

LOCUS STANDI IN ENVIRONMENTAL LITIGATION: A SOUTH AFRICAN
PERSPECTIVE.

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Submitted as the dissertation component (which counts for at least fifty percent of the degree) in partial fulfilment of the requirements for the degree of Master of Laws in the School of Law, University of Natal, 1997.

DECLARATION

I hereby declare that this dissertation, which is submitted in partial fulfilment for the requirements of the Master of Laws Degree in the School of Law University of Natal, Pietermaritzburg, is my own unaided work, except where otherwise stated.

No part of this dissertation has been previously submitted for a degree to any other university.


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Pietermaritzburg, January, 1997.

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Abstract

Environmentalists, citizens groups, legal practitioners, academics and the ordinary citizens in South Africa today are over-excited with the prospects of the environmental rights litigation under the final Constitution of the Republic of South Africa, Act 108 of 1996 signed by the State President in Cape Town on the 18th December 1996. For the first time in the history of South Africa environmental rights have been lifted to the status of fundamental constitutional and human rights. From an environmental perspective, the upliftment of environmental rights to the level of constitutional protection is a great achievement that will benefit all South Africans. This dissertation throws some light on the concept of *locus standi* and public interest litigation as they have developed in the New South African Constitution, followed by an exposition of the common law rules of legal standing. The focus of attention will then turn to the extent to which the Interim Constitution of the Republic of South Africa Act 200 of 1993 and the final Constitution of the Republic of South Africa Act, 1996 extend or broaden the scope of standing, followed by a brief survey of legal standing of environmental associations in various countries. Finally, the document will conclude with a brief commentary on the law of standing in South Africa and possible suggestions for reform.

I. INTRODUCTION

In the past decades environmentalists have seen the legal concept of *locus standi* as a barrier to taking environmental problems to the courts. Calls for the liberalisation of *locus standi* to promote the public interest in environmental matters intensified as years went by. The New Constitution of the Republic of South Africa Act 108 of 1996 assented to by the State president on the 18th December 1996 has opened many avenues for the widening of the *locus standi* requirement. In my view, the incorporation of the environmental right in the Constitution coupled with the broadening of the *locus standi* requirement promise interesting changes from an environmental law perspective and therefore, creates an awareness of and sensitivity towards the environment.

For many years the exact content of the *locus standi* phenomenon has been baffling academics and judges. As a result, many good cases have failed because the party approaching the court could not prove that he or she has a 'legally enforceable right' or so-called 'sufficient interest' in the case.¹ Traditionally (under common law), a litigant is required to show a direct and substantial interest in the right which is the subject matter of the litigation and in the outcome of the litigation and not merely a financial interest which is only an indirect interest in such litigation.²

There is no doubt that the obvious effect of *locus standi* rules in any legal system is to exclude some people from obtaining the assistance of the courts in declaring and enforcing the law in circumstances where others could obtain that assistance. This is also typical of our common law. As a result, wherever someone is thus excluded by reason of *locus standi* rules, the law regards

¹. Elmene Bray, 'The Liberation Of Locus Standi in the Interim Constitution: An Environmental Angle' *THRHR* (1994) 57 at 481.

². L. Baxter, *Administrative Law*, 1984, 650 ff.

it as preferable that an illegality should continue than that the person excluded should have access to the courts.

Schiemann's view is that the *locus standi* rules are only one of several techniques of exclusion used by the law which can have the effect of permitting the illegality to continue.³ In the context of environmental law it was common to find a permanent exclusion that for the litigant to succeed, he or she has to prove that he or she has suffered damage or has a direct and substantial interest in the case. By contrast, in the context of administrative law, it is common to find a temporal exclusion that, however closely affected you are, you must allege within a given time, or a requirement that other remedies should first be exhausted.⁴

Legal systems, for all their very real diversity, are often faced with similar problems. How they react to those problems will of course depend on the needs of a particular country. This paper will be concerned with one such problem, that of standing and public interest litigation as they have developed the South African constitution. Standing is a controversial subject not only in environmental law but also in administrative law. As such an exposition of the case law will have to be followed by some explanation and criticism designed to highlight the underlying issues with a view to determine the future course which the law might take.

In the past two decades we have witnessed an increased pressure that has been placed upon the courts to alter their traditional posture. This was evidenced by those interests e.g, environmental concerns, which could not easily be accommodated by the individualized concepts of private rights starting to acquire increased value. This kind of achievement could be attributed to

³. Sir Konrad Schiemann '*Locus Standi*' 1990 *Public Law* 342.

⁴. Schiemann op cit at 342.

the great job done by environmentalists and others⁵ who generated a vast quantity of literature attacking the narrow conception of standing adopted by the courts while demanding that interests wider than those encapsulated by the individualist notions of property and liberty should be admitted in order to assess the right of bona fide litigants to standing.⁶

Of late, it appears that international law developments, particularly in the field of environmental and human rights, and the examples set by many countries' constitutions, especially India, played a major role in building up our environmental law legislation aimed at protecting the environment. This is evidenced by the inclusion of environmental protection provisions in a new South African constitutional structure.⁷

⁵. These include Peter Glavovic, Jan Glazewski, Cheryl Loots, Andre Rabie, and many others.

⁶. See L Baxter, *Administrative Law* (1984) 645-6.

⁷. See generally Glazewski 'The Environment, Human Rights and a New South African Constitution' (1991) 7 SAJHR 167 176-180.

2. THE COMMON LAW

2.1 The nature of locus standi

It is not easy to track down the meaning of the expression '*locus standi in judicio*' in the *Corpus Iuris Civilis* or other Roman writings despite the fact that it is employed fairly regularly. The term is difficult to define as it has been used to refer to different factors that affect a party's right to claim relief from a civil court. However, Huber in his writings speaks of it as follows:⁸

'In the case of both plaintiff and defendant, it is necessary that they should have a locus standi in judicio, that is, a capacity to appear before the law, such as is not possessed by all those who are not their own men, like children under seven years, and insane persons, who cannot appear any way, even when supported by their tutor'

From Huber's writings one learns that the term is used to refer to the legal capacity of a person to appear in court and therefore, applies to all the parties to an action, not only the party claiming to enforce his or her right.⁹ Standing becomes an issue when, having established that a legally enforceable right exists, the court asks at whose instance the right is enforceable.¹⁰

*The *locus standi* requirement has always prevented a party who wanted to bring an action in the public interest. In claiming the relief she or he seeks, a party is moved by the desire to benefit

⁸. *Hedendaegse Rechtsgeleerdheyt* 4.15.39 (As translated by Gane).

⁹. See P R Q Boberg '*The Law of Persons and the Family*' 1977 at 37.

¹⁰. Cheryl Loots '*Locus Standi to Claim Relief in Enforcement of Legislation*' SALJ at 132.

the public at large or a segment of the public. The main intention that she or he has is to vindicate or protect the public interest, not his or her own interest, although she or he may incidentally achieve that end as well.¹¹ The courts have used the term *locus standi* to refer to a plaintiff's or an applicant's right to claim the relief which he seeks. In this sense a plaintiff or an applicant would be said to lack *locus standi* if his claim was not based on a legal right enforceable by him.¹²

2.2 The General Rule

Traditionally, standing has been regarded as a preliminary or threshold issue that determines the right to sue such that it had to be dealt with *in limine* before the merits of the case are considered. The *locus standi* of an applicant may be questioned by the respondent or the court and the applicant has a duty to prove that he has *locus standi* either expressly or implicitly through the facts presented by him. The predominant factor in any issue regarding *locus standi* is that in order to have standing to challenge administrative unlawfulness an individual must show that he has some degree of personal interest in the administrative act under challenge. This interest indicates the *nexus* between the applicant and the merits of the case.

✓ In the context of administrative law a litigant who seeks redress in respect of unlawful administrative action must have *locus standi* or 'standing to sue' which entails the following:

- (i) the necessary capacity to sue; and
- (ii) a legally recognised interest in the administrative act complained of.

¹¹. *Ibid.*

¹². *Ibid.*

*The first requirement ensures that the litigant is that person who is properly able to represent his own rights or the rights of the person seeking the benefits of judicial relief. It would seem that the second requirement which requires the litigant to have a legally-recognised interest to claim the judicial remedy could be invoked in order to regulate access to the courts, to ensure that the person best suited to litigate the issues raised by the challenge is the one who appears in court, to prevent vexatious litigation, and to ensure that the court is presented with a concrete, not hypothetical dispute.¹³

The general rule of our law was laid down in the case of *Dalrymple v Colonial Treasurer*¹⁴ where the court held that 'No man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law. This principle runs through the whole of our jurisprudence. It is not confined merely to the civil side, the rule applies to wrongful acts which affect the public, as well as to torts committed against private individuals'.¹⁵ The ultimate demand by the court was that the applicant prove a 'sufficient' legally recognised interest before the case could be adjudicated.

A more difficult question that arose was the exact meaning of 'sufficient interest'. It would appear that in order to establish standing a litigant had to claim that (i) some legal right or recognised interest is at stake; (ii) the right is direct;¹⁶ and (iii) the right or interest is a personal one which means that the complainant's interest must be personal to him. Another relevant question that is worth noting is whether this personal

¹³. See Baxter op cit at 645.

¹⁴. 1910 TPD 372.

¹⁵. At 384-90.

¹⁶. See *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T).

interest must be a special interest of the complainant or must it be an interest uniquely enjoyed by an individual or identifiable group of individuals, an interest which is greater than that shared by members of the public at large?

In terms of our common law individuals normally don't have standing to vindicate 'the public interest', but they can approach the court if the same action infringes a similar personal interest of every other member of the public. With four notable exceptions (to be considered later),¹⁷ the South African courts have been reluctant to recognize the standing of litigants who have claimed to be suing in a representative capacity on behalf of others. Traditionally, the right to engage in litigation is restricted to those who can be said to have locus standi in the cause. Therefore, locus standi is accorded to those who have some real or immediate interest or concern in the subject of the litigation.

A possible question that may arise is whether an environmentalist could not be said to have sufficient interest in the preservation of the natural environment to be able to claim *locus standi*. This question arose in the case of *Van Moltke v Costa Aerosa (Pty) Ltd*.¹⁸ In this case the applicant, a resident of Llandudno, a coastal suburb near Cape Town, who regularly visited Sandy Bay, sought an interdict restricting the respondent developer from continuing with the development of certain land above the high-water mark on the ground that the requisite planning permission had not been obtained under the then applicable Cape Townships Ordinance. The applicant also alleged that certain undesirable environmental consequences would result. The applicant further alleged that the respondent's activities were interfering with the ecology of the area and thus constituted a public nuisance which he now sought to prevent by obtaining an interdict.

¹⁷. See Baxter op cit at 658-667.

¹⁸. 1975 (1) SA 255 (C).

The court did not have to consider the latter as it decided that the applicant lacked the required standing, holding that the party seeking relief must show that he is suffering or will suffer some injury, prejudice or damage or invasion of right peculiar to himself and over and above that sustained by the members of the public in general. It is not enough to allege that a nuisance is being committed, he must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to court.¹⁹

In coming to this decision the court seems to have adopted the Anglo-American approach in regard to standing that a member of the public cannot institute a private action for a public nuisance unless he can show that he has suffered some particular damage distinguishable from that sustained by other members of the public. Surprisingly, the court seems to have ignored the earlier decision in *Dell v Town Council of Cape Town*²⁰ which holds the converse. This case involved an application for an interdict to restrain the Town Council from dumping refuse on the beach of Table Bay to the nuisance of adjoining inhabitants.

In delivering the judgement of the court, De Villiers CJ allowed the application and held that the refuse constituted a threat to public health, i.e, a nuisance to the public of Cape Town at large. The Court regarded the applicant as one of the members of the public and was entitled to make the application to restrain the nuisance in any public place in the town, and upon any part of the beach in the neighbourhood of the town. One interesting point which De Villiers CJ made in his concluding remarks was that it would be absurd to say that Dell should have waited until his health had been affected by the nuisance. As such the court was justified in granting the interdict taking into account the fact that the probable effect of the nuisance in question would

¹⁹. At 258B-F.

²⁰. (1879) 9 Buch 2.

be to injure his health. That alone was an indication that he had made out a *prima facie* case to justify the granting of an interdict in his favour. The Dell decision is South African authority for the view that it is competent to any one of the public to take proceedings to abate a nuisance of a public nature.²¹

The South African courts have repeatedly reaffirmed that South African law knows no *actio popularis*. It was always required of the applicant to demonstrate a direct, personal interest in the administrative action under challenge. It is now generally accepted that the *actio popularis* or actions in the public interest indeed never formed part of South African law. The case of *Bagnall v The Colonial Government*²² is the leading authority in this regard. The *Bagnall* case happens to be the first case in which a South African court roundly denounced the idea of an action in the public interest. In this case the Honourable Chief Justice, De Villiers CJ remarked that: 'As to our law, I am not aware that any South African court has ever recognized the right of any individual to vindicate the rights of the public where he himself has not sustained any direct injury or damage from a breach of the law'. The Chief Justice went on to say that: 'Under our law an action can only be brought by or on behalf of a person to whom a debt is owing, or who has sustained damage, or is likely to sustain damage, by reason of an injury done to him or breach of duty owing to him, or whose rights have been otherwise infringed or threatened to be infringed'.²³

The *Bagnall* decision was also confirmed by the Appellate Division in the case of *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd*²⁴ where Wessels CJ expressed the law as

²¹. At 6.

²². (1907) 24 SC 470.

²³. At 477.

²⁴. 1933 AD 87.

follows: 'The *actio popularis* is undoubtedly obsolete, and no one can bring an action and allege that he is bringing an action in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have'.²⁵

Turning now to the exceptions to the general principle which allows a litigant to come to court solely in order to vindicate the public interest an exposition of case law is necessary. These are the exceptions to the rule that the claim must be tied to a direct, personal and sufficient interest in the action concerned. There are reported cases that may be said to have been brought in the public interest. Some of these cases succeeded and some failed (These cases will be considered below). The following exceptions have been recognized:²⁶

(a) Principle in *Patz v Greene & Co*

The case *Patz v Greene*²⁷ provides some flexibility with regard to the principle that a litigant cannot be allowed to come to court with a view to vindicate the public interest. In this case the applicant applied for an interdict against an alleged illegal administrative action. The court held that where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy. In this sense damage refers to an encroachment on a right (statutory), and where the statute is in the interest of the public at large, any member may apply for a remedy but must also prove personal loss as a result of such conduct.

²⁵. At 101.

²⁶. See Baxter op cit at 658.

²⁷. 1907, TS 425.

In short, the court laid down the following rule: (1) Where a statute was enacted in the interests of a particular class of persons, any member of that class could take action to enforce it, irrespective of whether he personally was adversely affected by non-compliance with it; (2) where a statute was enacted in the public interest, any member of the public who could show that he was adversely affected by non-compliance with it would have *locus standi* to enforce it. This rule was accepted as authority in all cases where an applicant's *locus standi* was to be considered in an attack on alleged illegal administrative action.

The *Patz v Greene & Co* principle has been applied in numerous cases (discussed below).²⁸ In nearly all instances the applicant who wished to approach the court in a matter where the environment is allegedly harmed had to ask the court to exercise its powers of review of the action in the public interest. The only obstacle that an applicant faced was that he or she had to show that he or she sustained damage as indicated above.

One of the criticisms levelled against this judgement comes from Rabie²⁹ who pointed out that in stipulating an additional requirement, viz damage or personal loss, the judgement imposes an undesirable burden in respect of *locus standi*. His criticism is directed at the 'presumption of damage' for its inappropriateness, since the general interest which the individual has in the observance of rules governing a general relationship, is not based on an assumed loss or damage but on the interest he has in the correct application of the law in that general relationship. Furthermore it has been argued by some critics that the rule in *Patz v Greene* which has dominated the issue of standing for a number of years is not absolute in that

²⁸. See *Director of Education, Transvaal v McCagie & Others* 1918 AD 616; *Smalberger v Cape Town Ltd* 1979 (3) SA 457 (c); and also *BEF (Pty) Ltd v Cape Town Municipality* 1983 SA 387 (C) 400.

