

FACILITATING PUBLIC INTEREST ENVIRONMENTAL LITIGATION THROUGH LOCUS STANDI REQUIREMENTS

A Comparative Analysis of South Africa and Germany

by

Nicolas Brennecke (BRNNIC045)

University of Cape Town

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Supervisor:

Professor Alexander Paterson

Institute of Marine and Environmental Law

University of Cape Town

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Abstract

The purpose of this dissertation is to undertake a critical and comparative review of South Africa and Germany's legislation and jurisprudence of relevance to facilitating public interest environmental litigation through the liberalisation of locus standi requirements. The dissertation presents the theoretical framework and explains the origin of public interest litigation and defines the term and its growing impetus in the environmental context. It further examines the term locus standi and the inherent link of public interest litigation with the liberalisation of locus standi requirements. Furthermore, it presents the theory behind the key elements which kind of interest is sufficient to found locus standi, which persons/entities are accorded locus standi, and which procedural issues such as environmental costs relate to locus standi. Regarding South Africa, the dissertation demonstrates how the traditionally restrictive approach regarding locus standi entirely changed with the adoptions of the 1993 Interim and 1996 Final Constitutions and the 1998 National Environmental Management Act, which have broadly enhanced plaintiffs litigating in the public interest in environmental matters. Apart from the pre-Constitutional context and the current legal framework, it evaluates the new approach with reference to court decisions and how these have addressed the aforementioned key elements influencing locus standi. Regarding Germany, the dissertation examines how its legal system, historically always focused on the protection of individual rights, has been extensively influenced by both international law such as the Aarhus Convention and European Union (EU) law, which have both promoted wider access to courts in environmental litigation. This part also examines both the legal framework and court decisions and the issue of how these court decisions have dealt with the three key elements. While the dissertation concludes that South Africa has liberalised its locus standi requirements in a more consistent manner, it argues that the liberalisation of locus standi requirements has not opened the often-feared floodgates in both jurisdictions. The dissertation presents the specific lessons Germany can learn from South Africa to facilitate public interest environmental litigation. On the one hand, it can learn from South Africa's clear and ambitious legal framework and from its mostly correspondingly progressive court decisions as well, while on the other hand some court decisions do not follow suit. Furthermore, the dissertation also illustrates the significant obstacles to implementing these lessons in Germany. Concerning the kind of interest plaintiffs must show, Germany is under no obligation by international or EU law to give up its focus on the protection of individual rights entirely. Regarding the range of plaintiffs that are accorded locus standi, it argues that neither legal regime has demanded Germany to implement such a wide extension of locus standi requirements like in South Africa. Regarding these issues, the dissertation concludes that in Germany there is still urgent need for reforms such as properly implementing the Aarhus Convention, though.

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1. Introduction

1.1. Context

The liberalisation of locus standi requirements has fundamentally increased the opportunities for public interest litigation.¹ This dissertation seeks to comparatively review the issue of how locus standi requirements have changed in South Africa and Germany and how this has affected public interest litigation particularly in the environmental context. Both legal systems have undergone fundamental changes in terms of locus standi requirements in the recent years. Despite this common fact, the way they have changed differs quite remarkably due to both systems' historic particularities.

The concept of public interest environmental litigation is increasingly considered to be crucial to create a dynamic environmental regime.² The term public interest indicates the common well-being of the public in general, while the word litigation refers to the process of initiating or defending a contested legal claim with a view of seeking a remedy.³ Public interest litigation can be defined as any litigation in which the plaintiff intends to advance a widely shared interest rather than a specific interest.⁴ Stemming from the flaws of the traditional notion of locus standi, there has been a growing impetus for public interest litigation. Unlawful decisions and acts of government may not be challenged, either because no-one is entitled to sue or because those who have the necessary locus standi choose not to sue.⁵ There are different forms of public interest litigation. They can be categorised into litigation against public entities as opposed to litigation against private entities. Another differentiation would be litigation of an administrative nature, seeking to hold the administration to account, as opposed to litigation of a criminal nature, which seeks to hold public/private entities to account. Another kind in this category would be litigation of a civil nature which seeks to secure interdicts/civil orders against private entities.

Locus standi deals with the issue whether a person approaching the court is a proper party to present the matter.⁶ Liberalising locus standi requirements has become increasingly important in public law generally since parties often do not bring a public law issue before the court for personal gain, but to

¹ Kidd M "Public interest environmental litigation: Recent cases raise possible obstacles" 2010 (13/5) *PER/PELJ* 27.

² Sang B "Tending towards greater eco-protection in Kenya: public interest environmental litigation and its prospects within the new constitutional order" 2013 (57/1) *J.A.L.* 32.

³ Sang 2013 (57/1) *J.A.L.* 31.

