituted in this jurisdiction; procedurally, children may sue to remedy or to prevent harm to them and/or to vindicate their personal rights through their next friend[49].

In *Environnement Jeunesse v Procureur General Du Canada*[50], the applicant failed to secure authorisation to bring a class action suit on behalf of Quebec citizens aged 35 and under, alleging that inadequate action on global warming disproportionately affected this class. In addition to finding was "*no factual or rational explanation*" for the decision to determine the class by reference to a maximum age of 35[51], the court also noted that "*if some of the alleged*

[49] See for example, Order 15 Rule 16 of Superior Court Rules (as amended)
[50] District of Montreal, Superior Court, 11 July 2019. Unofficial English translation of decision available https://enjeu.qc.ca/wp-content/uploads/2018/11/Application_for_authorization_UNOFFICIAL.pdf
[51] Ibid. at para. 117

infringements have not yet occurred but could someday, there is a risk that the debate be only theoretical"[52].

This statement illustrates the difficulties that young people as plaintiffs will invariably meet, if standing is determined by reference to an existing or imminent threat to rights, rather than a potential breach of rights in the future.

Standing for Persons Not Yet Born

For present purposes, the more significant issue is the standing of future generations, being persons not yet born *or conceived*. The body jurisprudence on the right to life of the unborn is nevertheless of some assistance in considering the *locus standi* principles applicable to interested parties seeking to protecting the rights of those who cannot (yet) vindicate their own.

In *Society for the Protection of Unborn Children (Ireland) Ltd v Coogan (No.1)*[53] the plaintiff ("**SPUC**") was a body incorporated with the objective protecting the right to life of the unborn.

In recognizing that SPUC had standing to seek to protect the (then) constitutional right to life of the unborn, the Supreme Court determined that it had "*a* bona fide *concern and interest, interest being used in the sense of proximity or an objective interest*" and that there was *"no question of the plaintiff being an officious or meddlesome intervenient in this matter"*[54].

At the time of the proceedings, the right to life of the unborn was expressly protected in the enshrined in the Constitution[55] and was, as such, "*part of the fundamental law of the State*"[56]. Where it was the parents or guardians of the unborn who might be the party seeking the "*destruction*" of that right, it was appropriate that other citizens seeking to defend those rights be entitled to do so "*if the public interest requires that such breaches or attempted breaches should be restrained*"[57].

Climate change litigation arguably constitutes the very essence of public interest litigation. There is no reason why the same considerations which afforded standing to SPUC could not be applied to eNGOs in this context where:

i. future generations of persons yet to be born are clearly incapable of challenging current climate policies or inaction which will directly impact on the suite of rights which they *will* become entitled to exercise (but not in time to an effective remedy);

ii. An established eNGO, meeting the requisite criteria set out in legislation (see Section 2) or otherwise, is unlikely to be *an officious or meddlesome intervenient*; and

iii. the public interest would be served by ensuring that future generations could be "*heard*" on how existing laws would detrimentally impact their environmental rights – particularly where it is only (or disproportionately) those generations who will suffer the consequences associated with the inadequacies of those laws.

[52] Ibid. at para. 122
[53] [1988] IR 734
[54] Ibid. at 742.
[55] Article 40.3.3, as inserted by the Eighth Amendment to the Irish Constitution, 1983.
[56] Ibid. at 743.
[57] Ibid. at 744

Approach in Other Jurisdictions

While this may seem like a radical concept in the common law world, precedent from other jurisdictions demonstrates its feasibility in practice. Two examples, from the Philippines and Colombia, are considered below.

The Philippines

In *Oposa v Factoran*[58], plaintiff minors and an eNGO issued a class action suit challenging the granting by government of timber licensing agreements which had led to significant destruction of the country's natural rainforests.

The Supreme Court had:

"*…no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue in* [sic] *behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned…every generation has a responsibility to the next to preserve that rhythm and harmony* [of nature] *for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come*[59].