²⁹. See M A Rabie 'Locus Standi tot 'n Inerdik' 1972 *THRHR* 375.

it is no more than an aid to statutory interpretation, and that the decisive consideration must always be the intention of the legislature.³⁰

The *Patz* rule has dominated the issue of locus standi for so long that one would have thought that it is absolute, however, just at the time when many of us hailed it as being tantamount to a revival of the *actio popularis*, others felt that it is no more than an aid to statutory interpretation as discussed above. It follows that the rule leaves much to be desired, more so because it requires the applicant to prove special damage or personal harm, another setback towards the movement for the total liberation of the locus standi requirement.

In my mind, it would have been appropriate for the court to allow standing to any member of the public to bring an action in the public interest where the action arises out of the contravention of legislation. The case of *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*³¹ serves as a good example in this regard. In delivering the judgement of the court, Stratford JA held that, 'where it appears either from a reading of the enactment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an act in the interest of any person or class of persons, the intervention of the court can be sought by any such person to enforce the prohibition without proof of special damage'.³²

Despite all these criticisms the *Patz* rule was successfully applied in the following cases: In *BEF (Pty) Ltd v Cape Town*

³⁰. See T P van Reenen 'Locus Standi in South African Environmental Law: A Repraisal in International and Comparative Perspective' *SAJELP* vol 2 (1995) 124.

³¹. 1933 AD 87.

³². At 95.

*Municipality*³³ the *Patz Principle* was invoked in support of the standing of residents who sought to enforce compliance with a town planning scheme created for their benefit. In *Director of Education, Transvaal v McGagie*³⁴ legislation prescribing the procedure and required qualifications for the appointment of headmasters was enacted. These were held to have been enacted in the interests of all applicants for the post. Therefore, unsuccessful applicants had standing to challenge the validity of the appointment when it was made.

The case of *Bamford v Minister of Community and State Auxiliary Services*³⁵ provides a good example of instances where the court could allow standing to any member of the public to bring an action in the public interest where the action arises out of the contravention of legislation. In this case Mr Bamford, Member of Parliament for the Groote Schuur constituency and permanently resident in Rondebosch, brought an urgent application for an interim order interdicting the respondent from proceeding further with the erection of certain residences on the Groote Schuur Estate at Rondebosch. In terms of Act 9 of 1910, continued public access to the park on the Groote Schuur Estate was preserved and no suburban dwellings could be erected on the property at any time. This Section had to be read with the Preamble and the Second Schedule to the Act which states that the government of the Republic of South Africa holds the Groote Schuur Estates subject to the conditions contained in the will of Cecil John Rhodes. Of particular relevance is paragraph 1 of the Second Schedule to the Act which provides that continued public access to the 'park' on the Groote Schuur Estate is to be preserved.

~~* The applicant contended that as a member of the public he was entitled to access to the park but that the erection of~~

³³. 1983 (2) SA 387 (C).

³⁴. 1918 AD 616.

³⁵. At 95.

~~residences contrary to the legislative provisions, would erode and eventually whittle away the rights of public access to the park.~~ Furthermore, he contended that the government, acting through the respondent, was erecting a number of residences in a portion of the park, which had already reduced and would in future reduce his right as a member of the public to have access to the park. The respondent contended, inter alia, that the applicant had no locus standi, since his position as a Member of Parliament did not give him the locus standi, to sue on behalf of the public, nor had he alleged that he had ever used the right of access to the park, nor that he had intended to do so, and was now prevented from doing so.

An important question raised by the court was whether the legislature prohibited the action in the interests of any particular person or class of persons, or whether it was prohibited merely in the public interest. In this regard, Watermeyer JP held that in the first case any such person can enforce the prohibition without proof of damage, but in the second case a member of the public must show special damage or an apprehension of damage in order to have locus standi.

In this case the main issue (a view objected to by the respondent) was that the applicant (as an individual) also has an interest in compliance with the rules and regulations governing the general relationship without proving that he has suffered real prejudice or might suffer potential prejudice. The respondent's objection was that Bamford's interest was one shared by every other member of the public and thus not an interest sufficiently peculiar to him and as such he has no standing to vindicate 'the public interest'. This objection was dismissed by the court. Watermeyer JP held that the relevant legislation regarding access of the public to the park, does not prohibit anything but that it confers a right of access on all members of the public, and any unlawful interference with that right can be restrained by any member of the public without proof of special damage. It was not therefore necessary for the applicant to

allege that he has used the park in the past nor that he wants to use it in the future.

The court held that Mr Bamford did have locus standi, because the statute 'confers a right of access on all members of the public, and any unlawful interference with that right can be restrained by any member of the public without proof of special damage'.³⁶ This appears to be a bold decision in the sense that an applicant does not have to show proof of a personal loss. Another interesting point is that the court held, further, that it was impractical to expect proof from the applicant of actual prejudice suffered by him, since the statutory rules in question may, at that stage, not yet have been broken. All that is required is that his rights, freedoms and privileges may possibly be affected.

Interestingly enough, the bold and quite liberal *Bamford* approach was supported in the judgement of Eloff DJP in *Waks en ander v Jacobs en 'n ander*.³⁷ The application in this case arose from the notorious decision of the Conservative Party-Controlled Carletonville City Council in 1988 and 1990 to reserve public parks in the town for the exclusive use of whites in terms of the subsequently repealed Reservation of Separate Amenities Act 49 of 1953, a decision which had precipitated a damaging consumer boycott. Responding to a complain about vagrancy in one park, the council had adopted a reservation in favour of whites which was applicable, without explanation or reservation, to all parks in the white residential area and one in the business centre. This decision had drastically prejudicial consequences for both the residents of Carletonville and its broader community.

Three applicants applied for an order declaring the decision of the City Council invalid. It appeared that the first applicant

³⁶. At 1060.

³⁷. 1990 (1) SA 913 (T), 919.

was a white resident of Carletonville, that he was a ratepayer and that he was a director of and in full control of a hardware shop in the town. The second applicant was a resident of Khutsong, a Black residential area outside the municipal area of Carletonville. The third respondent was an Indian man who did not live in Carletonville but was the manager of and had an interest in a clothing shop in the town. Both of these shops were drastically affected by a consumer boycott by the local black population instituted as a result of the decision of the city council to reserve the use of the parks for whites.

The main issue of concern was the *locus standi* of the applicants to seek an order invalidating the city council's decision. In fact the respondent challenged the *locus standi* of all three of the applicants. The Court found that in the circumstances the first and third applicants did not have *locus standi*.

On appeal in *Jacobs en 'n ander v Waks en andere*³⁸ it was contended on behalf of the appellants that the description by the respondents of their involvement in their respective business was too vague. There was, so it was contended, no indication that they were shareholders in the business or that they had a financial or legal interest in the businesses. It was also contended that there was no causal connection between the city council's decision to reserve the use of the parks for whites and the ensuing drop in turnover.

With regard to the first respondent, the appellants contended that the ordinary rule that a municipal ratepayer has sufficient interest in the application of municipal funds to clothe him with *locus standi* did not apply in the instant case because of the following factors: that the spending on the requisite notice boards to enforce the decision was so small that it could not give rise to a real interest; that the rule was based on the relationship of trust between the city council and the ratepayer

³⁸. 1992 (1) SA 521.

and that relationship of trust was not breached in the instant case where the first respondent, as a white person, was not prejudiced by the decision; and that the first respondent could not complain that the decision was not to the advantage of the city council.

In delivering the decision of the Court Botha JA began by defining *locus standi*: 'In general the requirement of *locus standi* means that someone who seeks relief must have a sufficient interest in the subject matter of the litigation to persuade the court that his claim should be adjudicated. It is not a technical concept with rigidly defined boundaries. The requirement is most commonly described by saying that a plaintiff or applicant must have a direct interest in the relief sought (it must not be too remote); alternatively, it is also said that, in the context of the facts, there must be a real interest (not an abstract or academic one), or that it must be a present interest (not a hypothetical one)'.³⁹

Botha JA remarked that the first and third applicants had *locus standi* first on the basis of their interests in Carletonville businesses which were suffering a substantial drop in turnover as a result of a black consumer boycott in the protest against the city's decision. Someone who, like the first applicant, was a director in full control of a company which ran a business or who, like the third applicant, was the manager of a business had a real interest in its prosperity and profitability; since it was clear that the consumer boycott would end and the turnover of their businesses be restored if the city council's decision was set aside, the first and third applicants had a sufficiently direct interest to give them *locus standi*.⁴⁰

Another reason why the first applicant, a Carletonville

³⁹. At 533J-534B, in translation from the Afrikaans text.

⁴⁰. At 534F-535E.

ratepayer, continued Botha JA, had *locus standi* to challenge the council's decision was the established principle that a municipal ratepayer has *locus standi* to apply to court for the setting aside of an unlawful appropriation of municipal funds by a city council. A ratepayer's interest in the authorized use of municipal funds was sufficient to confer *locus standi* to restrain the improper expenditure of such funds, and it was not necessary that, in addition, some other right or interest of his should have been violated.⁴¹

A further ground upon which the third applicant (an Indian man who, prior to the decision of the Carletonville City Council, was accustomed to playing with his grandson in one of the parks subsequently reserved for the use of whites had *locus standi* was that parks, said Botha JA, were held in trust by the council for the use of the general public, including non-residents of Carletonville. That being so, the third applicant had a direct interest in the matter, for his right to use the park had been interfered with by the council.⁴²

To sum up this well reasoned judgement delivered by Botha JA, one can safely conclude that like earlier courts, the Appellate Division in *Jacobs* required the applicants, in order to enjoy *locus standi*, to establish a personal interest in the outcome of the proceedings which was not common to all members of the public. The court has therefore not revived the long-defunct *actio popularis* in the realm of standing to apply for the review of decisions of executive bodies, but it has developed the law in three respects, by recognizing injury to dignity as a basis upon which *locus standi* might be claimed; by laying down that a litigant might be held to have *locus standi* on the ground of an interest which does not amount to a legally enforceable right of action; and by making it clear that issues of *locus standi* should

⁴¹. At 536I-537B.

⁴². At 538D-540B.

be dealt with in a substantive and practical manner rather than a formalistic or technical one.⁴³

A contrary view was held in the case of *South African Optometrist Association v Frames Distributors (Pty) Ltd T/A Frames Unlimited*.⁴⁴ In this case the court held that where the statute prohibits the performance of any particular act which affects the public at large, no person has a right of action against another person merely because that other person has performed the prohibited act. It is incumbent upon the party complaining to allege and prove that the doing of the act has caused him some special damage or that the statute concerned is one which was enacted in his special interest.

(b) Standing for Interdict de Libero Homine Exhibendo (habeas Corpus) and Related Interdicts

Another notable exception is the standing requirements for the 'habeas corpus' remedy which appear to be much more liberal than normal. The 'habeas corpus' is a remedy designed to place under review the lawfulness of a deprivation of personal liberty, aiming ultimately at the release of an individual from unlawful detention. The case of *Bozzolli v Station Commander, John Vorster Square, Johannesburg*⁴⁵ is a good example of a situation whereby an individual as a party can be accorded standing to apply for an interdict on behalf of (a) detainee(s). In this case the principal of the Witwatersrand University had unsuccessfully applied for an order for the release of a number of students of his university who had been detained.

⁴³. See Annual Law Survey of South African Law, 'Civil Procedure' Juta & Co, Limited, 1992 at 568.

⁴⁴. 1985 3 SA 100 (D).

⁴⁵. 1972 (3) SA 934 (W).

In *Wood v Ondangwa Tribal Authority*⁴⁶ the court *a quo* maintained that the applicants, two church leaders and the secretary of a political party (SWAPO), and the persons who were threatened with detention were members, respectively, of the church's congregation and the political party, did not have *locus standi*. However, what is of importance is the pronouncements of the Appellate Division on the question of *locus standi* delivered by Rumpff CJ who referred to the *Bozzoli* case and was prepared to give a wider interpretation to 'special interest' in that the 'habeas corpus' may be obtained by a friend or relative of the detainee. He went further to hold that where the detainee has no kith or kin, a 'good Samaritan' who comes to his aid could hardly fail to be a friend or relative of the detainee. He further stressed that the applicant does not purport to act on behalf of the community at large but as a *negotiorum gestor* or *curator ad litem* on behalf of the detainee.⁴⁷

It is submitted that in the case of 'habeas corpus' remedies, departure from the normally strict rules relating to standing constitutes no more than an apparent exception to the principle that individuals require a direct and personal interest in order to enjoy standing. There is no doubt that emphasis was placed upon the fact that 'illegal deprivation of liberty is a threat to the very foundation of a society based on law and order', signifying that the consideration of the public interest played an important part in the decision.⁴⁸ However, Rumpff CJ was quick to remark that the mere fact that someone other than the person directly affected by the action complained of is allowed to approach the court does not reintroduce the *actio popularis*; the interest involved is still one which is personalized in the sense that there is a clearly identifiable individual whose interests are at stake.

⁴⁶. 1975 2 SA 294(A).

⁴⁷. At 311.

⁴⁸. At 309-310.

(c) Public Authorities as Representatives of the Public Interest

It has long been recognized that public authorities may act as representatives of the public interests in matters falling within their regulatory jurisdiction. Therefore, a local authority may sue for the abatement of a public nuisance; stand against other authorities to protect the interests of residents falling within its jurisdiction; stand to seek enforcement of parliamentary and administrative legislation as well as town-planning conditions. In this capacity the local authority acts as representative and guardian of the inhabitants of the township.⁴⁹

In the field of administrative law, the courts have readily recognized the standing of local authorities to attack the administrative decisions of other public authorities where it is believed that they are invalid and that they might have undesirable consequences for the residents falling within the jurisdiction of the local authority. The case of *Brits Town Council v Pienaar NO*⁵⁰ is illustrative of this viewpoint. This is one case where an applicant who had applied unsuccessfully to the council for certain business licences had successfully appealed to the provincial administrator against the refusal. The court recognized that the council was entitled to seek review of the administrator's decision because it was the 'guardian and representative of its ratepayers' and it had a duty to ensure that the best interests of the latter were safeguarded.⁵¹

In a number of cases it was also submitted that the standing of local authorities to seek enforcement of parliamentary and administrative legislation, as well as town-planning conditions, has been regularly recognized by the courts again on the ground that the local authority is the 'representative and guardian of

⁴⁹. See *Caledon Afdelingsraad v Mathe* 1974 (2) SA 398 (C).

⁵⁰. 1949(1) SA 1004 (T).

⁵¹. At 1013-1032.

the inhabitants of the township'.⁵² This is clearly illustrated in *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*,⁵³ where Stratford JA held that 'where it appears either from the reading of the enactment itself or from that plus a regard to surrounding circumstances that the legislature has prohibited the doing of an act in the interest of any person or class of persons, the intervention of the court can be sought by any such person (e.g, the municipality) to enforce the prohibition without proof of special damage'.⁵⁴

The other case worth noting is *Transvaal Canoe Union v Butgereit*⁵⁵ where an application was made for a declaration of rights. According to the applicants (the first applicant being a voluntary association whose members consist of several canoe clubs), they were entitled to paddle their canoes along a public river [a *res publica*]. The first respondent was a riparian owner who contended that the canoeists were trespassing, since her land stretched to the middle point of the river. In terms of its constitution, the Canoe Union was a legal *persona* and its executive committee could 'act for and on behalf of the Union in any matter or litigation or where any action on behalf of the Union is necessary in the discretion of the executive committee'.⁵⁶ Without arguing the point any further, Eloff DJP held that as the Canoe Union's own interests were involved it had *locus standi* to bring the case.

What in fact is suggested is that where the matter concerns

⁵². See *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718; *City Council of Johannesburg v Berger* 1939 WLD 87; and *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87.

⁵³. 1933 AD 87.

⁵⁴. At 96.

⁵⁵. 1986 4 SA 207 (T).

⁵⁶. At 208-9.

legislation enacted in the public interest a right of action should be available if an infringement of the right has occurred or is reasonably apprehended; where the legislature intended the remedy concerned to be available; and if the legislature intended that any member of the public or representative organization should be able to enforce such remedy. In my view there are certain issues which are so important to society that any person should be able to take up the cudgels in the interest of the public, and that, with regard to enforcement of legislation, such an intention may be ascribed to the legislature.