⁴ Mullen T "Public Interest Litigation in Scotland" 2015 (4) *Jur. Rev.* 363.

⁵ Mullen 2015 (4) *Jur. Rev.* 365.

⁶ Loots C "Standing, Ripeness and Mootness" in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* (2008) 7-1.

hold public authorities accountable for acting unlawfully.⁷ Public interest litigation significantly departs from the restrictive notion of locus standi.⁸ It has particularly had a significant impact in the environmental context. Environmental pollution often includes harm of such general nature, that it has become unreasonable to expect that only those directly affected have locus standi.⁹ Thus, the concepts of public interest environmental litigation and locus standi are inherently linked. The former significantly correlates with the liberalisation of locus standi requirements.

The traditional common-law approach towards locus standi in South Africa fundamentally altered with the adoption of the Interim Constitution¹⁰ in 1993 and the Final Constitution¹¹ in 1996. Prior to the constitutional shift, locus standi requirements used to be a lot more restrictive. A plaintiff was required both to have a personal interest in the matter and to have been adversely affected by the alleged wrong.¹² It could not approach a court arguing that the defendant did something contrary to the law.¹³ This traditionally posed a serious obstacle to individual public interest litigants or non-governmental organizations (NGOs).¹⁴ This approach entirely changed with the adoption of the Interim and Final Constitutions and the National Environmental Management Act¹⁵ (NEMA), which have jointly broadly widened access to courts. The wide locus standi in section 38¹⁶ Final Constitution (FC) must be seen in close correlation with the widely-applicable environmental right in section 24¹⁷ FC.¹⁸ The constitutional provision in section 38(d) that anyone acting in the public interest may approach a competent court for relief may be the most far-reaching of the five grounds.¹⁹ Standing in environmental litigation is far

⁷ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-2.

⁸ Sang 2013 (57/1) *J.A.L.* 31.

⁹ Sang 2013 (57/1) *J.A.L.* 32.

¹⁰ Constitution of the Republic of South Africa Act, 200 of 1993.

¹¹ Constitution of the Republic of South Africa Act, 108 of 1996.

¹² Devenish G "Locus standi revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution" 2005 (38) *De Jure* 31.

¹³ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-2.

¹⁴ Glazewski J *Environmental Law in South Africa* 5-12; Van der Linde J & Basson E "Environment" in *Constitutional Law of SA* (2008) 50-54.

¹⁵ National Environmental Management Act, 107 of 1998.

¹⁶ Section 38 FC: "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".

¹⁷ Section 24 FC: "Everyone has the right (a) to an environment that is not harmful to their health or 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".

¹⁸ Kotze L "A critical survey of domestic constitutional provisions relating to environmental protection in South Africa" 2008 (14) *Tilburg L. Rev.* 321.

¹⁹ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-11.

easier to secure as a result of section 24 as well.²⁰ Furthermore, section 32(1)(e) NEMA even provides broader standing by allowing any person or group of persons to seek appropriate relief in respect of any breach of NEMA, its section 2 principles, or any other statutory environmental provision.²¹ The only limitation is that the person acts in the interest of protecting the environment. Thus, the changes in both the Interim and Final Constitutions and NEMA have significantly facilitated plaintiffs to litigate in the public interest in environmental matters.

The traditionally restrictive approach in Germany has been fundamentally challenged as well, but in an entirely different context. Germany's legal system has historically always focused on the protection of individual rights. The traditional German "individual public right" (*subjektives öffentliches Recht*), historically developed in the nineteenth century, is still essentially important in German administrative law.²² Stemming from this concept, the German national particularity of the "impairment of rights doctrine" (*Schutznormtheorie*) emerged, resulting in a highly individualised system of judicial review.²³ In the Federal Republic of Germany, a general right of access to justice against acts of public authority was incorporated into article 19(4)²⁴ of the *Grundgesetz*²⁵ (Constitution of the Federal Republic of Germany) in 1949.²⁶ It was not possible to bring an action without relying on the possible impairment of an individual right, and a plaintiff could not win its case if the act of the public authority was simply unlawful.²⁷ The concept of public interest litigation used to be simply different in nature in this regard. Unlike South Africa, the new trend in German legislation did not start due to newly adopted constitutional provisions, but due to extensive influences by both international and EU law. First, Article 25 of the Single European Act²⁸ transferred the competence to regulate environmental matters to the European Community (EC) in 1986.²⁹ Secondly, the adoption of the Aarhus Convention³⁰ of the United Nations Economic Commission for Europe in 1998 had a remarkable effect on German law, aiming to

²⁰ Van der Linde & Basson "Environment" in *Constitutional Law of SA* (2008) 50-54.

²¹ Van der Linde & Basson "Environment" in *Constitutional Law of SA* (2008) 50-54.

