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STRENGTHENING *LOCUS STANDI* IN PUBLIC INTEREST ENVIRONMENTAL
LITIGATION: HAS LEADERSHIP MOVED FROM THE UNITED
STATES TO SOUTH AFRICA?

Tumai Murombo

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1 INTRODUCTION

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard - per William O. Douglas dissenting in *Sierra Club v Morton* 405 U.S. 727,749 (1972).

For a very long time United States of America ('USA') appellate federal courts have insisted that for a litigant to bring a case they must pass the standing (*locus standi*)¹ test developed by the Supreme Court over time in a long line of cases.² In addition to showing an 'injury-in-fact',³ Article III, Sect. 3 of the Constitution of the USA⁴ requires a prospective litigant to show that, such injury is

concrete and particularised; the threat [of injury] must be *actual and imminent*, not conjectural or hypothetical; it must be fairly *traceable to the challenged action* of the defendant; and it must be likely that a favourable judicial decision will prevent or *redress the injury*.⁵ (*Emphasis added*)

This 'standing doctrine', with its origins in private common law, has resulted in a number of cases where public interest environmental organisations have failed to prove standing to bring suits purely in the interests of protecting the environment, natural resources or a component thereof. Public interest environmental organisations in the USA must show that the action or threat of action or omission complained of poses an 'actual or imminent' injury to their members; otherwise they will have no standing to bring the suits. The decisions referred to above culminated in the recent decision of the US Supreme Court in *Summers et al v Earth Island Institute et al* 552 US — ; 128 S.Ct. 1118 (2008)⁶ where the Supreme Court reiterated its allegiance⁷ to the stringent approach to standing, thereby adding more fuel to the complex standing debate. This conservative approach to standing exemplified by the USA unfortunately could be seen in quite a number of other common law jurisdictions.

1 'Standing' and '*locus standi*' are used interchangeably throughout the paper.

2 *Sierra Club v Morton* 405 U.S. 727, 92 S.Ct. 1361 (1972), *Lujan v Defenders of Wildlife*, 504 U.S. 555 (1992), *Friends of the Earth Inc. v Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167(2000), *NRDC v EP*, 464 F.3d1, 373 US App. D.C 223 (2006), and generally B.C. Mank, 'Standing and Future Generations: Does *Massachusetts v. EPA* Open Standing for generations to Come?', 34 *Columbia Journal of Envtl. Law* 1 (2009).

3 See *Lujan v Defenders of Wildlife*, note 2 above, where the USA Supreme Court elaborated on the criteria for constitutional *locus standi* in the US as requiring that the litigant must prove an injury-in-fact, causation and redressability., (injury-in-fact means the injury must be 'actual or imminent, not 'conjectural' or 'hypothetical').

4 Article III, Section 3 of the Constitution of USA provides that 'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State...' (*Emphasis added*). This is often called the 'Cases and Controversies clause'.

5 The test was recently restated in *Summers v Earth Island Institute*, 552 US—; 128 S.Ct. 1118 (2008) citing *Laidlaw* 528 US 167, 180-181 (2000). Note that the test only matters in federal constitutional jurisdiction and not in most state jurisdictions.

6 To some this decision however shows the gradual shift of the justices' approach on federal standing. The decision was carried by a majority of five against four dissenting (the dissent would have granted standing). However it represents a regression from the progress made in *Massachusetts*, see R. Matthews, '*Summers v. Earth Island Institute: Injury, Precedent, and the Environmental Standing Saga*', 23 *Tul. Envtl. L.J.* 171 (2009) and R. Murphy, 'Abandoning Standing: Trading a Rule of Access for a Rule of Deference', 60 *Admin. L. Rev.* 943 (2008).

7 The level of dissent shows a gradual incremental shift of ideology and mentality, see J. Bonine, Standing to Sue: The First Step in Access to Justice (Lecture delivered via Internet to Mercer University Law School Students, January 1999), available at <https://www.law.uoregon.edu/faculty/jebonine/docs/boninelecture.pdf>.

The constitutional system in the USA, with regards to standing, summarised above contrasts sharply with the new approach adopted in the new constitutional dispensation in South Africa since 1994. Prior to 1994 the requirements for standing in South Africa for all civil cases, public and private, were largely based on the common law requirements which then, by and large, mirrored the USA approach.⁸ The Constitution of the Republic of South Africa, 1996⁹ did away with strict standing requirements where any right in the Bill of Rights is implicated, and for the purposes of this paper, also relaxed the approach to standing in public interest environmental litigation. In South Africa, the approach to standing was further relaxed in the National Environmental Management Act 107 of 1998 ('the NEMA') in not only matters that concern human rights (environmental rights), but also the implementation and enforcement of any environmental management statute. To this extent it has been argued that the NEMA in fact is an attempt to broaden the common law doctrine of standing in environmental law matters generally.¹⁰

In this paper I undertake a comparative constitutional analysis of the doctrine of standing in public interest environmental litigation by the

South African courts since 1994 with a view to informing the development or reform of rules on standing in other conservative common law jurisdictions, using the USA as a comparator. More narrowly, the comparative constitutional analysis of the rules on locus standi in the USA and South Africa is aimed at drawing lessons for the US federal courts from recent South African jurisprudence.¹¹ I argue that the USA and other conservative jurisdictions have so much to learn from the nuanced constitutional approach to standing that the South African courts, especially the Constitutional Court, have developed over the short period of constitutional democracy.¹² The comparative constitutional analysis is apposite given the Anglo common law history and traditions of the USA and South Africa and the relative progress made in both jurisdictions in developing environmental law jurisprudence. I proceed from a brief overview of the approach by South African courts to develop a motivation as to why the USA federal courts should employ comparative constitutionalism to develop a nuanced approach to the USA rules on standing in public interest environmental law matters. By using the USA as a comparator I hope to inform, not only developments in the US, but also in other countries

8 So much has already been written on the approach of South African courts to locus standi pre-1994 and how the new constitutional framework has changed the landscape, thus I will not belabour this history of the locus standi doctrine in South Africa, rather the focus being on what lessons can the USA federal courts learn from that South African experience with the doctrine. For South African court's approach on locus standi, see Y. Burns and M. Kidd, 'Administrative Law & Implementation of Environmental Law', in H.A. Strydom & N.D. King eds, *Environmental Management in South Africa* 222, 263 (Cape Town: Juta, 2nd ed. 2009); C. Loots, 'Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation', 104 *SALJ* 131(1987); C. Loots, 'Keeping Locus Standi in Chains: *National Education Crisis Committee v State President of the Republic of South Africa* WLD 9 September 1986 Case No 16736/86', 3 *S. Afr. J. on Hum. Rts* 66 (1987); L. Ferris, 'Environmental Rights and Locus Standi', in A. Paterson and L. J. Kotze eds, *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 149-150 (Cape Town: Juta, 2009) and *Von Moltke v Costa Areosa (Pty) Ltd*, 1975 (1) SA 255(C).