(d) Ratepayers

Traditionally, the courts have always been reluctant to recognize a general right to standing to taxpayers as opposed to ratepayers. The latter have fared better. The courts have in a number of earlier decisions departed from the relatively narrow approach traditionally adopted towards the rules relating to standing. They have recognized that ratepayers may challenge the validity of action taken by their local authorities.

Various reasons have been advanced for distinguishing ratepayers from taxpayers. It was generally felt that to recognize a group as wide as that of taxpayers would come close to recognizing a general right of standing on the part of the public to challenge any administrative action financed from the fiscus. A more realistic explanation of the anomaly is that the courts fear that by recognizing taxpayer standing, in the same way that they have recognized the standing of ratepayers, they might open the floodgates to an official action from an extremely wide group of potential litigants.⁵⁷

⁵⁷. Baxter *op cit* at 659.

The case of *Verstappen v Port Edward Town Board and Others*⁵⁸ is illustrative of a situation where ratepayers can seek *locus standi in judicio* with a view to abate a nuisance of a public nature. In this case the applicant sought to establish her *locus standi in judicio* to apply for an interdict restraining the first respondent local authority from committing the illegality of operating the waste disposal site without the required permit on the basis that she was a ratepayer of the first respondent and that in several reported cases the courts had afforded ratepayers the right to interdict local authorities from dealing with their funds or property contrary to law.⁵⁹

In order to determine whether, said Magid J, a member of the public has *locus standi* to prevent the commission of an act prohibited by statute, the first enquiry is whether the legislature prohibited the doing of the act in the interests of any particular person or class of persons or whether it was merely prohibited in the public interest. If the former, any person who belongs to the class of persons in whose interests the doing of the act was prohibited may interdict the act without proof of any special damage. If not, the applicant must prove that he has suffered or will suffer such special damage as a result of the doing of the act.

The Court, *per* Magid J, accordingly held that it did not consider that the mere fact that some municipal funds were obviously spent in managing and operating the waste disposal site in question could conceivably afford the applicant *locus standi* to interdict what she regarded as an illegality. The Court held that it had not been established on the papers that the first respondent's manner of operation of waste disposal site was more expensive than any of the various methods suggested by the applicant.⁶⁰

⁵⁸. 1994 (3) SA 569.

⁵⁹. At 575B.

⁶⁰. At 575E-G.

In my view, the Court arrived at a correct decision in that the Legislature intended its provisions to operate in the interests of the public at large. In this regard, the applicant failed to show that the contravention of the Act by the respondent has caused or is likely to cause her some special damage. It follows that a right should be infringed or a threat of such violation should for the purpose of proving *locus standi*.

(e) *Actio popularis* (citizen's action)

The fifth possible exception is the *actio popularis* found in Roman Law which could be instituted by any member of the public to prevent violations of *res sacrae* and *res publicae*. The *actiones populares* originated in Roman law and were used for a particular group of actions which could be instituted by any member of the community. The *actio popularis* was not a single action, but included a variety of actions, the distinguishing feature of which was that the plaintiff or applicant need not have been personally involved in or affected by the act upon which the action was based. It was destined to serve the interests of the people. It is trite law that the *actio popularis* fell into desuetude during the era of Roman-Dutch law.⁶¹

Having analyzed the exception to the general principle that a person cannot be allowed to come to court solely in order to vindicate the public interest unless his or her claim is tied to a direct, personal and sufficient interest in the action concerned, one also needs to look at another important issue which is closely connected to the problem of standing. In fact, before the enactment of the new South African constitution, the burning question that faced every environmental lawyer was how environmental rights and interests could be protected, and the

⁶¹. See J D van der Vyver 'Actiones Populares and the Problem of Standing in Roman-Dutch, South African Law' 1978 *Acta Juridica* 191.

quest for an answer involved an analysis of whether such rights were recognised and afforded protection at common law and by statute. The other question that is of particular relevance is the extent to which the South African law recognised and protected such a right. In this regard there is still dissension amongst academics on whether or not our common law has the capacity to recognize and protect environmental rights.⁶²

Van Niekerk⁶³ argues that the common law is the ideal vehicle for the protection of environmental rights. This is evidenced by his call for the recognition in our law of an ecological norm. The question that he raised was whether in law generally (and in South African law in particular) recognition could not be given to a general jurisprudential norm against ecological damage; a norm which would be operative in all fields of the law both national and international and on all levels of the administration of justice. From the question raised above the only argument that could be pursued here is the basic argument that on all levels of juridical decision-making, the protection of the environment has become a matter of such importance that it should consciously be allowed to assume its role as one of the major concerns of the law. Put the other way round, his claim is that even if no remedy was effectively available to the individual or the community, the legal profession could use its ingenuity to find some legal remedy.

The strength of the arguments put forward above can be tested by asking ourselves the question whether the South African law indeed provides any common-law remedy that could be invoked to the protect environmental interests as Van Niekerk proposed. Once again legal academics seem to be divided on this issue. It would

⁶². See R Lyster *'The Protection of Environmental Rights'* (1992) 109 SALJ 518-524.

⁶³. See Barend van Niekerk *'The ecological norm in law or the jurisprudence of the fight against pollution'* (1975) 92 SALJ 82.

seem that even though private-law remedies exist, their impact on environmental conservation is very slight.⁶⁴ One of the problems identified was that while an interdict is potentially a valuable remedy, its effectiveness was narrowed down by the requirement that there be no adequate alternative remedy. This problem was further exacerbated by the *locus standi* requirements which rendered the successful claiming of civil remedies and judicial review problematic since the plaintiff was required to demonstrate a direct personal interest in the relief claimed.⁶⁵

Cowen⁶⁶ is totally opposed to the argument that the common law is capable of meeting the challenge of the environment. He claims that the common law is particularly incapable of meeting the challenge of the environment, since it protects and enforces only private rights and obligations. His main argument is that 'if South African lawyers concerned with the protection of the environment are to be relevant and effective, they must reach out beyond the principles, concepts and underlying philosophies of conventional branches of law; for these have grave inherent limitations in the specific context of the environmental challenge. The conventional branches of law were in large measure designed to cope with different problems from those presented by the need to protect the environment in modern industrialised societies and the developing countries'.

Properly evaluated, this argument suggests that Van Niekerk fails to appreciate the fact that environmental law is concerned with enforcing the public interest in environment quality, aiming at all times to balance the public interest and private rights; and

⁶⁴. Noted by the South African Law Commission (See the discussion of '*Remedies in environmental law*' in the Interim Report on Group and Human Rights, 1991, pp 542-3.

⁶⁵. See *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C).

⁶⁶. See D V Cowen '*Toward Distinctive Principles of South African Environmental Law: Some jurisprudential perspectives and a role for legislation*' (1989) 52 *THRHR* 3 at 8.

that while common law remedies offered by the law of delict in respect of injury to person are unquestionably at a plaintiff's disposal if he can demonstrate a threat to his health, the requirements of standing remain an obstacle.

In the public-law sphere an individual or group occupying a subservient position could not champion the 'public interest' in a dispute against the state administration but has also to prove a direct or personal interest in the case.⁶⁷ Since environmental law has developed a unique public-law character, governmental control of the environment has increased, leaving the individual in a much weaker position to vindicate the public (environmental) interest.⁶⁸ This had led to the denial of the individual and 'group' interests in the broader general interest in which they shared (i.e. an interest in a healthy environment and the duty to prevent air or water pollution). As a result of this development, many 'faceless' offenders were never brought to book.

In what Loots⁶⁹ describes as 'missed opportunity for judicial reform', the South African Appellate Division delivered a judgement which could have set our courts on the same road at much the same time that the Indian Supreme Court took the first steps along the road to the judicial reform of the doctrine of standing. The case of *Cabinet of the Transitional Government for the Territory of South West Africa v Eins*⁷⁰ is one example where the Appellate Division itself missed a golden opportunity to liberalize the law of standing for the purpose of constitutional litigation.

⁶⁷. See Cheryl Loots 'Locus Standi to Claim Relief in the Public Interest' 1989 SALJ 131-2.

⁶⁸. See Elmene Bray 'Locus standi in environmental law' 1989 CILSA 33-8.

⁶⁹. Loots 'Standing to enforce fundamental rights', SAJHR, 1994, 51-9.

⁷⁰. 1988 (3) SA 369 (A).

The facts of this case have nothing to do with any threat to the environment but from them comes a good illustration of how reluctant our courts were to adopt a liberal approach to standing. This case was brought before the Appellate Division on appeal from the Supreme Court of South West Africa (as it then was). Eins applied for an order declaring legislation invalid in terms of the South West Africa Constitution Act 39 of 1968. The legislation was an Act passed by the Legislative Assembly which authorized the Transitional Cabinet to prohibit certain persons from being within the territory or order them to be removed from the territory if it had reason to believe that such persons endangered, or were likely to endanger, the security of the territory or its inhabitants or the maintenance of public order, or that such persons endangered, or were likely to endanger, a feeling of hostility between members of the different population groups of the territory. The persons who could be prohibited or removed in terms of this legislation were not rendering service in the defence force or employed by the government.

Eins alleged that he was one of thousands of people who were permanent residents of South West Africa but who were not born in the territory and could therefore be prohibited from being in the territory or removed from the territory in terms of the Act. It was submitted that the Act deprived Eins, and obviously others in his position, of fundamental right to reside in South West Africa, which was guaranteed by the constitution, and supplanted such right with a licence recoverable in the discretion of the Cabinet of the Transitional Government of South West Africa.

The court of first instance declared the Act to be unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in the South West Africa Legislative and Executive Authority Establishment Proclamation R101 of 1985, enacted in terms of s 38 of the South West Africa Constitution Act 39 of 1968. The Appellate Division refused to consider the merits of the application, holding that any action had been taken against him,

or that the Cabinet intended to take any action against him in terms of the Act. From this decision one learns that the court's power to review legislation has been severely curtailed because the court insisted that only people who have actually had action taken against them in terms of the legislation have standing. To make matters worse, a prejudicial action may be taken against such persons before they could have an opportunity to seek judicial redress.⁷¹

The *Wood* case⁷² is also illustrative of the missed opportunity as proposed by Loots. In this case church leaders were allowed to claim an interdict in the interest of a large, vaguely defined, group of persons who feared that they would be illegally arrested, tried and subjected to summary punishment on account of their political affiliations. The court took into account that it would be impractical to expect the people under threat, many of whom were tribesmen living about 800 kilometres from the seat of the court, to approach the court themselves and therefore allowed the applicants to represent their interests. This decision could have been used by the courts as a precedent to justify the relaxation of the traditional rules of standing in other areas of law, but instead they limited its application to matters involving violations of life, liberty or physical integrity.⁷³

This case also serves as one typical example of a situation where the Appellate Division in effect singled out a common-law right which it judged to be of such importance that any member of the public should be able to take action to enforce it even though he or she was not personally affected or threatened.⁷⁴ Loots⁷⁵

⁷¹. See Cheryl Loots 'Standing to enforce fundamental interest' SAJHR at 53.

⁷². *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A).

⁷³. Loots op cit at 51.

⁷⁴. Van Reenen op cit 125.

regards the decision in *Wood* as a very strong precedent in this regard. Her view is that, the court can judge certain legislation to be of such importance to the public interest that the legislature must have intended that any person could enforce it.

Although the case does not deal specifically with the violation of environmental rights, its decision could have been used by the courts as a precedent to justify the relaxation of the traditional rules of standing in other areas of law as well, instead of limiting its application to matters involving violations of life, liberty or physical integrity. (Similarly, the Appellate Division itself missed a golden opportunity to liberalize the law of standing for the purpose of constitutional litigation in the case of *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A)).

The above analysis of the extent to which the common law guarantees the right to standing to protect the environment suggests the need to change the environmental statutes in order to solve the problems of standing. It is submitted that our statutes should be made to apply more widely in the sense that they should authorize any person or organization to bring a civil action claiming the enforcement of the provisions thereof without the necessity of proving an interest or personal damage in the relief claimed. In my view, the only change that this innovation would make to the present common law position is that, it would not be necessary to prove that the applicant is personally adversely affected by the illegality alleged. Both the Interim Constitution of the Republic of South Africa Act 200 of 1993 and the final Constitution of South Africa (May, 1996) provide likewise. These two constitutions will be the subject of discussion in the two chapters that follow. The question that we have to ask ourselves is whether or not these constitutions fully liberate the standing requirement.

⁷⁵. Loots op cit at 51-3.

3. STANDING UNDER THE INTERIM CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

The Constitution relaxes the traditional rules of legal standing with respect to infringements of or threats to both the fundamental rights entrenched in Chapter 3 (the Bill of Rights) and those that fall beyond this Chapter by granting standing to persons acting as members of or in the interest of a group or class of persons and persons acting in the public interest.⁷⁶ Regrettably, this Constitution is not without drawbacks.⁷⁷

The greatest challenge facing our courts is to interpret and implement this extended locus standi requirement and explicitly recognized actio popularis in the light of s 29 of the Constitution. By so doing our courts, especially the Constitutional Court, will be able to develop authoritative case law that will form part of our law. One of the positive aspects of the Bill of rights is that it has overcome some of the problems of access to justice encountered in environmental litigation in the public law field in South Africa. The Constitution has finally moved away from the restrictive approach to standing thereby allowing the courts to open up their doors to potential plaintiffs who have been denied standing in terms of the Common law.

3.1 Access to environmental justice

South African courts have, in the past, adopted a restrictive approach to the issue of standing in the sense that standing was only accorded to an applicant seeking to vindicate a private interest. This approach required that a person who approaches the court is entitled to claim only relief which is in his or her own

⁷⁶. Section 7.

⁷⁷. The criticisms levelled against special environmental provisions will be outlined below.

interest. It would appear that the aforementioned requirement has been restrictively interpreted in order to preclude an organisation from coming to court as representative of the interests of its members, as distinct from its own interests. As a result, this limitation hampered the effective utilisation by all potential beneficiaries of the opportunities available for recourse to the law.

The Constitution contains provisions aimed both at broadening the array of environmental issues which can be brought before courts and extending the range of people with effective access to environmental justice. Therefore, even if judges choose to interpret the new provisions restrictively the constitutional standing requirement will ensure that people are able to enforce their rights without being confronted by a variety of technical procedural hurdles.⁷⁸

The broadening of the *locus standi* requirement promises interesting changes in the sphere of environmental law, since an individual or group can now act on behalf of the community or the general public, for example, to combat air or water pollution without having to prove personal damage. Nevertheless, the question is how this broadened concept of *locus standi* and *actio popularis* will be interpreted and implemented in the light of section 29 of the Constitution of the Republic of South Africa.

3.2 Application of the Bill of Rights

Winstanley⁷⁹ submits that the practical effect of the environmental right in any given situation will depend to a large extent on the applicability of the Bill of Rights. Section 7(2)

⁷⁸. See Christina Murray 'Litigating in the Public Interest: Intervention and the Amicus Curiae' SAJHR 1994 at 253.

⁷⁹. T Winstanley 'Entrenching Environmental Protection in the New Constitution' (1995) 1 SAJELP at 88.

of the Interim Constitution provides that the chapter and the rights entrenched within it apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution. This includes: all law in force on 27 April 1994 and all law that may come into force during the currency of the interim Constitution; statutes of parliament, statutes and ordinances of provincial government and municipal by-laws; administrative decisions taken or performed during the currency of the Constitution; and, the rules of the common law and customary law. Furthermore, Section 7(1) of the same constitution explicitly binds the legislative organs of the state at all levels of government.

From these two provisions comes a very important question that has been troubling academics up to this time. The question is whether the Bill of Rights applies vertically or horizontally? It would seem that the text itself does not clearly indicate whether a vertical or horizontal application was intended. Winstanley⁸⁰ argues that if the Bill has vertical application only, the environmental right will be of limited value and besides that, the vertical application would create absurdity and may also open the way for the serious abuse of rights. Furthermore, she argues that many activities which impact on the right of the individual to a healthy environment are performed by private individuals or companies and not the state. In order to justify her arguments, she gives the following example, that, 'if a court finds that an employer who permits smoking in an office building infringes a non-smoking applicant's right to an (occupational) environment which is not detrimental to health and well being, and the bill only applies vertically, then the result would be that employees within a state building would be able to enforce that right but privately employed individuals could not'.⁸¹

⁸⁰. Winstanley op cit at 88.