²² Mangold A "The persistence of national peculiarities: Translating representative environmental action from transnational into German law" 2014 (21) *Ind. J. Global Legal Stud.* 223.

²³ Franzius C "Modernisierung des subjektiven öffentlichen Rechts: Zum Funktionswandel der Verwaltungsgerichtsbarkeit (Modernisation of the public individual right: On the functional transformation of administrative jurisdiction)" 2016 *UPR* 6.

²⁴ Article 19(4) *Grundgesetz*: "Should any person's rights be impaired by public authority, he may appeal to the courts."

²⁵ *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law/Constitution of the Federal Republic of Germany), May 23, 1949, BGBl. I, 1.

²⁶ Seibert MJ "Verbandsklagen im Umweltrecht: Aktueller Stand, Perspektiven und praktische Probleme (Representative actions in environmental law: Status quo, perspectives and practical problems)" 2013 *NVwZ* 1040.

²⁷ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 231.

²⁸ Single European Act, February 17, 1986, O.J. L 169/1.

²⁹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 233.

³⁰ Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters, 38 *ILM* 517 (1999).

provide wide access to justice.³¹ Since the EU was signatory party of the Convention, it was obliged to implement it into EU law, which it did in Directive 2003/35/EC^{32,33}. This directive amended Directive 85/337/EEC³⁴ (Environmental Impact Assessment/EIA Directive) and inter alia inserted a new article 10a³⁵. Germany implemented this directive into the *Umweltrechtsbehelfsgesetz*³⁶ (Environmental Appeals Act, abbreviated as UmwRG) whereas section 2(1)³⁷ required the infringement of provisions that protect individual rights.³⁸ The European Court of Justice (ECJ) has also played a decisive role by declaring that the specific abovementioned provision violated EU law.³⁹ Thus, both South Africa and Germany have widened access to justice in environmental matters under essentially different historic circumstances. This provides an excellent opportunity to comparatively review both approaches in order to reflect on their respective merits and challenges in the context of public interest environmental litigation.

1.2. Purpose and scope

The main purpose of this dissertation is to undertake a critical and comparative review of South Africa's and Germany's legislation and jurisprudence of relevance to promoting public interest environmental litigation through locus standi requirements. A subsidiary purpose is to understand the origins, forms

³¹ Myller B "Access to the courts of the member states for NGOs in environmental matters under European Union Law: Judgment of the Court of 12 May 2011 – Case C-115/09 Trianel and Judgment of 8 March 2011 – Case C-240/09 *Lesoochrannárske Zoskupenie*" 2011 (23) JEL 513.

³² Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L156/17.

³³ Porsch W "Verwaltungsgerichtlicher Rechtsschutz im Umweltrecht: über die Störung der Verbandsklage zur Umwelt-Popularklage? (Legal protection by administrative courts in environmental law: Beyond strengthening of representative environmental action to an environmental actio popularis?)" 2013 NVwZ 1393.

³⁴ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175; meanwhile replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1.

³⁵ Article 10a Directive 85/337/EEC: "Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively, (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court of law (...) to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. (...) What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article. (...)".

³⁶ *Umweltrechtsbehelfsgesetz* (Environmental Appeals Act), December 7, 2006, BGBl. I, 2816.

³⁷ Section 2(1) UmwRG (outdated version): "A domestic or foreign association (...) may bring an action in accordance with the Verwaltungsgerichtsordnung to challenge a decision (...) or a failure to adopt such a decision, without being required to maintain an impairment of its own rights, provided that the association (1) asserts that a decision (...) or a failure to adopt such a decision contravenes legislative provisions which seek to protect the environment, which confer individual rights and which may be relevant to the decision."

³⁸ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 250.

³⁹ Seibert 2013 NVwZ 1041; *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, ECJ, Judgment of May 12, 2011, C-115/09, ECLI:EU:C:2011:289.

and nature of public interest environmental litigation and the role of locus standi in providing key elements. This dissertation seeks to critically review both South Africa and Germany's legal regime against these elements. Besides this, the purpose is to distil a set of possible lessons from South Africa with a view to proposing possible reforms in Germany. Lastly, this dissertation aims at considering possible obstacles to implementing these reforms. While all the different types described in the section above would fall within the bounds of public interest litigation, the main focus of this dissertation is on litigation against public entities and litigation of an administrative nature respectively. The reason for this delimitation is the fact that most environmental laws apply in the administrative law sphere between the state and the citizen. Hence, citizens are merely entitled to litigate against administrative actions in the public interest.

1.3. Methodology and structure

This dissertation takes the form of a desk-top study, considering all relevant laws, jurisprudence, and commentary thereon. The legal framework will provide the basis from which to examine how locus standi requirements have changed over time and how this can be observed in various court decisions.