9 Constitution of the Republic of South Africa Act, 108 of 1996 ('the Constitution of 1996')

10 See Ferris, note 8 above at 149-150.

11 It is in federal courts especially where the USA judiciary has largely remained anti-public interest environmental litigation and has used standing doctrine to forestall such litigation wherever possible, including in cases where the US Congress has made specific provision for citizens suits, see Bonine, note 7 above and *Massachusetts v EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007).

12 See *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and others* 1996 (1) SA 984 (CC), *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, 1996 (3) SA 1095 (TkS) 1106, *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*, 1999 (2) SA 709 (SCA), *De Cock v Minister of Water Affairs et al*, 2005 (12) BCLR 1183 (CC) (direct access to Constitutional Court refused); *Direct Mineral Development: Gauteng Region and Another v Save the Vaal Environment and Others*, 1999(2) SA 709 (SCA); *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd*, 2008(2) SA 592 (C) (common law rules on standing to bring class action) and *Ngxuzza and Others v Perm Sec, Dept of Welfare Eastern Cape and Another*, 2001 (2) SA 609 (E) (class action under section 38 of the Constitution of the Republic of South Africa, 1996) and writings cited in note 8 above.

where the conservative approach to locus standi is still revered.¹³

The paper concludes that the archaic approach to standing in conservative common law jurisdictions such as the USA federal courts should be reformed and enriched by drawing on recent South African public interest environmental and constitutional law jurisprudence. The persistence of the strict approach in these jurisdictions may well be better reformed through constitutional reforms that not only introduces environmental rights, but also widen the rules on standing when it comes to the vindication of such a right in the Bill of Rights and other environmental legislation. But knowing the difficulty of amending the USA Constitution, for instance, and given the role played so far by the federal judiciary in constraining standing rules, the better approach is for the US courts to deploy a liberal approach to interpreting Article 3 of the USA Constitution.¹⁴ In other countries where there are no constitutional standing provisions, I argue that the common law should be modernised by interpreting it into the modern context where sustainable development is taking centre stage. Whilst the USA used to provide guidance and leadership in public interest environmental litigation, it is now to South Africa that common law countries must turn for guidance given the synergy between South Africa jurisprudence and the principles underpinning environmental regulation. It is apposite however to start by unravelling the private common law origins of the strict approach to standing both in South Africa and the comparator jurisdictions, the USA.

13 In this regard, I am particularly interested in a number of African countries such as Zimbabwe, Kenya, Botswana, Namibia, among others, where public interest environmental litigators, mainly non-governmental civic society organisations are required to prove special interest. Most of these countries have or are in the process of reforming their environmental laws borrowing mostly from the USA, Australia and South Africa, hence the choice of the USA as a comparator. Note however that detailed studies of all these jurisdictions are beyond the scope of this paper.

14 The USA Constitution is notoriously difficult to amend given its over 200 year history. Also, the strict approach to standing has been linked to a conservative interpretation of the Constitution by judges and it can be argued that a change in the approach or ideology of the judges could precipitate a liberal approach to standing.

2 THE INITIAL POSITION: LOCUS STANDI

As already indicated above, many South African and USA scholars have unravelled the origins and the development of the doctrine of standing with reference to environmental litigation. It is important however by way of putting this paper in context to highlight the main themes and the current legal position in South Africa and its origins. Firstly, it has been argued that the doctrine of standing was developed in the first place, under both English¹⁵ and Roman-Dutch common law, to ensure that courts play their proper function in any constitutional democracy where the rule of law, and the doctrine of separation of powers underlie the constitutional system, namely that courts do not make law but merely apply the law by adjudicating disputes that are ripe for adjudication and not prospective hypothetical cases.¹⁶

Secondly, the doctrine was developed to, in a way, prevent the floodgates from opening, where every Tom and Dick, or 'busybodies, cranks and other mischief makers'¹⁷ could take up any case and bring it before the court regardless of their interest in the

15 *Gouriet v Union of Post Office Workers and others* [1977] 3 All ER 70 (HL) (except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him.) and *X and Others (minors) v Bedfordshire County Council M (a minor) and Another v Newham London Borough Council and Others E (a minor) v Dorset County Council and other appeals* [1995] 3 All ER 353 (HL).

16 See *Summers v Earth Island Institute*, note 5 above and *Ferreira v Levin NO and Others*, note 12 above.

17 *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses Ltd*, [1982] AC 617, 653G-H, [1981] 2 W.L.R.722, 740 and *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, note 12 above at 1106.

matter or the outcome.¹⁸ In a sense the doctrine of standing saved a gate keeping function. Third, this legal situation was born out of the focus of private law litigation on the protection and vindication of private interests or rights.¹⁹ It may be argued that in the USA these private law origins also played a role in the highly individualised conceptions of civil liberties and human rights in the USA. The same approach also bedevilled public interest environmental litigation in the United Kingdom, the birth place of the common law, and thus of the common law rules on locus standi.²⁰ However even then the English courts realised the need to permit public interest litigation where necessary. Lord Diplock who in *Ex parte National Federation of Self-Employed and Small Businesses Ltd* appositely observed that;

[i]t would be...a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locust standi from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped.²¹

The contemporary situation is that in the United Kingdom standing no longer presents an insurmountable challenge to public interest litigation.²² Similarly, in India the Supreme Court,

through judicial interpretation, has liberalised rules on standing without legislative intervention.²³

It is important to underscore that in the *Ferreira* case referred to above, the court also pointed out crucial aspects that have often led to confusion on the bench. In particular the court noted that a distinction must be made always between the approach of the courts to standing in *public law* and on the other hand *private law litigation*, albeit the court acknowledged the increasing blurring of the line between these two fields. In this respect O' Regan J correctly observed that;

[e]xisting common-law rules of standing have often developed in the context of private litigation. As a general rule, *private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events*. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that *nexus* is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, *the harm alleged may often be quite diffuse or amorphous*. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or

18 See *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, note 12 above at 1106 (Pickering J noted that the floodgates argument was baseless as there were several rules of procedure that could be used to control frivolous and vexatious litigation, such as for e.g. punitive cost orders and rules on security costs).