⁸¹. Ibid.

The question of application also came before our courts in the following three recently reported cases, namely, *Gardener v Whitaker*,⁸² *Mandela v Falati*,⁸³ and *De Klerk and Another v Du Plessis and Others*.⁸⁴ In regard to the first case (*Whitaker*), the issue raised before the court was whether Chapter 3 of the Constitution applies not only between an individual and organs of the state (the so called "vertical" application), but also to litigation between private individuals or entities ("horizontal" application). It is submitted that an answer to this question is to be sought in the provisions of the Constitution itself, interpreted properly by having regard, *inter alia*, to comparative law and the underlying values and objects of the Constitution. The court found that 'there is no uniform and single answer to the question of whether an alleged breach of a fundamental right contained in chapter three can found an action between private individuals'.⁸⁵

Furthermore, the court also found that the use of the word "law" in section 7 suggests that not only public law relations are subject to the provisions of the chapter. This is further supported by section 33(2) which provides that neither the common law nor customary law may infringe upon any fundamental right in the chapter, otherwise than in terms of section 33(1), the general limitation clause. In addition section 33(3) recognises common law and customary law rights not inconsistent with the rights contained in the chapter, which would have been unnecessary as far as private law matters were concerned if the chapter only applied vertically.

⁸². 1994 (5) BCLR 19 (E).

⁸³. 1994 (4) BCLR 1 (W).

⁸⁴. (1994) (6) BCLR 124 (T).

⁸⁵. Winstanley op cit at 89.

In *Mandela v Falati*⁸⁶ the Court observed that before deciding whether the constitutional right of freedom of expression had any bearing on the matter, it first had to be determined whether the Constitution has application to private disputes, that is, whether it applies horizontally, between citizen and citizen, or only vertically between the State and its citizens. The Court held that although the framers of the constitution had not spelt out in plain language what they intended in this regard, it appeared to the Court that the Constitution applied horizontally. The court also found that certain rights protected by the Constitution pre-eminently required horizontal application. The court accordingly concluded that the framers of the Constitution intended that the rights necessary to conduct such activity could be enforced as between individuals. It is submitted that although the right which was the subject of litigation in the two cases discussed above was freedom of expression, Winstanley⁸⁷ argues that it is quite reasonable to suggest that an environmental right is similarly one which must have horizontal application. Otherwise, a failure to treat environmental right as such would seriously negate the essential content of the right in question.

In *De Klerk and Another v Du Plessis and Others*⁸⁸ the Court departed from the trend set in the earlier case, that Chapter 3 of the Bill of Rights applies horizontally. In this case, the Court found itself unable to agree with the reasoning in *Mandela v Falati* and found that the decision was wrongly decided. In answering the question whether the framers of the Constitution intended the Bill of Rights to have horizontal application, the court held that the answer should be sought within the four corners of the Constitution. It further held that traditionally bills of rights have sought to strike a balance between governmental power and individual liberty and to constitute a

⁸⁶. 1994 (4) BCLR 1 (W).

⁸⁷. Winstanley op cit at 89.

⁸⁸. 1994 (6) BCLR 124 (T).

protection against state tyranny. The Court concluded that fundamental rights and freedoms are protected against State action only. Furthermore, it is clear that where horizontal application occurs, it is invariably provided in express terms.

The court went further to hold that it would be the correct approach to the interpretation of the Bill of Rights provisions in Chapter 3 of our Constitution to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary, either in respect of Chapter 3 as a whole or in respect of individual sections thereof. Nowhere does the Constitution contain an explicit provision that the fundamental rights provisions have horizontal effect between private citizens. Furthermore, section 33(4) would be unnecessary if Chapter 3 had horizontal effect. It also held that it is inconceivable that the framers intended the whole body of private law to become unsettled, as would be the consequence of horizontal application. As a result, the court found itself unable to agree with the reasoning in *Mandela v Falati* and found that this decision was clearly wrong.

Lastly, to reinforce its support for the view that only vertical application of the Bill of Rights was intended, the court held that section 7(2) refers to "all law", this must be read as "all public law applicable to the State and its organs". Furthermore, section 7(4)(b) which widens the *locus standi* of litigants to include the *actio popularis*, is not compatible with litigation between private citizens. Moreover, the court further held that the reasoning of the learned Judge in *Mandela v Falati* (*supra*) that political activity occurs at grassroots level and that therefore the drafters intended section 21 to have horizontal application disregards the fact that historically political activity was not inhibited by the citizenry but by State repression. That is the evil the drafters sought to combat.

It could be argued that provision should be made for the Bill of Rights to apply directly to private individuals, especially in

environmental cases. That is to say that the Bill should apply horizontally as between private citizens. The rationale behind this view is that if the Bill of Rights were to apply only vertically, I believe our courts will have serious difficulties in applying the provisions of the constitution, for example, in pollution related cases where only private individuals are involved. In my view, it is reasonable to argue for the horizontal application of the Bill of Rights as between private citizens if we were to take environmental rights seriously. Despite the fact that our Constitution does not expressly provide for a direct application of fundamental rights as between individuals the state is required to ensure that fundamental rights are guaranteed as against third parties. It is submitted that a purposive interpretation of the Bill of Rights would certainly be preferable from an environmental perspective.

3.3 Interpretation and implementation by the court

The meaning of some of the provisions of the Constitution are plain and may be ascertained from simply reading the text. However, constitutional disputes can often not be resolved with reference to the literal meaning of provisions. The Constitution provides a framework for the exercise of state power. It seeks to bind the government to the values underlying fundamental rights and prescribes a process for political decision-making.⁸⁹

Consequently, the courts have to develop some form of controlling mechanism to ensure that it is not flooded by mischief-makers and busybodies,⁹⁰ for example 7(4) (b):

- (i) With regard to the interests required to obtain *locus*

⁸⁹. See J de Waal & G Erasmus 'The Constitutional Jurisprudence of South African Courts on the Application, Interpretation and Limitation of Fundamental Rights during the Transition' *Stellebosch Law Review* 1996 2 at 180-1.

⁹⁰. See Cachalia et al, *supra* at 24.

standi in the above instances, what type of interest is required: a direct or substantial interest?

- (ii) Under what circumstances would a class action be appropriate?
- (iii) what mechanisms would (or should) the courts devise to prevent them from being swamped by undeserving applications, especially where class actions and the *actio popularis* are concerned?⁹¹
- (iv) Finally, one must bear in mind that if our aims of cultivating democratic values and an awareness of the environment are to succeed, a narrow, positivistic interpretation of the environmental right and *locus standi* should not be tolerated.

This argument is supported by Section 35 of the Constitution which provides that:

- (a) in interpreting the provisions of Chapter 3, the court shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.⁹²
- (b) no law which limits any of the rights entrenched in this chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this chapter, provided such law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which

⁹¹. Ibid.

⁹². See Cachalia et al op cit at 121.

event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.⁹³

- (c) in the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.

It is interesting to note that the Constitutional Court has, on several occasions, committed itself to the "purposive" approach to interpretation.⁹⁴ In that sense the court has approved of an interpretation it refers to as "generous" or "broad" or "liberal".⁹⁵ Apart from the above substantive clauses (interpretation and application clauses) one needs to examine the exact content of the *locus standi* requirement since it forms the basis of this dissertation. This is provided in terms of section 7 of the Bill of Rights.

3.4 The locus standi clause

A closer look at Chapter 3 of the Constitution shows that section 7 confers *locus standi* on a wide spectrum of persons and groups. This section introduces important and substantial changes to the common law of standing. The common law has traditionally been hostile to representative actions in circumstances where an association, in its own right, has no direct substantial interest in the subject matter of the dispute but seeks to act on behalf of its members.⁹⁶ Section 7 provides that Chapter 3 binds all legislative and executive organs of the State at all levels of

⁹³. See Cachalia et al op cit at 122.

⁹⁴. See *S v Makanyane* 1995 6 BCLR 665 (CC) par 9-15.

⁹⁵. See De Waal and Erasmus op cit at 181.

⁹⁶. See Cachalia at 23.

government. Furthermore, juristic bodies are also entitled to the rights contained in Chapter 3 to the extent that the nature of the rights permits it.

In analysing the first part of section 7, it is clear that juristic persons, such as universities, welfare organizations, companies, societies and clubs are also entitled to the rights incorporated in Chapter 3. Nevertheless, although these bodies are not bearers of individual human rights, they will still have locus standi to challenge the constitutionality of laws that may conflict with those rights (e.g. a company or society will have *locus standi* to challenge air pollution which is unhealthy or detrimental to the well-being of its employees or members and the general public). The reason for this follows from s 35 which provides that in interpreting the provisions of Chapter 3 the court may have regard to comparable foreign case law.

The Canadian case of *R v Big M Drug Mart Ltd*⁹⁷ illustrates this point. In this case the company was charged for trading in contravention of the Lord's Day Act. The company challenged the constitutionality of this Act on the basis that it offended what were clearly human rights (the right to freedom of religion entrenched in the charter). However, in terms of the Canadian Charter juristic persons are not bearers of rights. The prosecution argued that freedom of religion is a personal freedom and that a corporation, being a statutory creation, can not be said to have a conscience or hold a religious belief. The Supreme Court of Canada held that the question as to "whether a corporation can enjoy or exercise freedom of religion is irrelevant. The respondent is arguing that the legislation is constitutionally invalid because it impairs freedom of religion and if the law impairs freedom of religion it does not matter whether the company can possess religious belief. An Accused atheist would be equally entitled to resist a charge under the Act. A law which itself infringes religious freedom is, by that

⁹⁷. 18 DLR (4th) at 321.

reason alone, inconsistent with the charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, Atheist, Agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue."⁹⁸

Section 7(4) of Chapter 3, entitled *Fundamental Rights*,⁹⁹ provides:

- (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
- (b) The relief referred to in paragraph (a) may be sought by:
 - (i) a person acting in his or her own interest.
 - (ii) an association acting in the interest of its members.
 - (iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her capacity or name.
 - (iv) a person acting as a member of or in the interests of a group or class of persons.
 - (v) a person acting in the public interest. Such a person does not have to prove any personal harm or damage.

Loots¹⁰⁰ argues that the effect of s 7(4) is that "any person or organization may enforce the rights contained in the Bill of Rights, irrespective of whether that person or organisation is

⁹⁸. See Cachalia at 22-3.

⁹⁹. Commonly known as the Bill of Rights.

¹⁰⁰. See Cheryl Loots '*Standing to enforce fundamental rights*' (1994) 10 *SAJHR* at 49-50.

adversely affected by the alleged infringement of rights'. What she suggests is that it will be possible to bring an action under this section on behalf of plaintiffs who cannot be specifically identified.

Contrary to Loots's views, Glazewski¹⁰¹ contends for a narrower interpretation. He argues that the Bill of Rights admittedly relaxes the *locus standi* requirement by granting standing to a 'person acting in the public interest of a group or class of person' and 'a person acting in the public interest'. However this only applies to an infringement of or threat to any right entrenched in Chapter 3 and not to legal rules which fall outside it. Furthermore, he argues that the *locus standi* requirement is restricted in that regardless of who brings the action it is still necessary to demonstrate that the health or well-being of an individual or group is being threatened or harmed. He gives the following example: that an environmental group or a concerned individual wishing to oppose the establishment of waste disposal site in the public interest on the ground that it infringes an environmental or planning statute might not be assisted by this clause. The applicant could arguably have standing if s/he could show that the proposal is detrimental to his or health as envisaged by section 29.¹⁰²

In my view, Glazewski's view cannot be reconciled with the decision in *Ferreira v Levin No and Others*¹⁰³. In this case, the court was divided on the question of whether Applicants had *locus standi* for a challenge based on section 25(3). In the view of Akermann J, section 7(4) deals with the situation where "an infringement of or threat to any right entrenched in this Chapter is alleged" and it therefore applies specifically to the

¹⁰¹. See Jan Glazewski op cit at 7.

¹⁰². See T Winstanley 'Entrenching Environmental Protection in the New Constitution' (1995) 1 SAJELP at 90-1.

¹⁰³. CCT 5/95 (19 March 1996).

jurisdiction vested in the courts by section 98(2)(a) and 101(3)(a) of the Constitution to deal with "any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3". But section 98(2) vests a general jurisdiction in the Court to interpret, protect and enforce the provisions of the Constitution. Section 7(4) in dealing with the section 98(2)(a) jurisdiction provides that where an infringement or threat to the infringement of a constitutional right is alleged, any of the persons referred to in section 7(4)(b) will have standing to bring the matter to "a competent court of law".¹⁰⁴

Furthermore, the category of persons empowered to do so is broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened, and to that extent the section demonstrates a broad and not a narrow approach to standing. Ordinarily a person whose rights are directly affected by an invalid law in a manner adverse to such person, has standing to challenge the validity of that law in the courts.¹⁰⁵ Section 7(4) does not, however, deal specifically with the jurisdiction vested in the Court by the other subsections of section 98(2). Section 98(2)(c) vests in this Court the jurisdiction to enquire into the "the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed before or after the commencement of the Constitution". The constitutionality of a law may be challenged on the basis that it is inconsistent with the provisions of the Constitution other than those contained in Chapter 3.¹⁰⁶

The majority of the Court (per Chaskalson P with Mohammed DP, Didcott, Langa, Madala JJ and Trengove AJ concurring) disagreed

¹⁰⁴. At 99A-B.

¹⁰⁵. See *Roodepoort-Maraisburg Town Council v Eastern properties (Pty) Ltd* 1933 Ad 87 at 101.

¹⁰⁶. At 99C-D.

with Ackermann J's analysis of the issue of *locus standi*. In their view Applicants had *locus standi* to challenge the section on the basis of section 25(3) of the Constitution. Ordinarily a person whose rights were directly and adversely affected by an invalid law had standing to challenge the validity of that law in the courts. Applicants had such an interest in the present case.¹⁰⁷

Chaskalson J ruled that once it is accepted, as Akermann J has, that the issue of constitutionality has to be tested objectively and not subjectively, there is no valid reason for denying persons in the position of the applicants standing to secure a ruling on the validity of a law that directly affects their interests. Further that even if section 7(4) were to be read extensively as applying by inference to all the subsections of section 98(2), he would not see it as an obstacle to the applicants' case. In that case it would have to be read as meaning "where an infringement of or threat to any right entrenched in this chapter (or any dispute over the constitutionality of any executive or administrative act or conduct or threatened administrative act or conduct of any organ of the state, or any enquiry into the constitutionality of any executive or administrative act or conduct or threatened administrative act or conduct of any organ of the state, or any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution) is alleged" the persons referred to in paragraph (b) shall have standing.¹⁰⁸

In conclusion, Chaskalson J went on to say that there would be no need on this extensive interpretation of the section to construe section 7(4) (b) (i) as meaning that the person acting in

¹⁰⁷. At 5-6ff.

¹⁰⁸. At 99G-H.

his or her own interest must be a person whose constitutional right has been infringed or threatened. This is not what the section says. What the section requires is that the person concerned should make the challenge in his or her own interest. It is for the Court to decide what is sufficient interest in such circumstances.¹⁰⁹ I think both judges arrived at the right decision which broadens the law of standing significantly.

In a separate judgement O'Regan J set out her own reasons finding that although in this case too, section 7(4)(a) requires applicants to allege an infringement of or threat to a right contained in chapter 3, applicants under section 7(4)(b)(v) need not point to an infringement of or threat to the right of a particular person. They need to allege that, objectively speaking, the challenged rule or conduct is in breach of a right enshrined in chapter 3. This flows from the notion of acting in the public interest. The public will ordinarily have an interest in the infringement of rights generally, not particularly.¹¹⁰

In my view the *Ferreira* decision is of significance for the reason that it demonstrates a broad and not a narrow approach to standing in that it allows prospective applicants to have standing in cases where it is alleged that a right enshrined in chapter 3 or any other right that falls beyond chapter 3 has been infringed or threatened to be infringed. In the past some restrictions have always been placed on the *locus standi* of a complainant. So this, I believe, is a great achievement.