Structurally, the dissertation is divided into five main parts besides this introductory chapter. Part 2 examines the theoretical framework and interaction of public interest litigation with locus standi requirements. This part sets the context and gives reasons why the topic is an essential issue. It explains what public interest litigation generally is and what factors have caused a growth in impetus recently. It further illustrates what the concept of locus standi is and how it is closely linked with public interest litigation. In addition, it presents the key elements related to locus standi requirements. It theoretically addresses what kind of interest plaintiffs can be required to show, what forms of persons/entities can be accorded locus standi, and what types of procedural requirements the legal framework can create to facilitate or hinder public interest litigation. This part presents the theoretical framework against which these three fundamental issues are dealt with in the subsequent parts.

Part 3 critically considers the South African approach to locus standi in the context of public interest environmental litigation. This part is split into two components. First, it addresses the pre-Constitutional context and the general constraints posed by locus standi in the context of public interest environmental litigation. Secondly, it critically evaluates South Africa's relevant regime in the Post-Constitutional context. This part relates to the three themes distilled in part 2 so as to ensure consistency and coherence in the critical and comparative evaluation.

Part 4 focuses on Germany. First, it examines what the historic context in the era prior to the influence by the European Union (EU) was and what the general constraints to public interest environmental

litigation were. Secondly, it considers Germany's relevant legal framework in the era post the EU influence, again using the three aforementioned themes.

Part 5 examines what lessons Germany can learn from South Africa's approach to locus standi in the context of public interest environmental litigation and what obstacles there are in Germany to implementing these lessons. This part again addresses the three themes distilled in part 2. Part 6 constitutes the conclusion.

2. Theoretical framework

This section illustrates the theoretical framework of this dissertation to explain why it raises a relevant issue. First, the basis and rationale of public interest litigation are presented to distinguish it from other kinds of litigation. Secondly, the causes for the growing impetus of the concept in the environmental context are examined, illustrating its specific necessity and characteristics. Thirdly, the concept of locus standi is defined and its development is explained. The fourth part deals with the inherent link between locus standi and public interest litigation and presents arguments both against and in favour of a more liberalised approach to locus standi. Lastly, the fifth part presents the theory behind the key elements influencing locus standi to illustrate the theoretical framework against which these elements are addressed in the subsequent parts.

2.1. Basis and rationale of public interest litigation

Traditionally, most legal systems used to feature laws which only allowed the aggrieved party to seek a remedy.⁴⁰ Other not personally affected parties were unable to bring an action.⁴¹ Public interest litigation on the other hand generally means litigation in the interest of the nebulous term public interest.⁴²

The substance of the term public interest needs to be determined. This is an extremely difficult task.⁴³ Whenever disputing parties bring an action before the court, there may be said to be some wider public benefit.⁴⁴ Not everything that is of interest to the public is of public interest, though.⁴⁵ According to the utilitarian theory of *John Rawls*, public interest stands for the summing process of individual interests to define the interest of the broader community.⁴⁶ The responsibility for assessing the public interest is shared between legislators through approving laws, the executive through decision-making and the judiciary through checking government action.⁴⁷ Another notion is that a public interest is everything other than a private interest. While a private interest presumes a higher degree of self-interest to advance one's own goals, public officials, legislators and judges are seen to serve the public.⁴⁸ A common denominator between commentators is that public interest generally means the common well-being of the public.⁴⁹

⁴⁰ Schall C "Public interest litigation concerning environmental matters before human rights courts: A promising future concept?" 2008 (20/3) *J.E.L.* 419.

⁴¹ Schall 2008 (20/3) *J.E.L.* 419.

⁴² Schall 2008 (20/3) *J.E.L.* 419.

⁴³ Chakrabarti S et al "Whose cost the public interest?" 2003 *P.L.* 698.

⁴⁴ Chakrabarti et al 2003 *P.L.* 698.

⁴⁵ Schall 2008 (20/3) *J.E.L.* 419.

⁴⁶ MacNair D "In the name of the public good: 'public interest' as a legal standard" 2006 10 *Can. Crim. L. Rev.* 178.

⁴⁷ MacNair 2006 10 *Can. Crim. L. Rev.* 179.

⁴⁸ MacNair 2006 10 *Can. Crim. L. Rev.* 181.

⁴⁹ Sang 2013 (57/1) *J.A.L.* 32.