This now infamous decision was delivered in 1993; it was and remains remarkable for its progressive stance, in particular its acknowledgement of intergenerational equity, and the need to give effect to that legal principle in practice.

The country's liberalised attitude to standing in this regard was later enshrined in its Rules of Procedure for Environmental Cases ("**the Filipino Rules**") with Rule 2, Section 5 now providing that any "*Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws*".[60]

Colombia

[58] G.R. No. 101083, David, JR, J. Supreme Court, July 30, 1993, unofficial copy decision available at https://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html
[59] Ibid., per David JR.
[60] Annotation to the Rules of Procedure for Environmental Cases, Rule 2, Section 5, https://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf

The plaintiff youth in *Future Generations v Ministry for Environment & Ors*[61] relied on a principle of intergenerational inequity to challenge the inadequacies of environmental policies, citing their disproportionate impact on younger and future generations.

The Court expressly acknowledged that the protection of fundamental rights involved the individual and all others *including* the unborn, who also deserved "*to enjoy the same environmental conditions that we have… [t]he environmental rights of future generations are based on the (i) ethical duty of the solidarity of the species and (ii) on the intrinsic value of nature*[62].

The court explained its reasoning by pointing out that earth's resources were shared among "*descendants or future generations who do not yet have a physical hold of them*", and that without adopting an equitable approach now which took into account the shared nature of the resources, the future of humanity could be jeopardised. This in turn gave rise to a binding legal relationship, whereby consideration must be given to the needs of future generations, in terms of resources, which necessarily translated into some limitation to the freedom of action of present generations and demanding new burdens of environmental commitments[63].

Conclusions

Neither courts or scientists can be precise about the damage that current policies and human activity might have on the environment or on the trajectory of climate change. There seems little scientific dispute however that the worst of the impact will be felt by future generations. In that sense, the harm to those persons is arguably not hypothetical, but rather inevitable (albeit not capable of precise definition at this remove), without action being taken in the present.

The apparent inevitability of that harm arguably provides adequate grounds for a constitutional amendment (or legislative provision) to recognize the rights of future generations as regards environmental matters and, consequentially, the entitlement of the appropriate party, such as an eNGO meeting relevant legislative criteria to invoke those rights and give a voice to those most affected.

SECTION 4 - Standing for or on behalf of Nature

Introduction

As discussed in Section 2, a key issue with standing rules as they apply to environmental harm cases is that in some cases, by necessity, the harm or damage will be presented in a distorted way. This is because, in common law jurisdictions such as Ireland and the United States, constitutional claims for infringement of environmental rights will only succeed where plaintiffs can show harm peculiar to themselves.

[61] *Dejusticia y otros v Presidencia de la República y otros*, Colombian Supreme Court, ruling STC4360 of 4 May 2018. http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf. Unofficial English translation of key experts at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf
[62] Ibid. at 18
[63] Ibid. at 20

It is impossible to assess or to compartmentalise the various motives of plaintiffs in climate litigation, for instance, but the reality must be that many potential claims do not regard as their primary object the vindication of a personal right. Rather, many claims are concerned widespread environmental harm associated with climate change and biodiversity loss; prospective plaintiffs in such claims are not just (or even necessarily) concerned with the protection of personal rights as they might be impacted by that harm but seek to invoke those rights with the ultimate end of protecting the natural environment, recognizing its standalone value (or, perhaps, its value to future generations).

This artificiality could be avoided where the true object of the legal protection, the natural environment said to be threatened by the harm, was capable of representation in its own right.

Legal academic commentary on the recognition of rights of nature (as distinct from humanity's rights associated with, or *to* nature) is not new; the feasibility and benefits of embracing the concept have been considered since the seminal work of Christopher Stone, "*Should Trees Have Standing*?"[64].

These considerations are no longer confined to academic commentary; rights of nature are now recognized in some constitutions and, more significantly, are legally exercisable, including though litigation, by the appropriate "guardian" or trustee of the environment. Such an approach in this jurisdiction would have significant implications for standing in environmental litigation.