Returning now to the criticisms levelled against Loots by Glazewski, Loots¹¹¹ easily justifies her arguments by outlining the significance of section 7(4). She argues that the reason why

¹⁰⁹. At 99(H-I) - 100(A).

¹¹⁰. At 120H.

¹¹¹. See Cheryl Loots 'Standing to enforce Fundamental Rights' SAJHR, (1994) at 49-50.

it is important to have such a clause in the Constitution is that people whose fundamental rights are infringed may not practically be in a position to approach the court for relief. The reasons for this may be that the people affected are unsophisticated and impecunious, so that they do not know how to go about enforcing their rights and are not in a financial position to do so. She also sees fear of judicial process as another barrier that exacerbates the problem. Most people view litigation as something emotionally traumatic, time consuming and costly that they are afraid to get involved in it. As a result, very often large numbers of people are affected and there is great benefit in one person or organization being able to approach the court on behalf of all whose rights are infringed.

3.5 The environmental right

Section 29 of the Constitution of the Republic of South Africa recognises a fundamental right to a healthy environment. This section provides that:

"Every person shall have the right to an environment that is not detrimental to his or her health or well-being".

On the face of it, the incorporation of an environmental right in the Bill of Rights represents a milestone in creating an awareness of and a sensitivity towards the environment. However, upon closer scrutiny the following criticisms may be levelled against this environmental right:¹¹²

- (i) The content of people's rights is of such a nature that they cannot be defined properly and are vague in terminology (e.g What is the content of the words

¹¹². See Tobias van Reenen 'Locus standi in South African Environmental Law: A Reappraisal in International and Comparative Perspective' (1995) 2 SAJELP at 142-4.

`environment', `health' and `well-being'). Since these rights are vague, they cannot be concretized and the courts will have difficulty in implementing them. Van Reenen¹¹³ argues that "there is therefore a real danger that the environmental right may become a hollow, ideological concept which is only included in the Bill to appease even the most radical `greens'".

- (ii) What legal standards are being established against which to measure an infringement of the environment? For example, should a `healthy environment' comply with the standards of developing or developed countries, and what will happen when conflict arises between environmental rights and the rights of private industry or developers? In these cases the court will have to balance these competing rights one against the other before it can give judgement.
- (iii) The environmental right is phrased as an anthropocentric right and forms part of individual human rights in the Bill of Rights. It therefore centres around the human being (e.g. concern for his health and well-being) and does not protect the natural environment for its own sake. Such an environmental right does not cultivate an awareness of stewardship for the environment, but still clings to the ethics of utilitarianism.
- (iv) The natural environment will not receive the protection it deserves under the constitution, and will in any event not receive the same prominence as the entrenched homocentric environmental rights. Since the expanded *locus standi* requirement refers only to basic human rights embodied in Chapter 3, the *action popularis* will not broaden the scope of the protection of natural environment for its own sake.

In short, the bill suffers from significant weaknesses.

¹¹³. Van Reenen op cit at 143.

Glazewski¹¹⁴ argues that the South African environmental clause embodied in section 29 is negatively phrased, in that it confers a right to an environment which is 'not detrimental to health rather than simply a healthy environment'. He suggests that the effect of this clause is to imply some sort of minimum standard of environmental quality rather than 'guaranteeing a limitless and thus unrealistic right to environmental integrity'.¹¹⁵ Winstanley¹¹⁶ shares the same sentiments and her view is that Section 29 is strange and unsatisfactory.

This negatively phrased clause is also objectionable for its failure to recognize the importance of protecting the environment, and of reducing waste and pollution. Furthermore, its shortcomings include its failure to mention the right to the wise management of natural resources; and the absence of a duty on either the state or individuals to conserve the environment or to minimise waste generation and pollution; and lastly, its failure to recognise the equal entitlement of future generations to similar environmental rights.¹¹⁷ What the clause does is to require, of course by inference, that the state does not actively harm individuals' environment.¹¹⁸ Fortunately, the drafters of the Constitution have redrafted this clause to make it more adequate.

It could well be argued that, even if environmental legislation

¹¹⁴. Jan Glazewski 'The Environment and the New Interim Constitution' (1995) 1 SAJELP at 4-6.

¹¹⁵. See Jan Glazewski 'The environment and the new Interim Constitution' (1994) 1 SAJELP 3-7.

¹¹⁶. See Terry Winstanley 'Entrenching Environmental Protection in the New Constitution' (1995) 1 SAJELP at 93.

¹¹⁷. Jan Glazewski op cit at 6.

¹¹⁸. This will be in line with the approach taken by other countries that placed an onus on the state to protect the environment. (This includes countries like, Brazil, Burkina Faso, Ethiopia, Colombia, India, The Seychelles and Spain).

provides for the protection of the natural environment as such, the environmental right incorporated in the Bill of Rights will take precedence. Besides those criticisms levelled against the environmental right as indicated above, there are certain advantages attached to the inclusion of an environmental right in the Bill of Rights:

- (i) It could play an educational role in creating better awareness of the importance of the environment to society itself.
- (ii) It could influence legislation generally and also promote the promulgation of legislation for the protection of the environment.

3.6 Limitation of the right

Section 33 of the Constitution deals with the limitation of rights entrenched in Chapter 3. Environmental rights are, like other basic rights, not absolute and may be limited by government institutions upon express authorization. However, such authorization is never unlimited. The environmental right may be limited by law of general application provided it is reasonable, justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right, and furthermore it has to be necessary in the case of some rights entrenched in Chapter 3 of the constitution. Therefore, it could well be argued that the entrenchment of these rights means that any legal rule which restricts free access to the courts, will be invalid unless the requirements for the limitation of rights are complied with.¹¹⁹

In this regard the South African Constitution adopted the

¹¹⁹. See I M Rautenbach 'General Provisions of the South African Bill of rights' (1995) at 98.

approach followed by the Canadian Constitution. In fact the South African model was drawn from the Canadian Charter of Rights and Freedoms. The general limitation in the Canadian Charter states that, 'The Canadian Charter of Rights and Freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹²⁰ What the Canadian courts did was to develop a two stage approach in determining the constitutional validity of any law under their respective instruments. The two stages of enquiry are as follows:

(i) *The first stage of inquiry*

The first stage of inquiry is whether the right or freedom has been infringed, breached or denied. If the answer to this question is in the affirmative, then one will have to move on to the second stage of inquiry. What the courts will first look at is the ambit of the fundamental right or freedom and then whether the law or act complained of interferes with its exercise. The onus is on the applicant in so far as the first issue is concerned to demonstrate that a fundamental right or freedom has been infringed. Therefore, the party invoking the limitations clause then bears the burden of demonstrating that the restriction is consonant with the limitations clause. Cachalia et al¹²¹ argue that this kind of approach should be adopted in respect of our Chapter not only because its structure follows that of the Canadian Charter, but also because it provides a sensible and logical framework of analysing and employing comparative foreign case law and jurisprudence in developing our own law.

(ii) *The second stage of the inquiry*

The second inquiry stems from the answer to the first inquiry,

¹²⁰. Section 1.

¹²¹. Cachalia et al '*Fundamental Rights in the New Constitution*' (1994) at 107.

that is whether or not the right to freedom has been infringed, breached or denied. Thus, if the answer to this question is in the affirmative, then it must, at this stage be determined whether the restriction is saved by the limitation provisions. To answer this question one also needs to first look at four comparative sources for the conceptual structure of our limitations clause which are stated as follows:¹²²

- * The first source is the general limitations clause in section 1 of the Canadian Charter which stipulates that the rights and freedoms contained in the charter are guaranteed 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.
- * the second source is to be found in the wording of the limitation clauses attached to the different rights contained in the Freedoms which follow a basic formula: 'subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order'.
- * The third source is the German Constitution which prevents judicial and legislative or executive collusion in subverting the rights and freedoms guaranteed by the Constitution by limiting them out of existence. Article 19.2 of the Basic Law provides that the 'essential content' of the rights may not be violated.
- * The fourth source is the concept drawn from the US jurisprudence that the limitations on certain rights ought to be more strictly scrutinized and others less so.

The authors have argued that notwithstanding the fact that the drafters of this clause have drawn from these different sources and that there is much to learn from the rich jurisprudence

¹²². Cachalia op cit at 109.

developed by the courts in the different jurisdictions, a word of caution concerning the use of comparative authority should be uttered.¹²³ That is to say that the court should only use the kind of authority that is best for our country.

One interesting point to be noted from the limitation clause is that it specifically subjects the common law to the rights contained in the chapter and renders any common-law limitation on such rights unconstitutional unless the limitation conforms with the requirements of section 33(1).¹²⁴ However, section 33(3) recognize common law rights other than those contained in the chapter 'to the extent that they are not inconsistent with this Chapter' This clause is boosted by section 35(3) which enjoins the courts to have 'due regard to the spirit, purport and objects' of the chapter when interpreting, applying or developing common law and customary law.

The inclusion of an 'environmental right' and 'locus standi clause' in the Bill of Rights admittedly represents victory from the point of view of environmentalists who have waited for many years to see this happening before the beginning of the 21st century. In my view, the challenge that lies ahead is to measure the success of the Bill of Rights by looking at how those rights enshrined in the Bill of Rights have fared in the courts so far. In this regard one needs to look at the few recent environmental cases that were decided by our courts to date.

3.7 Recent Cases

The case of *Van Huysteen and Others v The Minister of Environmental Affairs and Tourism and Others*¹²⁵ is one of the

¹²³. Ibid.

¹²⁴. Section 33(2).

. 1996 (1) SA 208 (C).

few recent cases that deals with *locus standi* in terms of Section 7(4)(b)(i) of the Interim Constitution. The case arose in the context of a proposed erection of a steel mill on a farm portion located in close proximity to the West Coast National Park and the wetlands at the Langebaan Lagoon which are protected under the Conservation of Wetlands of International Importance especially as Water Fowl Habitat.¹²⁶ The Sixth¹²⁷ and Seventh¹²⁸ respondents had applied to the Provincial Administration of the Western Cape for the rezoning of the land under the Land Use Planning Ordinance 15 of 1985 (C). Erf 2121 Langebaan was situated opposite the lagoon and was owned by the W Trust, the trustees of which were the three applicants. The Fourth applicant was joined in his personal capacity as a beneficiary under the Wittedrift Trust. The Trustees were desirous of building a holiday home or a permanent home on the trust property.

The question that the court had to decide was whether the applicants had *locus standi* to claim an order requiring second (the Premier of the Western Cape Province) and third respondents (the Minister of Agriculture, Planning and Tourism) to refrain from deciding the rezoning application before the board appointed in terms of s 15 has finalised its investigation.

Counsel for the sixth and seventh respondents raised an objection of a lack of *locus standi*. Relying on *Jacobs en 'n Ander v Waks en Andere*¹²⁹ he contended that applicants had to show that they had a direct interest in the relief sought and that they had not done so. He contended further relying on the same case, that a

¹²⁶. The Lagoon's wetlands were protected in terms of the Convention on Wetlands of International Importance to which South Africa was a contracting party.

¹²⁷. Iscor Limited.

¹²⁸. Saldanha Steel (Pty) Limited.

¹²⁹. 1992 (1) SA 521 (A) at 533J-534E.

person asking for relief cannot lay claim to *locus standi* if his interest in the case is no more and no less than the interest which all citizens have therein.

In view of the aforementioned arguments, one also needs, I believe, to look at the basis on which the sixth and seventh respondents opposed the interdict sought against the second and third respondents (it being common cause that the granting of such an interdict would adversely affect the sixth and seventh respondents). The following grounds can be identified:¹³⁰

- (a) that the order sought amounts to a final interdict which should not be granted because:
 - (i) applicants do not have *locus standi*;
 - (ii) they have not shown that they have any right which is being infringed;
 - (iii) even if they have shown such a right, they have not shown any infringement thereof; and
 - (iv) even if they have shown all the foregoing, they have an alternative remedy;

In developing this submission the respondent's counsel referred to the fact that, although the papers reveal that the trust property was situated at Meeuklip, Langebaan, right opposite the lagoon, there is no indication as to how far it is from the proposed development. He pointed to the fact that there was no evidence before the Court that the trust property was in the area for which the structure plan was approved and said that *prima facie* it did not fall in that area. Clearly, so he contended, areas of Vredenburg-Saldanha on the one hand and Langebaan on the other are not in the same municipal area. In the light of these considerations, he submitted, the applicants have not succeeded in showing that they have the necessary *locus standi* to bring the application.

¹³⁰. At 289 C-F.

In this regard counsel for the applicants submitted that the arguments put forward by the respondent's counsel, for example, that the applicants lack standing were refuted by the provisions of s 7(4)(b) of the Constitution, which evinced a clear intention to put an end to the previous restrictive approach to *locus standi* adopted by our courts. He submitted further that, apart from the fact that Mr Van Huysteen in his capacity is before the Court as fourth applicant, a purposive approach to interpreting s 7(4)(b) would lead to the conclusion that trustees suing on behalf of the trust would clearly be regarded as falling within the meaning of s 7(4)(b).

He went further to argue that the constitution had adopted and entrenched a very liberalised notion of legal standing to an extent that the 'own interest' referred to in s 7(4)(b)(i) is wide enough to cover an interest as trustee. In that sense, this 'more generous approach to legal standing' is applicable, as s 7(4) makes clear, in all cases where an infringement of or a threat to any right entrenched in chapter 3 of the constitution is alleged.¹³¹

In this regard the court held that the first, second and third applicants had *locus standi*, as their rights as trustees in respect of the trust property would be affected or threatened. This was because it was clear from the papers that if the views of those experts who were of the opinion that the erection and operation of a steel mill would detrimentally affect the lagoon and its sensitive ecosystem are correct and the views of the experts who take a different view are conclusively refuted before the board, the value of the trust property, which is just opposite the lagoon, must of necessity be diminished by industrial activity which pollutes or otherwise detrimentally affects the natural beauty and enjoyment associated with being

¹³¹. See J R L Milton et al in the chapter on 'Procedural Rights' in Van Wyk et al (eds) 'Rights and Constitutionalism, the new South African Order' at 421.

near to the lagoon.

The Court further held that the fourth applicant, in his personal capacity, will be affected in his interest as a beneficiary entitled to use and occupy the trust property and the benefits associated with such use and occupation which clearly include those flowing from its proximity to the lagoon. Lastly, the court held that 'own interest' referred to in section 7(4)(b)(i) of the Interim Constitution is wide enough to cover an interest as trustee.

It is submitted, in conclusion, that the *Van Huysteen's* case has set a good precedent in the law of standing after the coming into effect of the Bill of Rights in South Africa. In this case the court has interpreted the standing requirement very broadly as envisaged by Section 7 of the Constitution of the Republic of South Africa which entrenched a very liberalized notion of legal standing. As discussed above, this more generous approach to legal standing will greatly facilitate the enforcement of rights on behalf of those persons who are perhaps ignorant of their rights or do not have the capacity, financial or otherwise, to bring an action on their own.¹³²

Another recent case that adopted a more flexible approach to the problem of standing is the landmark case of *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*¹³³. In this case the applicants (the Wildlife Society, the Conservation Director thereof and two occupiers of cottages on the Transkei Wild Coast) sought an order against the respondents with regard to the grant of rights of occupation and the allocation of sites within the Transkei coastal conservation area to private

¹³². See JRL Milton et al, in a chapter on 'Procedural Rights' in Van Wyk et al (eds) *Rights and Constitutionalism, The New South African Order* at 421.

¹³³. [1996] 3 *All SA* 462 (Transkei Provincial Division).

individuals and the construction of structures on such sites which resulted in the environmental degradation of the area.

The application was brought in terms of section 39 of Transkei Decree No.9 (Environmental Conservation) which established a coastal conservation area on the entire length of the sea-shore and placed restrictions on development and building within that area. The respondents opposed the application and one of the issues they raised was the applicants' lack of *locus standi*.