19 See *Ferreira v Levin NO and Others*, note 12 above, Para 23.

20 J. K. Bantil, 'General Recourse to the Courts for Environmental Protection Purposes and the Problem of Legal Standing – A Comparative Study and Appraisal', 11 *Anglo-American Law Review* 292-295(1982).

21 See *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses Ltd*, note 17 above.

22 J. Holder and M. Lee, *Environmental Protection, Law and Policy Text and Materials* 379 (Cambridge: Cambridge University Press, 2nd ed. 2007).

23 An exhaustive analysis of Indian jurisprudence is not intended here and has been done elsewhere, for which see further A. Perry-Kessaris, 'Access to Environmental Justice in India's Garden City (Bangalore)', in A. Harding ed., *Access to Environmental Justice: A Comparative Study* 66 (Leiden: Martinus Nijhoff Publishers, 2007) and J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (The Hague: Kluwer Law International, 2008). The Indian Supreme Court has adopted an expansive interpretation of the right to life, an approach that has seen public interest litigation flourish without opening any flood gates or allowing the judiciary to encroach on other branches of government, see for instance *M.C Mehta v Kamal Nath*, 1997 1 SCC 388, and *M.C Mehta and Others v Shrivam Food and Fertilizer Industries and Union of India (Oleum Gas Leak Case – III)*, AIR 1987 SC 1026.

constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But *it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.* (Emphasis added)²⁴

The court also point out that a distinction must be made between the issue of standing and that of ripeness, - issues that call for different inquiries.²⁵ In this vein one notes that the USA approach appears to conflate the two issues with ripeness essentially determining, among other factors, whether a litigant has satisfied the standing requirements.²⁶ The South African Constitutional Court clearly disapproved of this approach in *Ferreira* by emphasising that a litigant should not be non-suited merely because her case is not yet ripe. In other words a litigant may still have locus standi and still be told by the court that she has approached the court prematurely, and must wait for the legal dispute to 'crystallise'.²⁷ While it is undeniable that there is a nexus between the question of ripeness and the question of whether a litigant has standing, the inquiries to establish the two legal prerequisites must not be conflated as has tended to be the case in the USA federal jurisprudence. Put simply if you do not have a cause of action because the rights that you seek to vindicate have not yet accrued or crystallised, it follows that on that ground you may be non-suited. The ripeness inquiry is a separate initial inquiry but in the USA federal jurisprudence courts have tended to inquire

into the rights or cause of action or ripeness as part of the inquiry into standing, i.e. in order for a court to make the inquiry into a litigant's standing it means that the litigant must have standing premised on an identifiable right to be heard in the first place.²⁸

The above rules on standing as developed under South African common law were and are not cast in stone.²⁹ Often traditionally applied with a particular strictness in private law litigation, these rules were often relaxed under certain exceptions where public law litigation was involved and particularly where the liberty of an individual was concerned. Loots confirms that in pre-1994 South Africa the courts often allowed actions in the public interest (as opposed to the litigant showing a private interest) in 'matters involving violations of life, liberty, or physical integrity'.³⁰ These exceptions were not only the creations of the courts in South Africa, but can be traced even to Roman times where there was an acknowledgement that public interest litigation may be necessary.³¹ However South

24 See *Ferreira v Levin NO and Others*, Para 229 note 12 above.

25 See *Ferreira v Levin NO and Others*, note 12 above per Kriegler Paras 199 and 206, and Loots note 8 above at 137 who cautions against this confusion 'between the inquiry whether a right of action exists and the inquiry whether the particular claimant concerned has locus standi to enforce the right of action'.

26 See *Summers v Earth Island Institute*, note 5 above, the reasoning proceeds like this: you cannot challenge a law before it has been actually applied to you because there is no ripe dispute, therefore you do not have standing to challenge that law.

27 See *Ferreira v Levin NO and Others*, note 12 above, Para 199.

28 See Loots, note 8 above at 139 for this fine distinction.

29 The common law rules of standing still apply to matters that do not concern the Bill of Rights or the enforcement of environmental legislation i.e. most private law disputes such as family law, delict, contract, succession disputes will still require litigants to prove sufficient interests.

30 See Loots, note 8 above at 146 and *Director of Education, Transvaal v McCagie and Others* 1918 AD 616, *Wood and others v Ondangwa Tribal Authority and Another*, 1975 (2) SA 294 (A).

31 The so called *actio populares* - even though it had limited application to specific cases meeting certain strict requirements: see R.W. Lee, *Elements of Roman Law* para 708 (London: Sweet and Maxwell, 4th ed, 1956): - explaining that these were actions where 'in the public interest any member of the public was allowed to sue for a penalty, which he either kept for himself or divided with State'. Lee points out that the basis of the *actio populares* was to 'supplement the very inadequate criminal law'. This may have directly influenced the developments in South Africa of a more relaxed approach to standing in public law litigation particularly in matter where the public interest was at issue, although South African courts have insisted that the *actio populares* was never part of Roman-Dutch law (Loots, note 8 at 133, *Director of Education, Transvaal v McCagie and Others* note 30 above, *Cabinet of the Transitional Government of SWA v Eins* 1988(3) SA 369(A), *Attorney General v Dow*, Botswana Court of Appeal, 03/07/1992 and A. Berger, *Encyclopedic Dictionary of Roman Law Transactions of the American Philosophical Society*, New Series, Vol. 43, No. 2, 347(1953)).