The term litigation refers to the process of initiating or defending a contested legal claim to enforce a right.⁵⁰ Thus, public interest litigation can be defined as any litigation in which the plaintiff intends to benefit the public at large and not primarily itself.⁵¹

The justification for public interest litigation is controversial. One argument points out that because parliament is effectively controlled by the elected government, the courts should provide an alternative forum to express widely-held objections against specific policies.⁵² The counter-argument is that courts should not be seen as a kind of competing player or even surrogate of the executive, though.⁵³ The courts generally have a legitimate role independent from the executive to protect essential rights of the public.⁵⁴ Ultimately, the rationale for public interest litigation is inherently linked with the purpose of judicial review and originates from the principle of the rule of law which means that government must be able to show legal authority for its actions.⁵⁵ This notion of the purpose of judicial review can provide a consensus rationale for public interest litigation.⁵⁶

2.2. Causes for growing impetus

The assumption used to be that the traditional model of litigation was able to ensure both observance of the specific laws governing executive action and respect for the rule of law.⁵⁷ However, this approach has changed since there is a growing demand that it must be possible for persons who do not have a personal interest in the outcome to litigate in the public interest.⁵⁸ Traditionally, political theory used to consider government to be the representative of social and public interests.⁵⁹ However, too often administrative decisions have failed to lead to public benefits.⁶⁰ Public interest litigation has been essential in enforcing environmental rights as well.⁶¹ One decisive reason making it suitable for environmental protection is its shift of focus from private to public rights, and the decreasing importance of the plaintiffs' showing a direct harm.⁶²

Public interest environmental litigation has specific characteristics. First, it is primarily aimed at protecting the environment rather than particular individuals.⁶³ Secondly, it means that any citizen or

⁵⁰ Sang 2013 (57/1) *J.A.L.* 32.

⁵¹ Devenish 2005 (38) *De Jure* 42.

⁵² Cane P "Standing up for the public" 1995 *P.L.* 277.

⁵³ Cane 1995 *P.L.* 277.

⁵⁴ Cane 1995 *P.L.* 277.

⁵⁵ Mullen 2015 (4) *Jur. Rev.* 364.

⁵⁶ Mullen 2015 (4) *Jur. Rev.* 364.

⁵⁷ Mullen 2015 (4) *Jur. Rev.* 365.

⁵⁸ Mullen 2015 (4) *Jur. Rev.* 365.

⁵⁹ Mingde C & Fengyuan W "Environmental public interest litigation in China" 2011 (19) *Asia Pac. L. Rev.* 222.

⁶⁰ Mingde & Fengyuan 2011 (19) *Asia Pac. L. Rev.* 222.

⁶¹ Sang 2013 (57/1) *J.A.L.* 32.

⁶² Sang 2013 (57/1) *J.A.L.* 32.

⁶³ Mingde & Fengyuan 2011 (19) *Asia Pac. L. Rev.* 219.

NGO may bring a lawsuit to court when the environmental public interest is at risk.⁶⁴ Thirdly, it is litigation in which the plaintiff is not self-serving, but acts for the public interest.⁶⁵ Significantly, public interest environmental litigation revolutionizes the original nature of the judiciary system which only protects private interests.⁶⁶ It is particularly important in the environmental law sector since a lack of enforcement is extremely problematic in that field.⁶⁷

It is essential to note the crucial role of environmental NGOs.⁶⁸ They are non-profit groups and environmental protection is their main aim.⁶⁹ Furthermore, they can usually access resources more easily, are better informed than individuals and can bring an action more effectively.⁷⁰ They have increasingly taken a crucial role in enforcing laws by participating in compliance mechanisms and bringing actions before court themselves.⁷¹

2.3. Concept of locus standi

Defining locus standi is not an easy task since the concept generally refers to different aspects.⁷² Generally speaking, the concept deals with the issue whether a person approaching the court is a proper party to present the matter.⁷³ More specifically, it determines the right to sue which requires that a plaintiff should both have the necessary capacity to sue and a legally recognised interest in the relevant action to seek relief.⁷⁴ Referring to the former as capacity to sue and the latter as locus standi provides more clarity.⁷⁵ Determining one's capacity to sue, factors such as legal capacity, mental capacity and age must be taken into account.⁷⁶ Locus standi itself involves the issues whether the claim is based on a legally enforced right and whether the particular plaintiff is entitled to enforce that right.⁷⁷ Traditionally, in most jurisdictions, if the plaintiff has a legal right and has sustained an injury to that right by the enforcement of a statute, it has the necessary locus standi.⁷⁸

The reasons for the doctrine's development are multifaceted: Firstly, locus standi evolved to ensure that courts play their right function in a democracy and serve the rule of law and the doctrine of separation of

⁶⁴ Mingde & Fengyuan 2011 (19) *Asia Pac. L. Rev.* 219.

⁶⁵ Mingde & Fengyuan 2011 (19) *Asia Pac. L. Rev.* 219.

⁶⁶ Mingde & Fengyuan 2011 (19) *Asia Pac. L. Rev.* 220.

⁶⁷ Schall 2008 (20/3) *J.E.L.* 444.