Although the first respondent had raised the issue of the *locus standi* of the applicants, his counsel had conceded in his heads of argument that the Applicants had *locus standi* on the basis of section 7(4) (b) read with section 29 of the Constitution of the Republic of South Africa Act 200 of 1993.¹³⁴ In my view, I think the respondent's counsel was right in giving this concession by virtue of the provisions of s 7(4) (b) of the Constitution which evinced a clear intention to put an end to the previous restrictive approach to *locus standi* adopted by the courts.

The Court noted that even in circumstances where the *locus standi* afforded to persons by section 7 of the interim Constitution was not applicable and where a statute imposed an obligation upon the State to take certain measures in order to protect the environment in the interests of the public, a body such as the First Applicant whose main object was to promote environmental conservation in South Africa should have *locus standi* at common law to apply for an order compelling the State to comply with its obligations in terms of such statute. The Court held that to afford *locus standi* to a body such as the First Applicant in circumstances such as the present case would not open the floodgates to a torrent of frivolous or vexatious litigation against the state by cranks or busybodies.¹³⁵ This was a

¹³⁴. Herein referred to as "the interim Constitution".

¹³⁵. At 473d-e.

response to the principal objection raised against the adoption of a more flexible approach to the problem of *locus standi*, that the floodgates will thereby be open giving rise to an uncontrollable torrent of litigation. In this regard the court took into account a remark made by Mr Justice Kirby, President of the New South Wales Court of Appeal, in the course of an address at the Tenth Anniversary Conference of the Legal Resources Centre, namely, that it may sometimes be necessary to open the floodgates in order to irrigate the arid ground below them.

In delivering this judgment, Pickering J was persuaded, not only by the decision in *Van Huysteen's* case, but was also moved by the decisions in *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Business Ltd*¹³⁶ and *Re v Inspectorate of Pollution, Ex parte Greenpeace*.¹³⁷ In the first case Lord Diplock stated that there would be 'a grave lacuna in our system of law if a pressure group or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped'.¹³⁸

In the second case (*R v Inspectorate of pollution, Ex parte Greenpeace*) the Court upheld the *locus standi* of the Greenpeace organisation 'who, with its particular experience in environmental matters, its access to experts in relevant realms of science, technology and law is able to mount a carefully selected, focused, relevant and well-argued challenge'.¹³⁹ Of particular relevance is the judgement of Otton J who stated that if he were to deny standing to Greenpeace, 'those it represents

¹³⁶. [1982] AC 617 at 653 G-H.

¹³⁷. (No 2) [1994] (4) All ER 329 (QB).

¹³⁸. At 644C.

¹³⁹. At 359h.

might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties.'

The Court also considered the sentiments of the late Professor Van Niekerk¹⁴⁰. He was of the view that the most obvious solution to the problem of locus standi was 'to regard the environment as being peculiarly of interest to every member of society' and he continued by saying that, because the effect of the environmental blight will not spare any member of society in the final analysis, it did not seem misplaced in terms of existing legal principles to give every member of society the right to protect what amounts to his own interest. An adoption of this line of reasoning will not erode the basic principle of our law on which *locus standi* to sue is based namely 'that no man can sue in respect of a wrongful act, unless it constitutes the breach of a duty owed to him by the wrong-doer, or unless it causes him some damage in law'.

In my view, both the *Wildlife Society v Minister of Environmental Affairs and Tourism* and *Van Huysteen* cases should be welcome from an environmental perspective, for they adopted a more flexible approach to the problem of *locus standi*, another tentative step towards the total liberation of the *locus standi* requirement. I must point out that the inclusion of the "environmental right" in the constitution is a positive step towards environmental law reform in South Africa. Unfortunately, the environmental right provided for in Section 29 is phrased in an anthropocentric

¹⁴⁰. Van Niekerk 'The Ecological Norm in Law or the Jurisprudence of the Fight Against Pollution' 1975 SALJ 78.

fashion, and is without fixed content and therefore open to many interpretations. This approach does not promote stewardship of the environment and the impact of conservation of the natural environment is lost.¹⁴¹

From an environmental perspective, the most positive aspect of the new Constitution is that the Bill of Rights will afford the Constitutional Court the opportunity to develop a body of case law around environmental issues.¹⁴² The interpretation of the environmental right by the Constitutional Court is therefore a crucial issue and its decision may have far-reaching consequences for the recognition and implementation of the environmental right and the *locus standi* requirement.

In following the spirit of the Constitution, the courts will have to follow a contextual (purposive) interpretation and devise guidelines and mechanisms to determine the scope for the *locus standi* requirement. Acknowledging the current political and socio-economic situation, one realises that anthropocentric actions such as social upliftment and nation-building will receive priority on the Constitution.

It is submitted, in conclusion, that lawyers in all spheres of judicial activity are now faced with a great challenge to take up the tools given by the constitution and fashion an acceptable environment for all South African people, a view shared by Glazewski.¹⁴³ From an environmental law perspective, the challenge that faces our courts is to consider foreign jurisprudence with a view to shape our environmental law in order to enable us to meet the challenges of the 21st century. It is submitted that the use of foreign jurisprudence could also enhance our constitutional environmental provisions.

¹⁴¹. Winstanley op cit 85-97.

¹⁴². See Jan Glazewski 'The Environment and the New Interim Constitution' (1994) 1 SAJELP at 16.

¹⁴³. Glazewski op cit 16.

4. *LOCUS STANDI* UNDER THE NEW CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 OF 1996.

A closer analysis of the constitutional provisions enumerated in the Interim Constitution of the Republic of South Africa Act 200 of 1993 (the Bill of Rights) reveals that the Constitution leaves much to be desired. Despite the fact that it has entrenched certain key rights relating to environmental litigation, the Bill suffers from significant weaknesses. However, as Mureinik¹⁴⁴ puts it, it must be acknowledged that 'the point of the Bill of Rights is to foster a culture of justification'. That idea offers both a standard against which to evaluate Chapter 3 of the interim Constitution and a resource with which to resolve the interpretative questions that it raises. It is also a powerful guide for answering the questions of interpretation that it generates. It is submitted that if the courts use that guide properly, they can overcome most of the deficiencies in the Bill, and make it a potent weapon for bringing about democracy.

Now, the greatest challenge facing lawyers and academics is to examine the extent to which the New Constitution of the Republic of South Africa Act 108 of 1996 addresses the deficiencies of the Interim Constitution of the Republic of South Africa Act 200 of 1993.

4.1 The Environmental Right

The environmental right appears in section 24 of the Constitution and reads as follows:

Every one has a right-

(a) to an environment that is not harmful to their health or

¹⁴⁴. E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' SAJHR 1994(1) AT 48.

well-being; and

- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
- (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Once again, the wording of the right in the final text is disappointing for a number of reasons. It is submitted that the text is strangely formulated and falls short of expectations within the country, especially the expectations of those who objected to the formulation of the environmental right in the Interim Constitution. The right has almost the same wording as in the draft final Constitution, except that there is an addition of the reference to the benefit of present and future generations, and the addition of the phrase 'while promoting justifiable economic and social benefit' something which the Interim Constitution failed to recognise.¹⁴⁵

It is submitted that the wording of the right in the final text is objectionable for the following reasons:¹⁴⁶

* despite calls amongst environmentalists and academics including Jan Glazewski¹⁴⁷, Peter Glavovic¹⁴⁸ and Cowen¹⁴⁹ to the

¹⁴⁵. See Environmental Law Monitor 'The Release of the Connep Discussion Document: Another Tentative Step Towards Environmental Law Reform in South Africa' Volume 1 Issue 1 June 1996 at 2.

¹⁴⁶. Environmental Law Monitor op cit at 2.

¹⁴⁷. Jan Glazewski 'The environment, human rights and a new South African Constitution' (1991) 7 SAJHR 167.

¹⁴⁸. Peter Glavovic 'Human Rights, and Environmental Law: The Case for a Bill of Rights' 1988 CILSA 52.

drafters of the Constitution that the environmental right clause be positively phrased, the right is still phrased negatively.¹⁵⁰

- * There is nothing in the wording of the right which ensures that the right will operate horizontally. This could have been done by including an environmental duty in the final text. As such, no duties are imposed on the State or people to protect the environment and to reduce waste and pollution.
- * The list in b(i) to (iii) lacks comprehensiveness and therefore, runs the risk of falling foul of the *expressio unius est exclusio alterius* rule of statutory interpretation. The list is vague for the following reasons:
 - (i) There is uncertainty as to the meaning of 'ecological degradation'
 - (ii) the list emphasises the importance of promoting conservation without specifying exactly what needs to be conserved.
 - (iii) The inclusion of the part on the use of legislative measures aimed at securing ecologically sustainable development, etc, to promote justifiable economic and social development does not appear to be feasible and realistic. The drafters of this clause seem to have failed to give much thought on this issue and it is feared that this may lead to problems in future interpretation of the right.¹⁵¹

¹⁴⁹. D V Cowen 'Towards some distinctive principles of South African law: Jurisprudential perspectives and a role for legislation' (1989) 52 THRHR 3.

¹⁵⁰. See Terry Winstanley op cit at 85.

¹⁵¹. Environmental Law Monitor op cit at 2.

After landing this major assault on the 'environmental right' in the new constitution, the *ELA*, together with some other organisations, made representations to the Constitutional Assembly concerning the environmental right. However, nothing seems to have come out of this.

4.2 Application and Interpretation

Section 8 of the Constitution provides that, (1) the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state; (2) a provision of the Bill of Rights binds natural and juristic persons if and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right; (3) further, that in applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply or, where necessary, develop the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) (the Limitation Clause); and

(4) that juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.

By contrast, this section differs materially from Section 7 of the Interim Constitution in that it includes the 'enforcement of right' clause, an extension of section 7(4) of Chapter 3 of the Interim Constitution of the Republic of South Africa Act 200 of 1993. It is submitted that the practical effect of the environmental right in any given situation will depend to a large

extent on the applicability of the Bill of Rights.¹⁵²

4.3 Enforcement of Rights

The framers of the New Constitution have moved in the right direction by including a separate section that deals with the enforcement of rights enshrined in the Constitution. In my view, this kind of enactment should be welcome. Section 38 of the Constitution provides that,

'Anyone listed in the bill of rights has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights'.

The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

The effect of section 38 is that any person or organization may enforce the rights contained in the Bill of Rights, irrespective of whether that person or organization is adversely affected by the alleged infringement of rights. This is also envisaged by Section 7(4) of Chapter 3 of the interim constitution.

¹⁵². See Winstanley op cit at 88.

4.4 The significance of section 38

The significance of section 38 in the Constitution is that people whose fundamental rights are infringed may not practicably be in a position to approach the court for relief. It is submitted that very often large numbers of people are affected and there is great benefit in one person or organization being able to approach the court on behalf of all whose rights are infringed.

Returning now to the question that seeks an answer as to the extent to which the New Constitution of 1996 addresses the deficiencies of the Interim Constitution, it appears to me that there are no major changes in the new constitution. One would have thought that the framers of the new constitution would take the objections of the *ELA* and other parties seriously when redrafting the Constitution. To everyone's surprise, and to the environmentalists in particular, this was not the case. As a result this failure renders the redrafting process a dismal failure, especially from an environmental perspective. However, it is submitted that the extent to which the environmental right clause will be useful in environmental cases will depend upon how widely the court interprets it.

So far, our courts have heard very few environmental related cases where constitutional provisions were used challenging a particular course of action. Therefore, at this stage it is difficult to measure the success of the constitution(s) in resolving environmental related disputes. However, the two cases of *Van Huysteen and Others v The Minister of Environmental Affairs and Tourism and Others*¹⁵³ and *Wildlife Society v Minister of Environmental Affairs and Tourism*¹⁵⁴ serve as good precedents for parties who seek to use the constitution to enforce rights contained in the constitution that they do not

¹⁵³. 1996 (1) SA 208 (C).

¹⁵⁴. [1996] 3 All SA 462.

have to prove any infringement of rights. Therefore, any person can champion an action in terms of section 38 of the New Constitution to vindicate a public interest without proving any special interest or infringement of his/her rights protected by the Constitution.

The greatest challenge facing the Constitutional Court in South Africa today is to develop cases to shape our environmental law. As the threats to our environment increase the need to use the law to protect the environment becomes more critical. Therefore, our courts should start to take environmental rights seriously. However, in order to make this dream a success, the Constitution should impose duties upon the State and its citizenry to protect and care for the environment.

There is no doubt that the Constitution has broadened the *locus standi* requirement significantly especially in view of the liberal decision of the Constitutional Court in *Ferreira v Levin*¹⁵⁵. The question is whether there is a need to liberate the standing requirement any further. In my view, one needs to look at some foreign jurisprudence in order to explore how other countries tackle the problem of standing in their jurisdictions. The main object is to find out if we could learn something from those countries that we can use to modify our own law. In my view, we can use foreign jurisprudence as a model to guide us in the future development of our environmental law.

¹⁵⁵. 1996 (1) BCLR 1 (CC) at 99.

5. A BRIEF SURVEY OF THE LEGAL STANDING OF ENVIRONMENTAL ASSOCIATIONS IN VARIOUS COUNTRIES

The problem of standing with respect to public interest litigation is universal and therefore not unique to South African law. The rule requiring an interest in the litigation applies in most legal systems. One important issue that I picked up from the Constitution, which of course needs further analysis, is the provision that "in interpreting the provisions of this Chapter a court shall where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law".¹⁵⁶ A look at the position in a few foreign legal systems may therefore help us identify lessons that those countries may have for South Africa.¹⁵⁷

With some few exceptions many countries both inside and outside Europe have always adopted a narrow approach to standing. I have identified the following countries as some of the few countries whose standing requirements are broad enough to open up access to environmental justice (these are the countries which South Africa can learn a lot from since their approach to standing is much wider):

5.1 India

Legal systems in different parts of the world often demonstrate attachment to similar doctrinal tools. The rule requiring an interest in the litigation applies in most legal systems. This is particularly evident within the law of standing in India. The

¹⁵⁶. Section 35 of the Interim Constitution of the Republic of South Africa Act 200 of 1993.

¹⁵⁷. See Tobias P van Reenen *Locus Standi in South African Environmental Law: A Reappraisal in the International and Comparative Perspective* (1995) 2 SAJELP at 132-3.

case of *Charnjit Ltd v Union of India*¹⁵⁸ is a good example for this view. In this case the Court held that no one except those whose rights were affected by a law could raise the question of the constitutionality of that law. It therefore comes as no surprise that the early jurisprudence of the Indian Supreme Court evinced such an attachment to the private rights view of standing which has exercised a similar hold on Anglo-American thought.

The narrow approach to standing has been justified further by floodgate arguments and the unwillingness or inability of the courts to adjudicate on matters that are best left to the discretion of policy makers, attorneys general, and other so-called guardians of the public interest. The Indian Supreme Court, having anticipated later innovations, declared in 1976 that, 'where a wrong against community interest is done, 'no *locus standi*' will not always be a plea to non-suit an interested public body chasing the wrongdoer in court. Since that time the Indian approach to public interest litigation has extended the rules of standing to the point that they may be said to have ceased to present any real obstacle to the public interest litigant.

The widening up of standing requirements in India has opened up access to the courts at least as widely as the South African Constitution has done.¹⁵⁹ This has enabled organisations and individuals to bring applications before the Indian Supreme Court.

The case of *Gupta v Union of India*¹⁶⁰ provides a classic justification of the Indian approach to public interest litigation. In this case, which involved the judges themselves, the Supreme Court undertook what could be described as a

¹⁵⁸. AIR 1951 SC 41.

¹⁵⁹. Section 7(4).

¹⁶⁰. AIR 1982 SC 149 at 188.

comprehensive revision of the law of standing. The case entails a number of different challenges to governmental action which involved the judiciary. Of particular relevance are two central issues which form the basis of this action.