African courts have held repeatedly that while part of Roman law, the *actio populares* was never part of Roman-Dutch law which was brought to South Africa in 1678.³²

The above approach has since changed in South Africa in matters where the bill of rights and the enforcement of environmental management legislation are concerned. As noted elsewhere above, before 1994 South African law required a litigant to show 'a sufficient, direct, and personal interest' in the matter.³³ This sufficient 'interest' was construed to refer to a 'legal right or recognised interest which must be direct and personal'.³⁴ This approach had the same limitations as those being experienced by public interest environmental organisations and environmentalists in the USA today and countries subscribing to a similar conservative stance on standing.³⁵ It was stringent and could not be relied upon to promote public interest environmental litigation.³⁶ With the advent of a new constitutional order in 1994 was born a new Constitution with extensive human rights and extensive standing provisions to facilitate effective protection of those rights and their vindication where they are

violated.³⁷ In terms of the Constitution of South Africa, virtually any person can bring an action to protect a provision of the Bill of Rights, something that may be unpalatable in the USA legal tradition given the litigious nature of the US society. This South African Bill of Rights includes, among other rights, the right to an environment not harmful to health and well being,³⁸ right to housing, health, sufficient water and food.³⁹ The way the right is framed and subsequent legislation giving content to this right have all practically given a measure of rights to the environment and animals that can be enforced by environmental organisations and concerned citizens without them showing any particularised interest or injury suffered as a result of the impugned action or inaction.⁴⁰ If a public interest organisation seeks to bring litigation, it must obviously show that one of its objectives is to protect the environment, that is, that it was established to further the interests of environmental protection in one way or the other.⁴¹ The widened standing provisions in the Constitution⁴²

32 See *Director of Education, Transvaal v McCagie and Others*, note 30 above.

33 *Id* at 623 (per Innes CJ, 'The principle of our law is that a private individual can only sue on his own behalf, not on behalf of the public. The right which he seeks to enforce, or the injury in respect of which he claims damages, or against which he desires protection, will depend upon the nature of the litigation. But the right must be available to him personally, and the injury must be sustained or apprehended by himself.'). *Von Moltke v Costa Areosa (Pty) Ltd*, 1975 (1) SA 255 (C), *Verstappen v Port Edward Town Board and Others*, 1994 (3) SA 569 (D) and J. Glazewski, *Environmental Law in South Africa* 121 (Durban: LexisNexis Butterworths, 2005).

34 See Burns and Kidd, note 8 above at 262.

35 See *Sierra Club v Morton*, note 2 above (denying a public interest environmental organisation standing as it failed to show and imminent injury to any of its members).

36 One may note here also that in fact, environmental law as such was still in its infancy and there was actually little public interest environmental litigation in South Africa.

37 Constitution of the Republic of South Africa 1996, section 38 thereof provides that, 'Anyone listed in this section 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'.
(*emphasis added*).

38 See Constitution of the Republic of South Africa Act, note 9 above, Section 24.

39 *Id*, Sections 26 and 27.

40 See *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*, note 12 above.

41 See *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, note 17 above at 1106.

42 See Constitution of the Republic of South Africa Act, note 9 above, section 38, a person seeking to enforce any rights outside the bill of rights still has to meet the common law requirements regarding standing. See also *All The Best Trading CC t/a Parkville Motors, and Others v S N Nayagar Property Development and Construction CC and Others*, 2005 (3) SA 396 (T) ('In principle a commercial entity or consortium that attempts to frustrate a rival's lawful endeavour to conduct business ought not to be able to promote its trade interests on the back of environmental considerations...').

as far as environmental matters are concerned, is further expanded in section 32(1) the NEMA which provides that;

Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision⁴³ concerned with the protection of the environment or the use of natural resources -

- (a) in that person's or group of person's own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment. (emphasis added)

It is clear from this provision that public interest environmental organisations in South Africa should not struggle to establish standing, and it has now become routine that such organisations can bring actions without their standing being brought into issue.⁴⁴

⁴³ In this regard one may disagree with the submission by Ferris that Section 32 of the NEMA is an attempt to broaden 'the narrow locus standi provisions of the common law' in environmental matters as the section specifically refers to environmental legislation only and not relevant common law- See Ferris, note 8 above.

⁴⁴ See *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, note 12 above. See also *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others*, note 12 above, *Wildlife and Environmental Society of Southern Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape*, 2005 (6) SA 123 (E), *Smit NO and others v His Majesty King Goodwill Zwelinthini Kabbekuzulu and Others*, (10237/2009), [2009] ZAKZPHC 75 (4 December 2009), and Cf. the USA position where the Supreme Court has said in *Summers* that 'it is well established that the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties'. i.e. *mero motu*.

Nevertheless the call by Pickering J in *Wildlife Society of Southern Africa*⁴⁵ has not yet been fully answered as any person wishing to litigate an environmental issue based on common law or customary law (as opposed to enforcing statutory environmental management laws) should still prove that she has standing in terms of the common law requirements discussed above. It must be stated here that the broadening of the rules on standing in South Africa has not led to an opening of the floodgates of litigation as feared, but reasonably the same cannot be ruled out in the US context or other affluent jurisdictions. However with regard to many African common law jurisdictions the floodgates argument is farfetched as the costs of litigation already constrain access to the courts.⁴⁶ This is not to argue however that there are no ways of liberalising rules on standing while concomitantly controlling the floodgates, an argument addressed elsewhere in this paper.

2.1 Why the need to broaden the common law rules of standing?

It may be wondered why so much ink has been spilt against the doctrine of standing especially in public interest environmental litigation. What is it that distinguishes such litigation from any other kinds of litigation? Does it merit this special treatment? A number of scholars⁴⁷ have grappled with these questions and in the final analysis it is agreed that natural resources or nature, animate or inanimate, increasingly requires us to legally protect it from the unsustainable exploitation that was heralded by industrialisation. A critical issue however is how nature can enforce any 'rights' created by nature conservation and environmental legislation outside

⁴⁵ See *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, note 12 above.

⁴⁶ Traditional procedural rules on legal costs are in fact one obstacle in the way of public interest environmental litigation, see generally T.L. Humby, 'Reflections on the Biowatch Dispute: Reviewing the Fundamental Rules on Costs in the Light of the Needs of Constitutional and/or Public Interest Litigation', 12(1) *Potchefstroom Electronic Law Journal (PELJ)* (2009), available at <http://www.scielo.org.za/pdf/pej/v12n1/v12n1a05.pdf>.