⁶⁸ Schall 2008 (20/3) *J.E.L.* 420.

⁶⁹ Mingde & Fengyuan 2011 (19) *Asia Pac. L. Rev.* 220.

⁷⁰ Schall 2008 (20/3) *J.E.L.* 444.

⁷¹ Schall 2008 (20/3) *J.E.L.* 420.

⁷² Devenish 2005 (38) *De Jure* 28.

⁷³ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-1.

⁷⁴ Devenish 2005 (38) *De Jure* 28.

⁷⁵ Devenish 2005 (38) *De Jure* 28.

⁷⁶ Bray W "Locus standi in environmental law" 1989 (XXII) *CILSA* 34.

⁷⁷ Devenish 2005 (38) *De Jure* 28-29.

⁷⁸ Benzioni F "Environmental standing: Who determines the value of other life?" 2008 (18) *Duke Envtl. L. & Pol'y F.* 352.

powers.⁷⁹ Secondly, the purpose was to prevent the floodgates from opening, where every “busybody” could bring any case before the court regardless of their interest in the matter.⁸⁰ Hence, the doctrine served a gate keeping function to restrict access to judicial remedies.⁸¹ Thirdly, it stemmed from the litigation focus on the protection of private rights, leading to highly individualised systems of judicial review.⁸²

2.4. Link between locus standi and public interest litigation

The concept of locus standi is inherently linked with public interest litigation mainly since the latter closely correlates with the liberalisation of locus standi requirements. The most significant arguments for both the traditional and liberalised approach towards locus standi are contrasted.

On the one hand, various arguments have been levelled against the recent approach to widen access to the courts and enable public interest litigation. Two essential arguments against a new approach suggest that the concept of locus standi is a consequence of the separation of powers.⁸³ Firstly, while courts are only supposed to adjudicate individualised disputes, political questions are a matter for the administration.⁸⁴ Secondly, this should be the task of democratically accountable public bodies rather than private individuals.⁸⁵ Otherwise the courts would be constrained to make policy decisions which an elected government is entitled to.⁸⁶ Thus, the concept of locus standi is a crucial element of the principle of separation of powers.⁸⁷ The large resistance of the judiciary to intervene in matters of public interest goes beyond the traditional notion of the court’s role, though. It has a far more practical reason.⁸⁸ Many of the judiciary simply fear that opening the court’s door to public interest litigants would risk opening the virtual floodgates to a multiplicity of proceedings.⁸⁹

On the other hand, there are significant arguments in favour of a more liberalised approach. The potential results stemming from the traditional approach are obvious. Since an individual lacking locus standi is an incapable plaintiff, government can exceed its powers in case of an abuse.⁹⁰ The purpose

⁷⁹ Murombo T “Strengthening locus standi in public interest environmental litigation: Has leadership moved from the United States to South Africa?” 2010 (6/2) *LEAD* 167.

⁸⁰ Murombo 2010 (6/2) *LEAD* 167-168.

⁸¹ Bailey T “Judicial discretion in locus standi: Inconsistency ahead?” 2010 (4) *Galway Student L. Rev.* 1.

⁸² Murombo 2010 (6/2) *LEAD* 168.

⁸³ Scalia A “The doctrine of standing as an essential element of the separation of powers” 1983 (17) *Suffolk U.L. Rev.* 894.

⁸⁴ Hough B “A re-examination of the case for a locus standi rule in public law” 1997 (28) *Cambrian L. Rev.* 88.

⁸⁵ Scalia 1983 (17) *Suffolk U.L. Rev.* 894.

⁸⁶ Hough 1997 (28) *Cambrian L. Rev.* 88.

⁸⁷ Scalia 1983 (17) *Suffolk U.L. Rev.* 881.

⁸⁸ Haskett D “Locus standi and the public interest” 1981 (4) *Can.-U.S. L.J.* 44.

⁸⁹ Haskett 1981 (4) *Can.-U.S. L.J.* 44.

⁹⁰ Hough 1997 (28) *Cambrian L. Rev.* 83.

of public law is to impose legal controls on governmental powers, though.⁹¹ The traditional approach fundamentally challenges the meaning of the rule of law.⁹² Hence, locus standi rules in public law have historically been embedded in a system which does not see the purpose of judicial review as the control of administrative action per se.⁹³ However, the requirement that government must observe the law must be a constitutional priority.⁹⁴ Regarding the argument of having to keep the floodgates closed, one has to further examine the term “potentially vexatious litigant”, which stands for a person whose motive is not to right a wrong.⁹⁵ A plaintiff who lacks a personal grievance, but genuinely seeks to further an interest, cannot be categorised that way, though.⁹⁶