At this juncture it might well be pointed out that Ireland, yet to formally recognize any standalone environment rights such as the right of citizens to a healthy environment, appears to be a long way from embracing the far more radical concept of rights of nature in its own right. Still, political and social discourse on environmental and climate issues has been notable for its rapid evolution in recent years; the law may, in turn, develop both rapidly and radically to reflect this.

Academic and Constitutional Recognition

Stone suggests that to recognize rights or interests of nature is not as radical a legal concept as might first appear, when we trace the development of rights-based and constitutional jurisprudence; acknowledging legal rights of any new groups or entity, first to children, woman and minority groups, and later the legal personhood of non-natural persons such as companies, institutions and religious orders, was invariably "*jarring to early jurists*":

"*Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless "things" to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social, and economic dimensions*.[65]

[64] Stone, *Should Trees Have Standing? – Towards Legal Rights for Natural Objects,* California Law Review 45 (1972): 450-501
[65] Ibid. at 453

In 2021, the European Parliament commissioned a study to explore the concept of rights of nature. In its published report[66] ("**the EU Report**"), the author noted that this concept already enjoys some recognition in international law, with instruments such as the 1992 Rio Declaration recognizing "*the integral and interdependent nature of the Earth, our home*"[67], and in South American constitutions.

The Preamble to the 2009 Ecuadorian Constitution celebrates "*nature, the Pacha Mama (Mother Earth), of which we are a part, and which is vital to our existence*". Article 71 proclaims the right of "*Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature*[68].

Similarly, in Bolivia, the 2009 Constitution has a stated the aim of protecting and defending an adequate environment for the development of living beings. The 2010 *Law on the Rights of Mother Earth (Madre Tierra* goes further, providing, at Article 2, that the State and any individual or collective person must respect, protect and guarantee "*the rights of Mother Earth*" for the well-being of current and future generations[69].

The rationale for developing a concept of environmental rights which encompasses rights of nature has been succinctly set out by Lord Carnwarth, former judge of the UK Supreme Court, in the following terms:

"*Environmental rights are not "human rights" in the ordinary sense. They are much more than that. They involve rights and duties. The rights are those of not just humans, but of all living things. The duties are ours, as the species which has the unique ability to influence the environment for good or ill*"[70].

The development has implications for the ways in which claims seeking to vindicate "*environmental rights*", in this broader sense. For present purposes, the issue is how this concept, if adopted in some fashion, might impact general rules on standing.

Approach in Other Jurisdictions in *Sierra Club v. Rogers C.B. Morton*[71], the much-cited dissenting opinion of Douglas J. acknowledged the inadequacies of a conventional approach to standing in environmental disputes:

"The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage…Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole - a creature of ecclesiastical

[66] *Can Nature Get It Right? A Study of Rights of Nature in the European Context*, Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 689.328- March 2021.
[67] Rio Declaration on Environment and Development. UN General Assembly 12 August 1992, available at https://www.un.org/en/conferences/environment/rio1992
[68] Unofficial English translation available at https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html
[69] EU Report at p.18
[70] Human Rights and the Environment Justice Human Rights Law Conference 2018 London, Lord Carnwath, 10 October 2018, p.6, available at https://www.supremecourt.uk/docs/speech-181010.pdf
[71] [1972] 405 US 727

law - is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.

So, it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modem technology and modem life. The river, for example, is the living symbol of all the life it sustains or nourishes-fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water-whether it be a fisherman, a canoeist, a zoologist, or a logger-must be able to speak for the values which the river represents and which are threatened with destruction"[72].

This judgement remains one of the strongest judicial calls for the protection of the rights of nature from the United States. While the courts of Colombia and the Philippines, considered below, again appear to represent the most liberal stance on the concept of rights of nature, other parts of the common law world have also demonstrated a limited willingness to recognize the standing of appropriate parties to vindicate and protect the rights and interests of the environment; Canada and New Zealand are two such examples.