⁴⁷ See Loots, note 8 above, See Glazewski, note 33 above, See Bonine, note 7 above and See Bentil, note 20 above.

a utilitarian framework? This is how locus standi became the arch enemy of environmental protection and sustainable use of natural resources. If only a litigant who has a sufficient specific individual interest could approach the courts to protect such interest, who was going to do this on behalf of nature? The government or the state? This institution proved time and again that it is usually under-resourced to play the function of the sole protector of natural resources and it is necessary to open that function to public interest civic organisations and individuals who have the means and time to bring litigation to protect nature.⁴⁸

Given the uniqueness of environmental disputes, the anachronism of the common law must give way to modern nuanced approaches to public interest environmental litigation. In addition, the advent of environmental law and environmental constitutionalism also call for a change in the ideology and approach to public interest litigation. Thus the court rightly exhorted in *Save the Vaal* that:

[The South African] Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with D the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.⁴⁹ (emphasis added)

It may be argued that the enshrinement of an environmental right in the South African constitution was partly responsible for the broadening of standing. By the same token it will be interesting to see whether the USA should pursue

this constitutional route, a very unlikely bet, rather than leaving it to the federal courts to develop the common law rules on standing. It is submitted in caution that given the potential difficulty of securing a liberalised standing regime through constitutional amendment in the USA for instance, the best promise lies in judicial engineering, that is, trusting the conservative federal judiciary to change with the times and favourably interpret the 'cases and controversies' clause. Yet again however even with this option Roosevelt III argues that judicial activism is not looked upon favourably in the USA and the federal courts, in particular the Supreme Court, are very careful not to tamper with established doctrines that, he argues, have substituted the text of the Constitution as the measure of legitimacy of judgments.⁵⁰ Similarly in most common law jurisdictions judicial activism has always been looked at with mixed feelings, lest it allows the judiciary to usurp the executive functions.⁵¹

More importantly however, the nature of public interest environmental litigation is such that it also depends on a number of other legal guarantees to succeed. For instance, environmental litigation presupposes accessibility of environmental information, mostly through public participation processes,⁵² guaranteed access to justice⁵³ and access to the courts, as well as guarantees that one is not going to be visited with the archaic rules of legal costs or an unimaginable strategic law suits against

⁴⁸ See generally B. van Niekerk, 'The Ecological Norm in Law or the Jurisprudence of the Fight Against Pollution', 92 *SALJ* 78 (1975); *Re Minors Oposa v Sec. of DENR*, 33 *I.L.M.* 173 (1994), See generally C.D. Stone, *Should Trees Have Standing* (California: William Kaufmann Inc. 1974.)

⁴⁹ See *Director: Mineral Development: Gauteng Region and Another v Save the Vaal Environment and Others*, [zRPz] note 12 above Para 20 per Olivier J.A.

⁵⁰ K. Roosevelt III, *The Myth of Judicial Activism, Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006).

⁵¹ See generally Justice L.T.C. Harms, 'Judging Under a Bill of Rights', 12 *Potchefstroom Electronic Law Journal (PELJ)* 3 2009 and J. Dugard, 'Judging the Judges: Towards an Appropriate Role of the Judiciary in South Africa's Transformation', 20 *Leiden Journal of International Law* 965 (2007).

⁵² For which in the South African Environmental Impact Assessment (EIA), see generally T Murombo, 'Beyond Public Participation: The Disjuncture Between South Africa's New EIA Law and Sustainable Development', 3 *Potchefstroom Electronic Law Journal (PELJ)* 1/31(2008).

⁵³ M.J. Nkhata, Public Interest Litigation and *Locus Standi* in Malawian Constitutional Law: Have the Courts Unduly Fettered Access to Justice and Legal Remedies?, 2 *MLJ* 209, 214 (2008) highlighting the intertwinement of locus standi and the right of access to justice.

public participation (SLAPP) suit.⁵⁴ In this regard it is submitted that broadening locus standi per se may be insufficient to promote the objectives of environmental regulation.⁵⁵ The legislature in South Africa has, in addition to broadening locus standi, also put in place guarantees to ensure that the above complementary procedural safeguards are available, albeit more could be done on the implementation of the relevant laws.⁵⁶ In addition the overriding factor is the efficacy of the environmental laws in terms of compliance, implementation and enforcement aspects that also require higher priority.

3 OLD HABITS DIE HARD: THE APPROACH TO STANDING IN USA FEDERAL COURTS

Pre-1994 South African scholars looked with admiration at the USA environmental legislation, which in some cases provided specific provisions to give citizens standing to enforce such legislation – the so called citizen suit provisions.⁵⁷ Unknown to

us was the fact that citizen suit provisions are often very limited in their application, and they apply only to the statute in which they are provided for (which is not in all environmental statutes).⁵⁸ At the broader constitutional and environmental regulation level the USA public interest litigator is still faced with a huge challenge when it comes to the right of appearance (standing) before the federal courts.⁵⁹ The similar fate largely bedevils public interest environmental litigation in other common law countries steeped in the conservative approach to standing. South Africa has since moved on taking the lead and it appears the USA federal courts especially the Courts of Appeals and the Supreme Court, have stagnated and in fact dug their heels into the common law naiveté that only individual members of groups who can prove an ‘injury-in-fact’ and an interest or right that is threatened with harm can have audience with the courts.⁶⁰

It is apposite to reiterate that in public interest environmental litigation, while the complainant or applicant may be a natural person the injury or harm is often suffered by the environment or part thereof, be it an endangered species, a river, a mountain, or the atmosphere. It naturally appears incomprehensible for the USA federal courts, to continuously interpret Article III section 3 of the USA Constitution as requiring a litigant to show imminent direct injury or threat of injury in all cases

54 For which, see Humby, note 46 above at 95, *Trustees of Biowatch v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC). SLAPP are discussed in detail elsewhere in S. Beder, ‘SLAPPs-Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You’, 72 *Current Affairs Bulletin* 22(1995) and H. Valentine and T. Murombo, *The Impact of Strategic Lawsuits Against Public Participation (SLAPP) on Public Participation in the Environmental Impact Assessment (EIA) Process in South Africa*, unpublished working paper, 2009 (on file with author).