First, the Minister of Law had decided to implement a policy under which only a certain percentage of the judges who sat within a particular area came from that area. The objective was to combat the narrow, parochial tendencies which could exist if the judiciary all came from the same geographical area. To achieve this end, the Minister sent a circular to the chief ministers of the representative Indian states asking them to secure the consent of the judges who worked within their state asking them to an appointment elsewhere should that be necessary. The Bombay Bar Association and Law Society challenged the circular on the basis that it constitutes an unconstitutional attack upon the independence of the judiciary.¹⁶¹

A second claim assailed the government policy of making short-term judicial appointments as a further attack on judicial independence, and sought a mandamus to compel the government to convert these judicial appointments into permanent posts. A preliminary objection was raised on behalf of the Union of India. It was argued that the petitioners had not suffered any legal injury by, for example, the making of short-term appointments. Legal injury, if any, was caused to the additional judges whose consent was sought. No third party could enforce the rights of others.¹⁶²

The leading opinion on this issue was delivered by Bhagwanti J who reasoned that:

¹⁶¹. See P P Graig and S L Deshpande 'Rights, Autonomy and Process: Public Interest Litigation in India' *Oxford Journal of Legal Studies* vol.9 at 359.

¹⁶². Ibid.

"It may now be taken as well established that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reasons of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an action for an appropriate direction, order or writ..."

In delivering the judgement of the court, Bhagwati J referred to traditional rules of *locus standi* under which judicial redress would only be available to those who had suffered a violation of a legal right or legally protected interest by the action of the state. Breach of such a legal right was a condition precedent for invoking the jurisdiction of the Court, and the protection of personal or proprietary interests narrowly so defined provided the central judicial theme. However, he observed that this approach arose in an era when private law dominated the legal scene and public law had not yet been born.

The honourable Judge went on to say that standing had to be liberalized because the very purpose of the law itself was undergoing a transformation. It was being used to foster social justice by creating new categories of rights in favour of large sections of the people, with correspondingly novel duties imposed upon the state. Individual rights were being supplemented by social rights; the former were 'practically meaningless in today's setting unless accompanied by the social rights necessary to make them effective and really accessible to all'. Furthermore, he expressed the view that, in modern society individual action could cause prejudice to large numbers, and could impair the advancement of the goals contained in 'Directive Principles of State Policy'. Thus the illegal discharge of effluent into a river, the invalid raising of bus fares, or the

forbidden release of noxious fumes should all be viewed as examples of injury to the public generally. As a result, any member of the public who has sufficient interest can maintain an action for the violation of a constitutional or other legal provision which causes public injury. Bhagwati J also acknowledged that there can be cases where there is both public injury arising from an illegal act, and a specific legal injury to an individual or group of individuals.

The most important point that emerges from the reasoning of Bhagwati J is the strong reaffirmation that standing should be construed broadly. It reinforces the notion that whenever a person or class of persons whose legal rights are violated is unable to approach the Court for redress due to poverty, disability or because of their socially disadvantaged position, any member of the public acting *bona fide* could move the Court for relief under Article 32.

The evolution of public interest litigation in India as a specific procedure designed to cater for the "common man", has also extended the range of people whose interests are represented in court. The Indian Constitution, in particular, has widened access to environmental justice quite remarkably. The environmental clauses in the Indian Constitution are contained in a specific part of the Constitution entitled 'Directive Principles of State Policy'. These Principles are devoted to economic and social rights or third generation rights. By way of contrast, these principles are clearly set apart from that part of the Constitution devoted to fundamental rights which embodies the traditional civil and political or first generation rights.

The Indian Supreme Court has relied on the environmental clauses to justify certain decisions in cases which have come before it. The case of *Tellis v Bombay Municipal Corporation*¹⁶³, is a pertinent illustration of the role which third generation rights

¹⁶³. *Op cit* note 95 at 51.

provided for in a constitution, can have in judicial proceedings. *Locus standi* was given to the petitioners who were pavement and slum dwellers in the city of Bombay. They had been forcibly evicted and their pavement and slum dwellings had been demolished by the respondents, the Bombay Corporation. They relied on, inter alia, Article 21 of the Indian Constitution which provides a fundamental right that:

'No person shall be deprived of his life or personal liberty except according to the procedure established by law'.

The petitioners argued that their 'fundamental right to life' had been infringed and that the procedure established under the Act¹⁶⁴ which the corporation had acted under, was unfair. They also pointed out that they chose to live there because it afforded them better work opportunities than elsewhere in the region.

The question which the court had to decide was whether the fundamental 'right to life' conferred by Article 21 included the 'right to livelihood'. The court answered this question in the affirmative. In deciding this question the court relied on certain directive principles in the Constitution. In particular it relied on a specific Article which provides that the state shall make an effective provision for securing the right to work 'within the limits of its economic capacity'. The court used these directive principles to come to the petitioners' aid.

In a recent decision in *Mehta v The Union of India*¹⁶⁵ an action was brought by the petitioner under Article 32 of the Constitution as public interest litigation in respect of pollution of the Ganges river by the uncontrolled and untreated effluent discharged by leather tanneries located on its banks.

¹⁶⁴. The Municipal Corporation Act, 1988.

¹⁶⁵. 1987 (4) SCC 463.

The discharge of this effluent from the tanneries adjacent to the river was of particular concern because it was ten times more noxious than household sewage. The Supreme Court was called upon to enforce the provisions of the Water (Prevention and Control of Pollution) Act of 1974 and the Environmental Protection Act of 1986.

The petitioner was not himself a riparian owner, but an active social worker who was concerned with protecting the lives and health of those who used the Ganges River. The Supreme Court ordered several tanneries to install water treatment plants or to stop production if they were unable to do so. As a result, the court took the far-reaching step of closing those tanneries which had ignored previous notices to take elementary steps for the treatment of industrial effluent. The court, relying on the environmental provisions in the constitution, held that 'closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people'.

In delivering its judgement the court took into account Article 21 of the constitution which protects life and liberty and then linked it with Articles 48A and 51A which make provision for the protection of the environment. The court held that the pollution of a river to the extent that its waters become dangerous to use does threaten life. Furthermore, the provision of clean water is certainly a contingent public good, and may even under certain circumstances be a collective good. Therefore, the cleanliness of the Ganges river can in that sense be regarded as a public good. The Ganges is the holy river of India; it is the purifier for all those within society. To alter the distribution of its benefits in such a way as to render them subject to control, other than by each potential beneficiary controlling his share of those benefits, would be to alter the very benefit of that society.

The Indian Supreme Court also invoked the Directive Principles in the case of *Kinkri Devi v State of Himachal Pradesh* where

locus standi was accorded to the petitioners who sought an order that a mining lease for the excavation of limestone granted by first respondent (the State of Himachal Pradesh) to third respondent be cancelled. The petitioners alleged that the mining activity posed a threat to adjoining lands, water resources, pastures, forests, wildlife, ecology and the environment generally. It comes as no surprise that the court noted the need for industrial growth and development but held that this must be from the point of view 'of its impact on the ecology'. The court went on to order the respondents to file a report by a return day as to the environmental effects of the mining activity. In justifying its decision, the court held that there is both a constitutional duty of the citizen not only to protect, but also to improve the environment and to preserve and safeguard the forests, the flora and the fauna, the rivers and lakes and all other water resources of the country.

The Indian cases discussed above reveal that the Indian Supreme Court has long moved away from the narrow approach to standing despite the floodgates arguments advanced by the proponents of the restrictive approach to standing. A similar kind of approach was followed by the United States Supreme Court which has also broadened the narrow scope of standing as shown in the few cases that will be the subject of discussion below.¹⁶⁶

5.2 United States

Until very recently, standing to sue lurked as the major obstacle to citizen groups seeking to protect environmental interests. Traditionally both the South African and the American law required the private applicant for judicial review to show that

¹⁶⁶. See *Scenic Hudson Preservation Conference v FPC* 354 F.2d 608 (2d Cir. 1965); *Citizen Committee for the Hudson Valley v Volpe* 302, F. Supp. 1083 (S.D.N.Y. 1969); *Road Review League v Boyd* 270 F. Supp. 650 (S.D.N.Y. 1967); and *Association of Data Processing Service Organisations, Inc v Camp* 397 US 150 (1970).

the illegal administrative action that harms the environment also infringes his subjective right. As a result, the requirement that the applicant himself or herself must suffer harm over and above that suffered by the public at large (i.e, that he should have suffered some personal injury as a result of the illegal act) has led to the condonation of the illegal action of the administrative agency by the court. However, over the past few decades the American law, and of recent, the South African law have witnessed a dramatic liberalisation of the *locus standi* requirement.

In the United States attention has been turned towards the citizen action to serve as a tool in controlling administrative agencies and in aiding the enforcement of environmental legislation. This trend came after much criticism levelled against administrative agencies in the environmental field. It came to be recognised that allowing the citizen to sue in the public interest would serve as an important check on administrative action. Moreover, it was recognised that one of the best devices for providing scrutiny of administrative action is to allow the citizen to keep a watchful eye on every administrative action. The rationale behind this view is that in most instances it is the citizen himself or herself who will suffer if administrative environmental action is inadequate.¹⁶⁷

In order to broaden the scope of public interest litigation quite substantially, the United States federal courts have read public environmental rights into statutes because of a tacit acknowledgement of a fundamental public right to a decent environment underlying the statutes.¹⁶⁸ The following cases illustrate the willingness of federal courts to read

¹⁶⁷. See Andre Rabie and Cor Eckard 'Locus standi: the administration's shield and the environmentalist's shackle' *CILSA IX* 1976 at 145-6.

¹⁶⁸. See John Pearson 'Toward a Constitutionally Protected Environment' *1971 Environment LR* 53 at 62-68.

environmental criteria into statutes having little or nothing to do with the environment and further show that courts implicitly recognize an underlying public interest in preserving the environment.

The first example is furnished by the judicial treatment of section 13 of the Rivers and Harbours Act of 1899.¹⁶⁹ The purpose of section 13 was to prohibit obstructions to navigation.¹⁷⁰ However, the Second Circuit held that the spillage of oil directly upon navigable waters violated section 13, even though navigation was not obstructed. Without considering whether navigation was obstructed, the Supreme Court, in 1966 in the case of *United States v Standard Oil Company*¹⁷¹ held that aviation gasoline, although commercially valuable before its accidental discharge into a river, was "refuse" within the meaning of section 13. What is worth noting in this case is that the Court read the statute "broadly" because of its own concern, not because of a prior mandate.

Similarly, the courts have read environmental considerations into section 10 of the Rivers and Harbours Act¹⁷² which entitled "Obstruction of Navigable Waters Generally". This Section provides that no such obstructions may be erected except upon recommendation of the Chief of Engineers and authorization by the Secretary of the Army. The statute itself does not appear to be specific on the guidelines for granting or withholding authorization, however, the secretary's primary, if not only,

¹⁶⁹. 33 U.S.C. S 407 1964.

¹⁷⁰. The essential purpose of Section 13 was to prevent the introduction into navigable channels of the only kind of material which had given trouble to navigation up to that time, i.e, such material as would form an actual physical obstruction to navigation. (This Act was published long before the serious pollution of navigable waters had occurred or was anticipated)

¹⁷¹. 384 U.S. 224 (1966).

¹⁷². 33 U.S. 352 (1964).

criterion would appear to be the proposed obstruction's effect on navigation. The Supreme Court, in the case of *United States ex rel. Greathouse v Dern*,¹⁷³ upheld the Secretary's refusal to authorize construction of a wharf for reasons unrelated to navigation and arguably connected with conservation.

Likewise, in the case of *United States v Ray*,¹⁷⁴ a federal district court, whose concern appeared to be exclusively environmental, upheld the Secretary's decision restricting a developer from constructing a fill in the vicinity of coral reef on the edge of the continental shelf. In this case navigability was not a problem because only small boats travelled the waters. Rather, the court enjoined the project for fear that it would destroy a "natural wonderland" habituated by rare species of fish, thereby implying the existence of a public right to the preservation of the reef's ecology.

The last case that also deals with the statutory construction and public environmental rights, is that of *Scenic Hudson Preservation Conference v FPC*¹⁷⁵ which happens to be a landmark in the area of standing to sue. In this case, the FPC had licensed Consolidated Edison's proposed Hydroelectric project at Storm King Mountain, which overlooked the Hudson River. Petitioners, including two conservation groups, contended that the FPC failed to consider relevant conservation factors before issuing the license. Consolidated Edison asserted that the conservation organisations lacked standing because the project would not injure them. The court held that allowing interested groups to sue was necessary to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development', and it remanded the case to the FPC with directions

¹⁷³. 289 U.S. 352 (1933).

¹⁷⁴. 281 F. Supp. 876 (S.D. Fla. 1965).

¹⁷⁵. 354 F.2d 608 (2d Cir. 1965)

to consider alternative methods of providing power to the New York City.

Another interesting point is the broadening of the *Scenic Hudson* theory in *Citizen Committee for the Hudson Valley v Volpe*¹⁷⁶ where the court held that the rule is that, if the statutes involved in the controversy are concerned with the protection of natural and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency. Similarly, in *Environmental Defence Fund v Harding*,¹⁷⁷ the plaintiffs, a number of conservation societies, were also allowed standing although they suffered no personal injury.

For the first time in the history of the United States the court in the famous case of *Scenic Hudson Preservation Conference v FPC* clearly departed from the traditional notions of standing by ruling that a group of persons which has shown a special interest in the environmental aspects of (power) development, even though lacking any personal economic interest, may have standing to challenge an administrative decision affecting the environment. The *Scenic Hudson* approach to standing was further broadened in the case of *Citizens Committee for the Hudson Valley v Volpe* where the court ruled that 'the rule is that if the statutes involved in the controversy are concerned with the protection of the natural and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency'. Relying on the *Scenic Hudson* precedent the court decided that the plaintiff's public interest in the resources and beauty of the threatened area was a sufficient interest to establish its standing.

¹⁷⁶. 302, F. Supp. 1083 (S.D.N.Y. 1969).

¹⁷⁷. 428 F 2d 1093 (DC Cir 1970).

The *Scenic Hudson* doctrine was further extended in the two subsequent cases of *Road Review League v Boyd*¹⁷⁸ and *Association of Data Processing Service Organisations, Inc v Camp*¹⁷⁹ quite significantly. In the first case, the point in issue was a determination by the Federal Bureau of Roads of the route of an interstate highway. Plaintiffs (a town, a community civic association, two wildlife sanctuaries whose property would have been adversely affected by the proposed highway, certain individuals whose property would have been taken for the road and the Road Review League, a non-profit organisation concerned with local problems involving the location of highways) alleged that the Bureau's decision had been "arbitrary and capricious" and sought review by the court as "aggrieved parties" under the authority of the Administrative Procedure Act (APA). They argued that defendant had not followed the mandate of the Federal Highway Act to "use maximum effort to preserve Federal, State and local government parklands and historical sites and the beauty and historical value of such lands and sites". Defendants contended that the action should be dismissed on the grounds that plaintiffs lacked proper standing. However, the court ruled that the Federal Highway Act manifested a "congressional intent that towns, local civic organisations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests".

In the second case, plaintiffs sought to challenge a ruling by the United States Comptroller of the Currency under the authority of the National Bank, but were held to lack proper standing by the lower courts on the grounds that they were not members of the class which the Act was designed to protect and had not alleged any actual or potential harm to a legally recognised interest. The Court reversed the decision of the lower court holding that the requisites for standing are met when 'the interests sought

¹⁷⁸. 270 F. Supp. 650 (S.D.N.Y. 1967).

¹⁷⁹. 397 US 150 (1970).

to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question'.¹⁸⁰

Turning now to the criteria which must be met by private plaintiffs who seek standing to challenge federal administrative action as contrary to the public interest, the case of *Office of Communication of the United Church of Christ v Federal Communications Commission*¹⁸¹ clarified the matter. Plaintiffs, a national religious organisation, a local church, and two more black community leaders, sought to intervene on their own behalf and as representatives of the "listener interest" in a Federal Communications Commission (FCC) hearing concerning the renewal of broadcast license of a Jackson, Mississippi, television Station. Plaintiffs desired to present to the FCC allegations that the station had engaged in racially and religiously discriminatory practices. The Commission contended that members of the viewing public as such are not in a position to suffer any injury unique or personal to themselves and the plaintiffs had thus presented no recognized basis for standing to challenge the agency's actions. The Court of Appeals for the District of Columbia Circuit, however, disagreed, concluding that "since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience". However, the Court was quick to rule that not all petitioners possessed the requisite standing. It ruled that the FCC must hear one or more of them as representatives of the "listener interest".¹⁸²

¹⁸⁰. 397 U.S. at 153.