Canada

In Canada, local municipalities have been held to be trustees for the environment. In *Scarborough v. R.E.F. Homes Ltd*[73], the plaintiff borough was held to be entitled to seek damages for destruction of trees on the basis that "*the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large*."

This aspect of the decision has been cited subsequently, including in *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*[74] where the Supreme Court of Canada was satisfied that the trial judge had "*correctly found…that the Town Council, "faced with a situation involving health and the environment", "was addressing a need of their community…In this manner, the municipality is attempting to fulfill its role as what the Ontario Court of Appeal has called a "trustee of the environment*""[75].

New Zealand

[72] Ibid. at 742
[73] (1979), 9 M.P.L.R. 255, at 257
[74] 2001 SCC 40
[75] Ibid. at para. 27

New Zealand appears to be the first common law jurisdiction to acknowledge the legal personality of some ecosystems and habitats, notably the Te Urewara National Park and Whanganui River[76].

Following extensive negotiations between government and indigenous Maori tribes, New Zealand passed the Te Awa Tupua (Whanganui River Claims Settlement) Act in 2017 *("***the Te Awa Tupua Act**")[77]. The Te Awa Tupua Act established a board, Te Pou Tupua[78], comprised of representatives from the Crown and the tribes along the Whanganui river, as the "*human face*" of the river ecosystem, known as *Te Awa Tupua*.

Section 14 confers wide standing on the board to vindicate the rights and interests of Te Awa Tupua as appropriate:

(1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.

(2)The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part…".

S. 19(2)(e) also expressly provides for Te Pou Tupua to participate, in a representative capacity "*in any statutory process affecting Te Awa Tupua in which Te Pou Tupua would be entitled to participate under any legislation*".

Colombia

In Colombia, the *Future Generations* decision considered the concept of solidarity with nature and recognised that the Amazon itself had rights capable of vindication through human legal action.

The Court held that it was the responsibility of the State to adopt immediate mitigation measures in respect of greenhouse gas emissions "*to protect the right to environmental welfare, both of the plaintiffs, and to the other people who inhabit and share the Amazonian territory, not only nationals, but foreigners*, together with all inhabitants of the globe, including ecosystems and living beings…" [79] [emphasis added]. The Colombian Amazon was recognized as a subject of rights, entitled to protection, conservation, maintenance and restoration led by the State and the territorial agencies[80].

In addition to its own jurisprudence, Colombia has made another valuable contribution to the international discussion on environmental rights through its 2016 request for an advisory opinion from the Intra-American Court of Human Rights[81]. The request arose from concerns that largescale infrastructure projects being proposed for the Wilder Caribbean Region may cause severe degradation to the human and marine environment.

[76] EU Report at p.18
[77] Available at https://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html#DLM6831452
[78] Section 18
[79] Ibid. at para. 11.3
[80] Ibid. at para. 14
[81] Also known as the American Convention on Human Rights, 22 November 1969

Though the Court was being asked to consider the issue of environmental harm vis-à-vis potential implications for breaches of *human* rights, its Advisory Opinion[82] engaged in an analysis of the inextricable links between the environment and human rights, [83], and expressly recognized the right to a healthy environment as:

"*an autonomous right* [which] unlike other rights, protects the components of the environment, *such as forests, rivers and seas*, as legal interests in themselves, *even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity … but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions,* to recognize legal personality and, consequently, rights to nature."[84]. [emphasis added]

Where a court recognizes the legal personality of a natural environment or entity and where it is deemed to enjoy protection in its own right, it follows that, within the jurisdiction of that court, *locus standi* principles must be flexible enough to accommodate representation seeking to ensure that protection.

The Philippines

The Philippines has been progressive in setting legal precedent for recognizing the rights of animals and nature. *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*[85], saw representative standing granted to the people of Manila Bay on behalf of cetacean species such as dolphins.