55 See also J.H. Adler, ‘Stand or Deliver: Citizens Suits, Standing and Environmental Protection’, 12 *Duke Environmental Law & Policy Forum* 39, 40 (2001).

56 For instance despite the South African: Promotion of Access to Information Act 2 of 2000 (‘PAIA’) it remains a challenge to obtain environmental information such as Environmental Management Plans (EMP) prepared by mining companies and Environmental Impact Assessment (EIA) reports. Arguably the PAIA has instilled an ‘ask for it if you want it’ mentality in information holders who previously readily released information.

57 See for instance Clean Water Act 505, 33 U.S.C §1365, Clean Air Act 42 U.S.C § 7604, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or The Superfund Act) 42 U.S.C 9659.

58 In addition Bonine argues that the good intentions of the US Congress in passing such legislation is being resisted by the judiciary under the guise of constitutional arguments that do not hold water, Bonine, note 7 above at 11, and to the contrary see Adler, note 55 above at 58 arguing that citizens suits provisions may lead to environmental over enforcement.

59 This paper is limited to federal courts, namely the Courts of Appeal and the US Supreme Court jurisprudence as these federal courts are the one specifically mandated with guarding the USA Constitution. The situation in the states could be quite different and in fact even some federal courts, such as the 9th Circuit Court of Appeals, are moving towards a nuanced broader interpretation of the doctrine of standing, see Bentil, note 20 above at 308-309 and authorities there cited who even argues that the US courts have since moved from the strict common law position.

60 See *Sierra Club v Morton*, note 2 above and Bentil, note 20 above.

and controversies.⁶¹ This point was aptly summed up by Burns and Kidd who assert that, ‘the common law position as regards locus standi was an obstacle to an individual’s being able to vindicate the public interest in a healthy or undamaged environment, unless s/he had been personally affected...’⁶² The old South African common law position reviewed above is almost similar to the current USA approach. A running inquiry in this paper is to unravel why South Africa has managed to move from this archaic position while the USA federal courts do not seem to see the necessity of moving from this much criticised status quo towards a progressive approach to standing.

The criticism of the strict approach to standing was recently flagged by one of the USA’s leading environmental law scholars Joseph Sax. Sax argues that for forty years since the birth of environmental law there has not been any significant progress in terms of developing a body of environmental law that supports the underpinning objectives of environmental regulation. He submits, correctly that, in the USA, ‘...judicial action remains a vital element of environmental law, and that element has provided a revealing aspect of what [he] see[s] as a misunderstanding of environmental harm’.⁶³ Sax

details how hopes of a liberal approach to standing in public interest environmental litigation were raised by the *Mineral King* decision (*Sierra Club v Morton*, 405 U.S. 727 (1972)) and how those hopes have faded over time as the Supreme Court continues to dig in on an archaic strict approach to standing. In reference to the Supreme Court decision in *Lujan*⁶⁴ Sax argues that the majority decision is ‘worthy of derision’ and is ‘indicative of a distinct lack of sympathy with environmental litigation on the part of a number of the present justices’. He sums up by observing that;

[w]hat is genuinely significant about the *Defenders* case, and deeply distressing, is what it shows about how the Justices perceive the significance of the [Endangered Species Act (16 U.S.C. 1531-1544, 87 Stat. 884) (‘ESA’)], what it means to be ‘injured’ by violations of the Act, and who is injured?⁶⁵

He categorically decries the;

vast chasm between what environmental protection is all about and what our jurists think legal rights are all about. In the profoundest sense, they are denying the very possibility of environmental law in the sense that they cannot conceive of the most fundamental concerns of environmental protection as having the status of basic legal rights.⁶⁶

Undoubtedly the focus on individual rights by the USA Supreme Court in environmental litigation has blinded it to the objectives of environmental law and regulation, namely to protect the public interest in sustainable use of natural resources and the intrinsic value of nature. For instance the ESA was never meant to promote the interests of human beings in animals or their habitats but precisely to protect the endangered animals and those habitats from anthropogenic threats. In the context of *Lujan* it is inconceivable to the USA Supreme Court for an individual to bring litigation in the interest of an endangered species unless they can show that they

61 This interpretation has been challenged by some scholars who argue that it has nothing to do with the actual wording of the Constitution and the intentions of the founding fathers. It has been argued that the federal courts have been blinkered by political worldviews to come up with a constitutional rule that was never intended by the framers of the Constitution: - for further details, see Bonine, note 7 above 14 (‘The historical research has shown that the basis for this ‘Constitutional anti-standing’ doctrine is thin at best and intellectually dishonest at worst’) and citing R. Berger, ‘*Standing to Sue in Public Actions: Is It a Constitutional Requirement?*’, 78 *Yale L.J.* 816 (1969) among others.

62 See Burns and Kidd, note 8 above.

63 J.L. Sax, ‘Environmental Law Forty years Later: Looking Back and Looking Ahead’, in M.I. Jeffrey, J. Firestone and K. Bubna-Litic eds, *Biodiversity Conservation, Law & Livelihoods: Bridging the North-South Divide* 17 (New York: Cambridge University Press, 2008). The importance of the role of the courts was also highlighted by J. Ngcobo in *Fuel Retailers Association of Southern Africa v Director General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province*, 2007 (6) SA 4 (CC), Para 102 (‘The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid’).

64 See *Lujan v Defenders of Wildlife*, note 2 above.

65 See Sax, note 63 above at 19.

66 *Id.* at 21.

are personally imminently threatened with an injury in fact.⁶⁷ Could any American citizen bring an action to stop activities by an American transnational corporation that may endanger the arctic Whales, the Snow Leopard, the Polar Bear or the Panda? Quite unthinkable in the current climate of conservative strict approach to the standing.