¹⁸¹. 359 F.2d 994 (D.C. Cir. 1966).

¹⁸². 359 F.2d at 1002.

Some developments in the field of standing have so far been achieved in the United States federal law since the early 70's. The US congress created the models for citizen enforcement of environmental protection in passing the US federal law (Clean Air Act (CAA) of 1970 the Federal Water Pollution Act (FWPCA) of 1972) and the National Environmental Policy Act of 1970. Today many environmental statutes include similar citizen suit provisions which allow citizens to obtain injunctive relief, requiring either a government agency to perform a mandatory duty according to the statute, or requiring a private defendant to comply with regulatory or permit limits, or an administrative order, and possibly, to remedy any harm caused to the environment.¹⁸³ Generally, the courts have become more willing to recognize a minimal personal interest as sufficient to found standing in environmental matters.¹⁸⁴

The case of *Lujan v National Wildlife Federation*¹⁸⁵ is a good example of the recent cases which were brought by organisations alleging interests on the part of their members. The case arose under the Endangered Species Act of 1973 (ESA), which provides that, (1) the purpose of the Act is the conservation of plants and animals threatened with extinction by the activities of human beings; (2) that a federal agency intending to take action affecting an endangered species must "consult" with the Secretary of the Interior or the Secretary of Commerce before taking any action affecting a species on the Endangered Species List (prepared by the Secretary of the Interior as required by the Act); and (3) that "any person" may sue to enjoin "any person",

¹⁸³. See generally Robbins *'Public interest environmental litigation in the United States'* in *Public interest perspectives in environmental law* by Robinson and Dunkely at 3-36.

¹⁸⁴. See *United States v Students Challenging Agency Procedures (SCRAP)* (412 US 669 1973), where the United States Supreme Court held that the plaintiff had standing even though the students who brought the action would not be more affected than any other member of the population.

¹⁸⁵. 110 S Ct 3177 (1990).

including the US, from violating any provision of the Act or regulation thereafter. Its key provision provides that "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species.

In 1978, the Secretary of the interior promulgated a rule that the *ESA* applies to federal agency action to be taken overseas. More than half the species on the Endangered Species List have primary ranges outside the US. In 1986, the Secretary replaced this rule with one limiting the scope of *ESA* to actions taken in US territory or on the high seas. In short, the regulation limited the duty of federal agencies to consult with the Secretary over projects affecting endangered species. Under the regulation, agencies must consult over projects in the United States or on the high seas, but not over projects overseas such as the Aswan Dam in Egypt.

Several environmental organisations, including Defenders of Wildlife, challenged the legality of a Department of Interior regulation issued under the Endangered Species Act, claiming that the new regulation violated the statute. To establish standing, two members of the Defenders of Wildlife claimed that they suffered an injury in fact. Joyce Kelly swore in an affidavit that she had travelled to Egypt in 1986 and viewed the habitat of the endangered Nile crocodile. She claimed that she "intended to do so again, and hoped to observe the crocodile directly". Amy Skilbred claimed that she had travelled to Sri Lanka in 1981 and observed the habitat of "endangered species such as the Asian elephant and the leopard". She also claimed that she intended to return to Sri Lanka to see members of these species. However, she acknowledged that she did not have a certain date for return.

The Court, through Justice Scalia, speaking for the majority, held that the plaintiffs failed to demonstrate that they suffered

the requisite injury in fact. Further, the intention to visit the places harbouring endangered species was not enough. The plaintiffs had set out no particular plans. Moreover, they specified no time when their indefinite plans would materialize and thus had shown no "actual or imminent" injury. Plaintiffs could not show injuries in fact by demonstrating a nexus linking their own "professional" interests in observing endangered species with the interests of all persons so engaged. The fact that ecosystems are generally interrelated was not enough, because the plaintiffs could not show that they used portions of an ecosystem "perceptibly affected by the unlawful action in question". Standing was similarly not available to anyone having an interest in studying or seeing endangered species, because of a professional commitment or otherwise. To establish standing there must be "a factual showing of perceptible harm".

The Court emphasized that "[v]indicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive". In particular, the Court said that if Congress could turn "the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts the Chief Executive's most important constitutional duty, that is to take care that the Laws be faithfully executed".¹⁸⁶

In what clearly appeared to be an intriguing and somewhat ambiguous concurring opinion Justice Kennedy joined by Justice Souter, emphasised that, had the plaintiffs purchased an airplane ticket, set a specific date to visit the habitat of the endangered species mentioned, or used the relevant sites on a regular basis, they might have established standing in a case of this kind. In any case, the court reaffirmed its position that

¹⁸⁶. 112 S. Ct. at 2145. (Discussed by R Sustein in *'What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III'* Michigan Law Review vol. 91:163 at 197-202.

"while it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way".

The US Supreme Court has held, in a line of cases, including *Sierra Club v Morton and Lujan II* that, in effect, concern for the environment, or even for a specific resource that is being depleted or contaminated, is not a sufficient "injury" to confer standing. It is not enough, in the Court's view, that the plaintiffs simply wish to know that the resource will not be harmed, or that the resource will "be there" should they ever wish to visit or use it; they must allege and prove that they actually use, or plan to use soon, the resource. In addition to demonstrating a "place" concreteness (that is, that the plaintiff is geographically near the threatened resource), the plaintiff must demonstrate "time" concreteness or "imminence" in his planned use. Therefore, plaintiffs must do more than merely allege injury in fact and they must present oral or written testimony (by way of affidavit) presenting concrete facts that the witness or affiant is "directly affected".¹⁸⁷

In my view, in order to broaden the scope of public interest litigation substantially, South Africa can learn from the United States federal courts that have read public environmental rights into statutes because of a tacit acknowledgement of a fundamental public right to a decent environment underlying the statutes. Therefore, our environmental statutes could be construed in such a way that would give standing to groups or parties interested in the protection and conservation of the environment where a threat to the environment is evident. I am convinced that the adoption of this particular kind of approach in South Africa would further broaden access to environmental justice far beyond

¹⁸⁷. See 'Public Interest Environmental Litigation in the United States' by Deirdre H Robbins in 'Public Interest Perspectives in Environmental Law' supra at 14-15.

what section 38 of the New Constitution envisages.¹⁸⁸

There is no material difference between the Indian and the United States' legal systems in terms of their approach to standing since both of them evince a flexible approach to standing. Switzerland is another country whose approach to standing is flexible.

5.3 Switzerland

Switzerland is one of the best-known European countries which has made way for public interest actions by environmental associations and/or concerned individuals. It was the first European Country to establish a right of action for environmental associations. A number of acts have been passed to enable nationwide associations to have standing to challenge certain administrative actions.

Article 12 of the Federal Nature and Heritage Conservation Act (NHCA 1966) was the first enactment which enables nationwide associations which, according to their statutes, devote themselves to nature and heritage conservation or related, purely non-commercial objectives, as well as municipalities, to appeal against certain administrative decisions. The Act allows those associations to lodge an administrative appeal to the federal government or judicial appeal to the Supreme Court against orders and decrees in so far as these are subject to federal appeals.¹⁸⁹

The second enactment is Article 55 of the Environmental Protection Act 1983 which grants the same rights of appeal and

¹⁸⁸. The New Constitution of the Republic of South Africa Act 108 of 1996.

¹⁸⁹. Martin Fuhr et al in *Public Interest Perspectives in Environmental Law* by Robinson and Duckeley supra at 79-80.

remedies at the cantonal level to nationwide environmental associations founded at least 10 years before the initiation of proceedings and officially recognised by the federal government. The law allows *locus standi* also to municipalities. The third enactment to permit lawsuits at the federal level is the Trails and Footpaths Act 1987, which has likewise opted for an accreditation procedure for national, specialist organisations administered by the Swiss Department of Interior.¹⁹⁰

The recent studies conducted on the subject have emphasised the positive effect of association lawsuits on environmental protection in Switzerland. Generally, the appeals by environmental associations have the effect of suspending the execution of the contested administrative decisions. However the main object of such lawsuits is the annulment or alteration of decisions contravening environmental law. Unfortunately, as the law stands in Switzerland at present there is no cause of action to recover environmental damages.¹⁹¹ Generally, the law of Switzerland in the area of standing to sue is as good as ours. However, the reluctance of the Government of Switzerland to allow a cause of action to recover environmental damage is one kind of approach that does not have a place in South Africa.

Besides the relaxation of the standing requirements in the countries discussed above there are quite a few other countries whose approach to standing is quite broad. A brief exposition of those countries will follow in the next discussion below. The common factor that one can easily identify from these countries is the courts' willingness to accord standing to concerned individuals, citizens and groups of persons whenever damage or threatened damage to the environment is evident. Recent environmental cases in South Africa reveal a trend towards a

¹⁹⁰. Ibid.

¹⁹¹. Ibid.

similar kind of approach.¹⁹²

5.4 Other countries

A similar relaxation of the standing requirement in environmental matters has taken place in many other countries both inside and outside Europe. In Canada, environmental groups and individuals are accepted as plaintiffs or "interveners" in the administrative tribunals. The 1980s have seen courts liberalizing their rules of standing to some extent. This achievement could be attributed to the enactment of the "Charter of Rights and Freedoms". The Canadian Supreme Court now acknowledges a "genuine interest" of the plaintiff and accords "public interest standing" to concerned citizens or groups of persons, if there is no other reasonable and effective way to bring the matter before a court.¹⁹³

The new Brazilian Constitution of 1988 expressly provides for an *actio popularis* against acts of public authorities which are harmful to national wealth, administrative morality or the environment, including the cultural heritage. In addition, a statute of 1985 also allows environmental associations with legal personality to bring a "public civil action" in order to stop environmentally harmful activities or claim compensation.¹⁹⁴

In Norway, the requirement of "legal interest" under section 28 of the Administration Act and section 54 of the (civil) Procedure Act does not exclude actions by groups such as the Norwegian Nature Conservation Association claiming to represent the

¹⁹². See *Wildlife Society of South Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* [1996] 3 All SA at 463f and *Van Huysteen and Others v The Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 208 (C).

¹⁹³. Martin Fuhr et al op cit at 81.

¹⁹⁴. Ibid.

interests of its members, even though such actions seem to be rare. In Poland, before the establishment of democracy in 1989 the legislation of the communist era gave certain officially licensed "social organisations" such as environmental associations and neighbourhood committees, the right to lodge administrative appeals and initiate proceedings in administrative, civil and criminal courts. However, the communist legislation was proved to be ineffective.¹⁹⁵

The law of the Netherlands as it now stands provides that environmental organisations, as an exception to the rule, need not satisfy any requirements additional to the formulation of their object and purpose in order to be able to obtain an injunction whenever the interests they seek to protect are harmed or threatened by harm. This position was formulated in a landmark decision of *De Nieuwe Meer*¹⁹⁶ where the Netherlands Supreme Court held that the general interest of environmental protection as such is encompassed by the protective scope of the Civil Code's delict law provision and that organisations whose object and purpose are environmental protection are entitled to seek injunctions in delict relating to harmful effects to the interests they are promoting on the basis of that description of the purpose alone.

After analysing the law of standing in other parts of the world to this extent I have come to the conclusion that South Africa has got much in common with most of the countries that I have just surveyed in the area of standing. The only noticeable exceptions are those few countries that still cling to the orthodox approach that requires plaintiffs to prove that their subjective rights have been violated in order to be accorded standing to sue. I strongly feel that there is much we can learn from those foreign countries whose legal systems evince a broader

¹⁹⁵. Ibid.

¹⁹⁶. Decided by the Netherlands Supreme Court on June 27, 1986 and reported in the *Nederlandse Jurisprudentie* (1987).

approach to standing.

6. COMMENTARY

The signing of the New Constitution of the Republic of South Africa Act No. 108, 1996 by the State President on the 10th December 1996 signalled victory to the many citizens groups which increasingly claim guardianship over the public interest in a decent environment. The threshold issue in citizen actions for the protection of environmental values is standing to sue. After so many years of uncertainties in the environmental sphere regarding the claimant's competence to vindicate the public interest there seems to be some light at the end of the tunnel. The Constitution has finally crushed the traditional barriers to standing by entrenching an environmental right as well as the enforcement of right clauses. It also gives citizen groups and individuals standing to protect the environment in the public interest. However, access to environmental justice requires not only legislative rights to go to court, but also the resources, both institutional and financial.

I must also point out that not only does the constitution open up access to environmental justice or entrench a justiciable environmental right, it also gives its custodians new responsibilities viz, the prevention of pollution and ecological degradation; promotion of conservation and the securing of ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Above all the challenge is upon all citizens to promote efforts which will prevent or eliminate damage to the environment for the benefit of present and future generations.

In my view, the Constitution has finally broadened the *locus standi* requirement quite substantially. So far very few environmental cases have come up before the Constitutional Court which brings me to the conclusion that it is too early to judge the success of the Courts in that respect. However, in these cases our courts have interpreted the standing provisions very

broadly.¹⁹⁷

In particular, the Court in *Ferreira v Levin No and Others*¹⁹⁸ held that a broad approach to *locus standi* should be adopted. In this case the Court remarked that section 7(4)(b) demonstrates that a broader and not a narrow approach to *locus standi* is required. Most importantly the Court held that the constitutionality of a law may be challenged on the basis that it is inconsistent with the provisions of the Constitution other than those contained in Chapter 3. In my view, the *Ferreira* decision should be welcome for its flexibility when it comes to the law of standing.

It is submitted in conclusion that the scope of *locus standi* in our constitution is broad enough as evidenced by the success of the few recent cases that came to the Constitutional Court. It is now left to our courts (and the Constitutional Court in particular) to develop more authoritative cases that will further open up access to environmental justice. The level of environmental consciousness in South Africa has increased quite substantially. As a result, an increase in the level of environmental litigation is also evident.

¹⁹⁷. These cases include *Van Huysteen and others NNO v Minister of Environmental Affairs and Tourism and Others* 1966(1) SA 283; *Wildlife Society of South Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* [1996] 3 All SA; and *Ferreira v Levin NO and Others and Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC).

¹⁹⁸. 1996(1) BCLR 1 (CC).

7. CONCLUSION

To sum up, one must applaud the many positive elements incorporated in the New Constitution of the Republic of South Africa Act No.108, 1996. In view of the deliberate effort by the drafters to incorporate public participation our courts must take the initiative in recognising the public law status of applicants requiring locus standi in the area of environment. I have no doubts whatsoever that the new Constitution, coupled with creative and realistic interpretation by our courts, will pave the way for a more liberalised view on locus standi in environmental affairs in South Africa.

The challenge that faces lawyers, ecologists and environmentalists is to start laying judicial "bricks" on the foundation laid down by the drafters of the constitution. Their task is to fashion an acceptable environment for all the present and future generations. Of importance is to note that public interest litigation will develop a body of case law which would indicate areas of concern in the constitution and define the legal issues involved. The Constitutional Court, in particular, will be faced with the most important task of developing case law that will fashion our environmental law as we move towards the 21st century.

Now that the constitution has finally broadened the concept of *locus standi* significantly, our courts, in general, are left with an obligation to open their doors to environmental organisations seeking to protect the environment for the benefit of present and future generations. Efficient procedures through which open and transparent environmental decisions could be taken should also be developed. Above all, the concept of *locus standi* should be expanded even further thereby making our courts more accessible. Now the main consideration is how litigation could be used strategically as a means of promoting and protecting environmental rights.

In conclusion I would suggest that standing rules should simply be done away with so that a litigant need only show that s/he has an arguable case on the law. This might appear to be another way to open up floodgates of cases coming to the courts but the reality is that we need to make way for people with deserving cases to appear before the courts without going through the hurdles of proving standing. I am not convinced that standing rules serve any real purpose in environmental litigation because what we are concerned with is the protection of the environment, the secondary concern being the conservation of our natural resources for the present and future generations. Lastly, increasing interest representation in environmental law points to the need for broad *locus standi* as discussed above. Our Constitution stipulates that citizens and citizens groups should have standing to vindicate the public interest. I, therefore, do not see any reason why standing should be restricted in anyway.

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