This was followed by *Resident Marine Mammals v. Reyes*[86], in which the court described the petitioners as "*the toothed whales, dolphins, porpoises, and other cetacean species, which inhabit the waters in and around the Tañon Strait. They are joined by Gloria Estenzo Ramos (Ramos) and Rose-Liza Eisma-Osorio (Eisma-Osorio) as their legal guardians and as friends (to be collectively known as "the Stewards") who allegedly empathize with, and seek the protection of, the aforementioned marine species*."[87]

The court had no difficulty in recognizing the standing of the petitioners, as legal guardians of the species named, to challenge permissions for the exploration, development, and exploitation of petroleum resources within in waters between the islands of Negros and Cebu.

Citing the dissenting decision of Douglas J. in *Sierra Club v Morton*, the court noted that although the Philippines had not gone so far as to grant standing to inanimate objects, "*the*

[82] Inter-American Court of Human Rights Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia. Official Summary issued by Court (English): http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115_OC-2317_opinion-3.pdf. See also Milnes and Feria-Tinta, *The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights*, *Yearbook of International Environmental Law*, Vol. 27 (2016) 64–81, with English translations of key excerpts
[83] Ibid. at paras. 47 – 70
[84] Ibid. at para. 62
[85] G.R. Nos. 171947-48
[86] G.R. No. 180771 April 21, 2015
[87] Ibid.

current trend moves towards simplification of procedures and facilitating court access in environmental cases…

the need to give the Resident Marine Mammals legal standing has been eliminated by our Rules, which allow any Filipino citizen, as a steward of nature, to bring a suit to enforce our environmental laws. It is worth noting here that the Stewards are joined as real parties in the Petition and not just in representation of the named cetacean species. The Stewards, Ramos and Eisma-Osorio, having shown in their petition that there may be possible violations of laws concerning the habitat of the Resident Marine Mammals, are therefore declared to possess the legal standing to file this petition."[88]

The decision must be seen in the context of the liberalized rules on standing as set out in the Filipino Rules, cited above[89]. The petitioners had invoked the "*citizen suit*" mechanism for representative actions under Rule 2, Section 5, permitting any Filipino citizen in representation of others, including minors or generations yet unborn, to file and action to enforce rights or obligations under environmental laws.

The merit of the Filipino Rules is that they recognize and seek to accommodate the procedural challenges which are peculiar to environmental cases; the rule for citizen suits such as this "*collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature*"[90].

Analysis of Approach in Other Jurisdictions

There are a number of issues which would (or arguably should) limit, to a greater or lesser extent, the ability of Ireland to adopt approaches to those considered above.

Constitutional Differences

Insofar as it refers to the natural environment at all, the Irish Constitution is somewhat different in emphasis when compared, for example, with its South American counterparts.

Article 10.1 of the Constitution provides that "[all] *natural resources, including the air and all forms of potential energy…belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body*".

This more anthropocentric view of the natural environment is rather stark, contemplating, as it does, interests associated with the natural environment in terms of the resources available for exploitation and profit, rather than something with intrinsic value worthy of protection in its own right.

In its 2020 Status Review of its Global Litigation Report, the UN Environment Programme noted that, as of 2012, at least 92 counties had "*granted constitutional status to the right to a clean or healthy environment*"[91]. It is interesting that Ireland, which has been progressive in

[88] Ibid.
[89] Annotation to the Rules of Procedure for Environmental Cases, Rule 2, Section 5, https://philja.judiciary.gov.ph/files/learning_materials/A.m.No.09-6-8-SC_annotation.pdf
[90] Annotation to the Rules, ibid. at 11
[91] Global Climate Litigation Report, 2020 Status Review United Nations Environment Programme, ISBN No: 978-92-807-3835-3 at p.42

the development of its constitutional regime in recent years, appears to be behind other countries on this express acknowledgment.

Distinct Social and Cultural Contexts

Many of the jurisdictions which appear to have embraced the concept of "*rights of nature*" have done so in the context of highly specific and sensitive cultural considerations.