The persistence of the strict approach to standing is therefore a serious threat to the prospects of public interest environmental litigation, not only in the USA, but also in other common law countries taking the same strict approach, and I argue that short of the hard to fancy constitutional amendment, the US federal courts must take a robust approach and create exceptions to the requirements to show an 'injury in fact' that is 'concrete and imminent', and not purely 'conjectural'. In addition, these words are not found in Article III of the US Constitution but are merely interpretive doctrines that the federal courts developed over time, and similarly could be progressively reinterpreted and developed over time. As correctly pointed out by Lord Diplock in *Ex parte National Federation of Self-Employed and Small Businesses Ltd*, the rules of standing

...were made by judges, [and] by judges they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities, that have been taking place continuously, sometimes slowly, sometimes swiftly, since the rules were originally propounded.⁶⁸

I posit that in order for common law countries sticking with the archaic strict approach to develop

⁶⁷ See *Lujan v Defenders of Wildlife*, note 2 above at 562 where the court reiterates this by ruling that if, 'the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish'. In fact, this can be interpreted to mean impossible to establish, because no one has been able to establish such standing. See also generally *Sierra Club v Morton*, note 2 above.

⁶⁸ See *Ex R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses Ltd*, note 17 above at 645-46 and 736.

their constitutional jurisprudence in this direction, it is beneficial to deploy comparative constitutional law and look to foreign developments in public interest environmental and constitutional litigation. This includes developments in South Africa⁶⁹ and such other jurisdictions like India,⁷⁰ among others. In fact it has been observed that this shift in the USA federal judiciary is showing some signs of becoming a reality albeit at a minuscule pace.⁷¹ Justices Ginsburg, in *Laidlaw*⁷² and together with Justice Breyer in *Grutter*⁷³ showed this progressive thinking. However both justices are currently in the minority. Furthermore Justice Breyer led the dissent in *Summers*, although in the latter case there was no direct reliance on comparative constitutional jurisprudence.

The strict approach to standing has often been justified on separation of powers doctrine together with a reference to the need to prevent the floodgates of litigation. In particular in *Summers* the court categorically stated that, '[i]n limiting the judicial power to 'Cases' and 'Controversies', Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to person caused by private or official violation of

⁶⁹ The Constitution of South Africa, 1996 is regarded as probably, 'the most progressive constitution in the world today in terms of guaranteeing and expansive set of fundamental human rights...' See D. Takacs, 'The Public trust Doctrine, Environmental Human Rights, and the Future of Private Property', 16 *New York University Environmental Law Journal* 71,740 (2008).

⁷⁰ See Perry-Kessaris, note 23 above.

⁷¹ V. Jackson and M. Tushnet eds, *Defining the Field of Comparative Constitutional Law* (New York: Foundation Press, 1999), see also *Grutter v Bollinger* 539 U.S 306 (2003). Even in the *Summers* decision the split in the Supreme Court is indicative of the growing awareness that in public interest environmental matters a religious observance of the stringent standing doctrine may be retrogressive, and see also D. Fontana, 'Refined Comparativism in Constitutional Law', 49 *UCLA L. Rev.* 539 (2001) (arguing that comparative constitutionalism can play a significant role in the USA and advocating the use of 'refined comparativism' as the model recommended).

⁷² See *Friends of the Earth Inc. v Laidlaw Env'tl. Servs., Inc.*, note 2 above

⁷³ *Grutter v Bollinger* 539 U.S 306 (2003)

law'.⁷⁴ In other words such function does not extend to rendering judgments on hypothetical cases. Does this imply that injury to the environment or animals does not fall into the purview of the function of courts? The court proceeded in *Summers* to highlight that, '[t]his limitation is founded in concern about the proper – and properly limited – role of the courts in a democratic society'.⁷⁵ The forestalling of an opening of the floodgates argument as noted above is also often articulated as the need to prevent busybodies and the litigious lot with deep pockets from bringing frivolous and vexatious 'public interest' actions. While this latter justification could be a real concern in the socio-economic context of the USA, still the procedural mechanisms to prevent an opening of the floodgates referred to above⁷⁶ may work, that is using costs orders and the general costs of litigation itself.

Regardless of the above justifications for this anachronism, the strict and conservative approach is out of sync with international developments in environmental law, and in public interest constitutional and environmental litigation where there is an increasing recognition that, more often than not, the people who suffer violation of constitutional rights, and natural resources that suffer environmental harms are unable to institute litigation due to a number of factors including the lack of supporting or complementary guarantees referred to above.⁷⁷ With regards to the stumbling block created by legal costs, Feris rightly argues that;

[o]ne should consider that litigation is expensive and very few individuals have the necessary financial resources required for extensive and complicated litigation. In the

South African context, people most often affected by environmental degradation are generally poor, which prevents them from gaining access to courts. Public interest organisations consequently take up the task of litigating on behalf of vulnerable groups.⁷⁸

Often there is an assumption that Americans and people in developed countries have means and are able to legally protect themselves but this masks the suffering of a huge population in those countries who also happen to disproportionately suffer from environmental injustice.⁷⁹ In the context of damage to nature while such damage or harm may directly affect people, often it largely directly affects or damages the environment, which in the USA legal conception does not have standing to bring suit, as it is not the subject of rights, but merely the object thereof. In this context the fact that the 'poor' in the USA may be different from the 'poor' in South Africa becomes immaterial, as we are in this paper mainly concerned with public interest environmental law organisations bringing suit to vindicate damage to the environment per se. The USA federal approach at best illustrates the deficiency of a human-centred utilitarian approach to environmental regulation where the interests of humans are elevated above all other interests. A purely utilitarian perspective, premised on a highly individualised conception of legal rights, is taken towards environmental harm. What does it take to change this anthropocentric view of environmental protection and public interest environmental litigation in USA? What did it take for South Africa to make the huge leap into the future?⁸⁰ I reiterate that failure a constitutional amendment to amend

74 See *Summers v Earth Island Institute*, note 5 above at 4 and see also *R (on the application of Rusbridger and another) v Attorney General* [2003] 3 All ER 784 (HL) and authorities there cited.

75 See *Summers v Earth Island Institute*, note 5 above 4.

76 See *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, note 12 above.

77 These include access to information and to justice, administrative justice and a change in the orthodox rules regarding litigation costs.

78 See Feris, note 8 above at 146 and Humby, note 46 above.

79 See generally C. Rechtschaffen and E. Gauna, *Environmental Justice Law, Policy and Regulation* 285-286 (Durham: Carolina Academic Press 2003).

80 It must be noted that even in South African anthropocentrism still underlies environmental law and regulation, see S. Pete 'Shuffling the Deckchairs on the Titanic? A Critique of the Assumptions Inherent in the South African *Fuel Retailers* Case from the Perspective of Deep Ecology', 15 *South African Journal of Environmental Law and Policy (SAJELP)* 103, 125 (2008).