Furthermore, the traditional approach has also proved to have significant flaws in the environmental context. Access to justice is decisive for environmental protection, as environmental law suffers from an enforcement deficit due to the inability and unwillingness of national governments to implement legislation sufficiently and the fact that the majority of environmental laws does not confer rights on individuals.⁹⁷ *Christopher Stone* already expressed in 1972 that the fact that the environment has no voice of its own should not deprive it from having legal rights.⁹⁸ The courts could traditionally not hear a case brought by a citizen in which the ecosystem or other life is injured by specific activities unless the human plaintiff can show that it was also injured by those activities.⁹⁹ The odd effect was that an injury to the ecosystem is only relevant to the extent that it also injures the human plaintiff.¹⁰⁰ Put it differently, the ecosystem becomes a setting for the human drama of injury and healing.¹⁰¹ Hence, public interest litigation is an important feature of the public law system to ensure that government acts lawfully and the entire ecosystem is protected properly.¹⁰²

2.5. Key elements influencing locus standi

There are specific key elements which influence locus standi and have a significant impact on public interest litigation. The main issues regarding the concept of locus standi are the questions which kind of interest is sufficient to found locus standi, which persons/entities are accorded locus standi and which

⁹¹ Hough 1997 (28) *Cambrian L. Rev.* 83.

⁹² McCalla W “Practice and procedure” 1979 (2) *Advoc. Q.* 326; Haskett 1981 (4) *Can.-U.S. L.J.* 45.

⁹³ Hough 1997 (28) *Cambrian L. Rev.* 83.

⁹⁴ Hough 1997 (28) *Cambrian L. Rev.* 83-84.

⁹⁵ Cane P “Statutes, standing and representation” 1990 *P.L.* 312.

⁹⁶ Cane 1990 *P.L.* 312.

⁹⁷ Hjalmarsson K “Access to justice in environmental matters in the EU Member States: A study of the case law from the European Court of Justice on access to national courts for non-governmental organizations and the costs of environmental proceedings” 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 9.

⁹⁸ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 9; Stone CD *Should trees have standing? Law, morality, and the environment* (2010) at 1-31.

⁹⁹ Benzoni 2008 (18) *Duke Env'tl. L. & Pol'y F.* 352.

¹⁰⁰ Benzoni 2008 (18) *Duke Env'tl. L. & Pol'y F.* 349.

¹⁰¹ Benzoni 2008 (18) *Duke Env'tl. L. & Pol'y F.* 349.

¹⁰² Cane 1990 *P.L.* 311-312.

procedural issues relate to locus standi. This section deals with the theoretical framework behind these key elements to coherently divide the subsequent analysis of the South African and German approach.

2.5.1. Interests sufficient to found locus standi

The first crucial question is which kind of interest is sufficient to found locus standi. In the law of locus standi, one must distinguish between plaintiffs who seek a remedy on the basis of their own personal interests (personal standing) and plaintiffs who seek relief on the basis that they represent the interests of other individuals or the public interest (representative standing).¹⁰³ Within the first category, one can generally distinguish between a personal interest and a special interest in the matter. The second category can be divided into three different kinds. Associational standing generally involves a group bringing an action on behalf of individuals who are its members.¹⁰⁴ Surrogate standing involves an individual representing the interests of another individual.¹⁰⁵ Public interest standing involves an individual or group claiming to represent the public interest.¹⁰⁶ Regarding the facilitation of public interest environmental litigation, one can conclude that representative standing is the far more efficient option. In cases where no particular interest is affected, representative litigants are still entitled to bring an action. However, the sub-categories of associational and surrogate standing still require particular interests of the group's members or other individuals. This is not the case regarding the public interest which goes far beyond the impact on the interests of individuals. Only this kind of standing can efficiently facilitate the concept of public interest environmental litigation.

2.5.2. Persons/entities which have locus standi

The second essential question is which persons or entities can be accorded locus standi. The main distinction in this regard is between granting individuals/natural persons locus standi on the one hand and entities/legal persons on the other. Regarding the specific context of public interest environmental litigation, one needs to further specify this distinction and take the particular entity of environmental NGOs into account. While some jurisdictions only specifically grant the power to litigate in the public interest to NGOs, others extend this to individuals in general. It is of severe importance whether only a restricted amount of entities such as environmental NGOs are entitled to sue or all individuals are granted this power. While the first kind might still significantly constrain public interest litigation in many cases, the second one might facilitate it to a greater extent.

¹⁰³ Cane 1995 *P.L.* 276.

¹⁰⁴ Cane 1995 *P.L.* 276.

¹⁰⁵ Cane 1995 *P.L.* 276.

¹⁰⁶ Cane 1995 *P.L.* 276.