Commentators have noted that in New Zealand, the legal personality ascribed to the natural habitats had its origins in a complex and sensitive settlement process between the Crown and indigenous tribes as part of a wider mediation and reconciliation process in recognition of past wrongs committed against the tribes and their culture[92].

Similarly, where a proliferation of provisions enshrining, in some form, a broad right to a healthy environment can be found across South America[93], the genesis of "*rights of nature*" may be the acknowledgement of the particular significance of the natural environment for the region's indigenous tribes; the Intra-American Court on Human Rights noted the "*special vulnerability*" of indigenous tribes in widely interpreting their right to a dignified life as encompassing their unique relationship to their land and natural environment[94].

Against this background, it is perhaps unsurprising that these are jurisdictions for which rights of nature do not seem a particularly radical development. Further, in reality, the so-called rights being ascribed to nature in the examples cited above (in the Colombian *Future Generations* case, for instance) might more properly be regarded as human rights to a healthy environment and/or balanced ecology which necessarily encompass a corresponding duty to protect the environment, which has value in its own right, for the benefit of others.

Other Considerations

Actio Popularis Concerns

To acknowledge standalone rights or interests of nature, which cannot litigate on its own behalf, presents the obvious problem of who might be entitled to vindicate those interests in court.

The EU Report notes that those advocating for rights of nature seem unperturbed by an *actio popularis* model of litigation, notwithstanding that this is expressly prohibited by most legal systems, including our own[95]; so, any party who believed the interests of nature required protection of the courts would have *locus standi* to represent those interests. To ascribe rights to the natural environment or to its features, without adopting corresponding rules on standing which set reasonable and practicable parameters for who might represent that interest is, in that sense, unthinkable.

Statutory Environmental Protection

[92] EU Report at p.18
[93] See Intra American Court decision at para. 58
[94] Ibid. at para. 48
[95] EU Report at p.53

To consider "*rights of nature*" is, in reality, to use another human construct the true purpose of which is to strengthen legal protections for the natural environment.

The questions arises therefore whether the concept is necessary or adds value to our existing legal framework, when we have available both national laws[96] and EU laws, notably the Birds and Habitats Directives[97] that have been implemented for the specific and express purpose of environmental protection.

The Preamble to the Habitats Directive[98], for instance, notes that:

the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements…".

Article 2(1) states that the aim of the Directive is "*to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild flora and fauna…*" of Member States, taking into account "*economic, social and cultural requirements and regional and local characteristics*".

These regimes are not without limitation. First, they are directed at Member States in terms of their obligations to protect natural habitats in the *Community* interest; their provisions may not be invoked against private enterprises involved in activities which do not require oversight by the State or State bodies that might be caught by the Directive.

Further, the protections afforded through the Birds and Habitats Directive tend to be deployed in the context of planning and development, i.e. where human development and expansion (and, in turn, encroachment on the natural environment) is already contemplated; when one considers that until recently, the bulk of Ireland's environmental jurisprudence had developed almost exclusively in the realm of judicial review of planning decisions, the complaint that modern environmental law "*focuses on endless growth, extraction, and development*[99] appears apposite.

Finally, some have questioned whether the protections afforded by the Directives can suffice when they extend only to specified species or habitat, where "*national priorities or political compromises*" may be at play when categorising certain species, and where ecological considerations should, arguably, be decisive[100].

Conclusions

[96] See for instance, the Environmental Protection Agency Act 1992 (as amended) and the Wildlife Act 1976 (as amended)
[97] Council Directives 2009/147/EC and 92/43/EEC, transposed in Ireland pursuant to the *European Communities (Birds and Natural Habitats Regulations 2011 (S. I. No. 477 of 2011)*
[98] Council Directive 92/43/EEC
[99] EU Report at p.14
[100] EU Report at p.52

Ascribing legal rights to nature, separate and distinct from the environmental rights of natural persons, presents a host of conceptual and legal difficulties; this is unsurprising, where the notion and language of legally enforceable rights were designed to support and facilitate human and societal interactions.