Article III or introduce an environmental right,⁸¹ the duty is on the judges of the federal courts to take it upon themselves to liberally interpret Article 111 of the USA Constitution.

4

THE COMPARATIVE CONTEXT

4.1 The geopolitical and socio-economic context of the discourse

Whilst both the US federal courts' and the South African courts' approaches to the issue of standing stem from the constitutional provisions of both countries and their interpretation by the respective judiciaries, it must be understood that the two constitutions are the result of different processes of political struggle. The South African Constitution is far much recent and was forged when human beings had had over two centuries of experience with constitutional democracies and their frailties. In addition the environmental imperatives and the relative policy priority that such imperatives are receiving in different countries are quite unique and sometimes different. South Africa, like many other developing countries has such urgent need to promote social and economic development while the USA is regarded as a developed country. These distinctions though are not mirrored in the realities of the courts' approach to the issues of standing. On the contrary, in South Africa where standing to bring all sorts of environmental challenges should supposedly be stringent to pave way for fast track economic development activities, the legislature and the courts have taken a more liberal approach

compared to the stringent approach that is followed by the US federal courts. It appears therefore that the only possible reasons why the USA has maintained the stringent approach is the overemphasis on individual rights that has overshadowed the need to protect the environment for its own sake, and a constitutional tradition on standing which the federal courts seem too cautious to modernise.⁸² Likewise the way the common law interfaces with legislation, and how courts are developing and adapting it in different jurisdictions is more and more taking different routes.

Comparative constitutionalism as an interpretative tool in constitutional adjudication can be invaluable to the conservative common law countries including US federal courts to change the way they have so far applied the common law standing doctrine as modified by legislation and constitutions. It is well known that Americans take pride in their laws and traditions and the same pride extends to the practices of the judiciary, which takes pride in centuries old application of doctrines forged through struggle and constitutional maturation. Nevertheless with globalisation and the shift towards a global legal system, it is argued that the US federal courts should open up to foreign domestic and international jurisprudence where such jurisprudence shows progressive trends that accord with the modern drive towards making use of the law to achieve sustainable development. While the USA gave the world framework environmental legislation and environmental awareness since the 1960s, it is time for the USA and similarly minded conservative jurisdictions to look at the fruitful ramifications of the environmental movement in South Africa and other jurisdictions and feed into their own environmental law developments.

81 The constitutional route may work better of the it actually begins as state initiative (as most states do not use Article II of the USA Constitution to test standing) and then when the majority of states recognise an environmental right and the necessity to broaden standing to effectively implement it then the federal initiative may bear some fruit. See Loots, note 8 above cites authority showing that some states such Michigan in its Environmental protection Act of 1970 already provide for the public with standing to enforce environmental laws.

82 The call to 'green' the judiciary in South Africa by Kidd becomes even seem more apposite and urgent in the USA federal courts, M. Kidd, 'Greening the Judiciary', 3 *PELJ* at 1(2006). The stringent common law approach to standing is also still followed in many other jurisdictions with an Anglo heritage, see for instance *Prof. Wangari Maathai, Pius John Njogu, John Makanga v City Council of Nairobi, Commissioner of Lands and Market Plaza Limited High Court of Kenya* Case No: 72 of 1994, and *Lawrence Nginyo Kariuki v County Council of Kiambu* HCCC Misc. No. 1446 of 1994 (an individual cannot bring suit on behalf of the public interest).

Clearly the social, economic and political context of a legal system is crucial in determining whether it is necessary to borrow from other jurisdictions, yet the key problem is the apparent resistance by the US courts generally to borrow at all, preferring ad hoc use of comparative constitutional law where it suits one or more justices. Looking at comparative constitutional developments does not necessarily entail the court applying the foreign precedents, rather it can be a process to enrich the reasoning process of judges.⁸³ As Fontana argues 'American constitutional law must enter the new century with a willingness to deal with a rapidly changing world. All around, countries are developing sophisticated judicial systems with talented judges who write cogent and compelling opinions'. By no coincidence Fontana gives the example of the constitutional developments in South Africa. The globalisation of constitutional law is by far surpassed by the globalisation of environmental law, given increasing global environmental problems that require concerted international action to deal with them. If anything, this is one good reason for the USA federal judiciary to take cognisance of developments in the modernisation of the legal rules regarding standing in bring public interest environmental litigation.

5

CONCLUSION: THE FUTURE OF STANDING IN PUBLIC INTEREST ENVIRONMENTAL LITIGATION

I have argued that a comparative constitutional approach to the issue of standing in matters of public interest environmental and constitutional litigation can be a useful way for the US federal courts, especially the Supreme Court to reform and modernise their approach to standing and bring the US Constitution into line with global trends towards a much more liberalised perspective on standing

where harm to the environment or natural resource is concerned. I have argued further that as a starting point the USA can look to the progressive constitutional dispensation in South Africa and the standing jurisprudence that has been developed around the 1996 Constitution. Such a comparative approach will not only, enrich US public interest environmental law jurisprudence, but also create room for public interest environmental law (and constitutional or civil rights) organisations to effectively vindicate and enforce the rights of marginalised communities and entities like the environment and wild animals that lack legal rights.

While the US Supreme Court justices are taking small steps towards this direction, it is submitted that they could do more without opening the floodgates, or overreaching their constitutional mandate, or destroying the foundations of the US Constitution and the long standing Anglo – American common law traditions. The orthodox standing rules were developed well before the civil rights and the environmental movements and they must be brought into line with contemporary legal thinking that is underpinned by the concept of sustainable development. Quite clearly the standing doctrine in the US federal courts is not necessarily tied to the text of the US Constitution and there is room for the judiciary to use interpretative tools to move away from an approach that has constrained public interest environmental litigation for long. This call also equally applies to other common law jurisdiction especially those in developing countries still steeped in archaic common law doctrines that constrain access to the courts for public interest environmental litigators who are not necessarily fighting to vindicate individualised rights but rights intrinsic to nature.

⁸³ See D. Fontana, note 71 above at 557, who sets out the benefits of comparative constitutionalism and the different strategies through which judges could make use of it in judicial reasoning.

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