Nevertheless, recognizing the entitlement of certain parties to vindicate the rights interests of the natural environment as "*stewards*" or "*guardians*" of the environment merits further consideration. We have existing legal mechanisms which could be deployed in similar fashion, such as the process for appointing guardians *ad litem*, committees in wardship, and trustees in bankruptcy, all of which could be looked to in devising a mechanism for representation of "natural environment" interests.

With a constitutional amendment to recognize collective environmental rights, which incorporate a duty to protect the natural environment, the *locus standi* principles as set out in decisions such as *Irish Penal Reform Trust* and *SPUC v Coogan* could be extended to appropriate eNGOs to vindicate a broader range of "environmental" rights.

Again, only organisations which could demonstrate, for instance (i) a *bona fide* interest in and (ii) satisfactory expertise relating to the subject matter of the dispute, would be permitted to ventilate issues "*on behalf of*" the natural environment said to be harmed.

Rather than requiring the eNGO to make any radical assumptions about what is best for that natural entity, this approach would simply permit the eNGO to rely on scientific expert evidence as to the ecological harm at issue and oblige the court to consider that evidence as *standalone* evidence of harm, without reference to any impact on a particular adverse impact on any natural person.

This model envisages that the same type of argument and evidence that eNGOs are currently permitted to rely upon in the context of planning judicial reviews would simply be expanded to other types of claim. Thus, the real benefit of granting such standing is that it would *"secure an effective voice for the environment even where federal administrative action and public-lands and waters were not involved…"*[101].

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It has been suggested that common law jurisdictions have been slower than others to tackle this. As one commentator notes, "*climate change is the kind of complex, multistakeholder issue that Anglo-American common law has historically left for politicians rather than judges to solve*"[102]. An analysis of various jurisdictions' approaches to the role of the courts in environmental litigation, including those in our jurisdiction, suggests that there is some truth to this statement.

Our current rules on standing are arguably inadequate for the purposes of environmental protection where they cannot accommodate standing to vindicate (i) collective rights, as they relate to the environment (ii) rights of future generations and (iii) rights or interests of nature.

[101] Ibid. at 471
[102] *Juliana v United States*, 134 Harv. L. Rev. 1929, 10 March 2021

The language of "*rights*", particularly "*rights of nature*" is problematic, but it is perhaps best considered as an attempt to meet the particular complication of individuals wishing to use their voice to protect interests separate and distinct from their own (at least partially) in environmental litigation. Instead of having to engage in a contortion exercise to demonstrate personal harm, permitting standing to invoke these classes of rights permits a court to examine evidence of the true harm alleged and to attribute appropriate weight to that evidence in its decision-making.

Even a perfunctory review of the case law cited from across jurisdictions in this paper illustrates the undoubted and vast contribution that eNGOs have made to modern environmental litigation. The importance of eNGOs as litigants will only increase as citizens continue to seek out all tools at their disposal, including litigation, to prevent or mitigate the impacts of environmental degradation and climate change; practical considerations alone suggest that legal systems might benefit from doing more, rather than less, to accommodate their participation on a broader basis.

Though the only proposal which might be immediately available to the legislature (in the absence of constitutional amendment) is to expressly permit an expanded basis for standing for eNGOs, the same statutory regime could be invoked if rights of future generations or (perhaps less likely in the short-term) rights of nature were capable of judicial scrutiny. Notwithstanding obvious differences in cultural, social and legal contexts, some of the legislative and procedural mechanisms utilised in other jurisdictions could be adapted relatively easily to suit Ireland's constitutional and legislative framework.

To adopt the most liberal approach to standing in environmental rights litigation, as contended for by some commentators, would first require a seismic shift in thinking towards a more eco-centric view of human life, existing, not in a vacuum, but as part of a wider system of biodiversity, all of which is entitled to some degree of legal protection.

Given our increasing awareness of the harm we as a species are capable of causing, and conversely, our unique ability to prevent or reverse that harm, not just for our benefit but for that the natural environment, the advent of serious consideration of the liberal approach may already on the horizon