2.5.3. Procedural issues relating to locus standi

The most significant procedural issue relating to locus standi is the question which party must bear the litigation costs. The main options to regulate this issue are either to impose the costs on each party without any regard for the outcome of the case or to impose the costs of the prevailing party on the losing one. While the latter is usually the case, further differentiations can be made regarding public interest environmental litigation. Either parties litigating in the public interest are exempted from bearing the costs at all or there are specific provisions to avoid overly expensive costs for them. Since public interest litigants are often under-resourced, they can easily be discouraged by restrictive cost regulations. Hence, it is first significant whether they are completely exempted from bearing the costs in all cases. Secondly, it is essential whether there are other provisions to facilitate litigating in the public interest.

3. South African approach to locus standi

This section deals with the South African approach to locus standi in the context of public interest environmental litigation. First, it examines the pre-Constitutional context and gives an overview of the common-law approach. Hereby, it explains how the traditional South African approach differed from the more restrictive English common-law position and how this approach was developed. Secondly, this section addresses the post-Constitutional context, illustrating the legal framework and evaluating it with reference to court decisions. It deals with the relevant provisions of the Interim and Final Constitutions and NEMA and with the question how the three key elements influencing locus standi have been addressed by the courts. Hereby, it is of essential importance to examine whether the courts have interpreted the provisions of the Interim and Final Constitutions respectively and of NEMA in a proper manner and given them a concise meaning regarding the facilitation of public interest environmental litigation.

3.1. Pre-Constitutional context

3.1.1. Overview of common-law approach

It is essential to first deal with general public interest court decisions before specific environmental cases, since several landmark decisions are of a more general nature.

Since English common law has significantly influenced South African common law, the assumption might be that both jurisdictions have the same locus standi requirements. However, an essential distinction must be made. In English law, a plaintiff must generally satisfy the court that it has sustained some special damage greater than that sustained by ordinary members of the public.¹⁰⁷ The traditional English test was even still applied in the later South African case *Von Moltke v Costa Areoso (Pty) Ltd*¹⁰⁸ in 1975.¹⁰⁹ This requirement presented an insurmountable obstacle to public interest litigation. However, already evident at an early stage in *Dalrymple v Colonial Treasure*¹¹⁰ (*Dalrymple case*), South African law explicitly departed from the erstwhile English common-law position.¹¹¹ In this case, *Innes CJ* stated that provided only that the plaintiff had a direct personal interest, it made no difference that its interest or injury were no greater than those of other members of the public.¹¹² Hence, the approach in

¹⁰⁷ Devenish 2005 (38) *De Jure* 30; *R v Surrey Justices* 1870 LR 5 QB 466; *R v Nicholson* 1899 2 QB 455; *R v Richmond Confirming Authority* 1921 1 KB 248.

¹⁰⁸ 1975 (1) SA 255 (C).

¹⁰⁹ Amechi E "Strengthening environmental public interest litigation through citizen suits in Nigeria: Learning from the South African environmental jurisprudential development" 2015 (23.3) *AJICL* 396; Bray 1989 (XXII) *CILSA* 39.

¹¹⁰ 1910 TS 372.

¹¹¹ Amechi 2015 (23.3) *AJICL* 396.

¹¹² 1910 TS 372 at 380-1; Amechi 2015 (23.3) *AJICL* 396.

South African law became slightly different. Regarding the facilitation of public interest litigation, this less rigid rule can be acknowledged as positive development.

An even more positive observation can be made in the nineteenth-century case of *Dell v The Town Council of Cape Town*¹¹³ which indicated that a personal interest was not a requirement in South Africa at the time.¹¹⁴ The court argued that the plaintiff had locus standi for an action brought in the public interest and held that it is entitled to make this application to restrain the public nuisance in any public place in town.¹¹⁵ Hence, this decision marked an exception and constituted an innovative judgment which facilitated public interest environmental litigation at an early stage.

Nevertheless, this progressive approach changed in various cases such as *Patz v Green & Co*¹¹⁶ (*Patz case*), *Bagnall v Colonial Government*¹¹⁷ (*Bagnall case*), and in the *Dalrymple* case, all decided in the beginning of the twentieth century.¹¹⁸ In the *Bagnall* case, it was explicitly stated that South African courts did not recognise the right of an individual to vindicate the rights of the public where it had not sustained any direct injury.¹¹⁹ The *Dalrymple* case similarly highlighted the difficulties created by the traditional approach.¹²⁰ Although the illegality of the decision was accepted by the court, *Innes CJ* ruled 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”.¹²¹ On a positive note, the *Patz* case at least made some concessions and laid down an important precedent. It stated that 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 the statute would have locus standi to enforce it.¹²² Thus, on the one hand, this decision enabled public-spirited citizens or organisations to litigate, but on the other hand posed a severe obstacle to them by requiring them to show personal damage. *Director of Education, Transvaal v McCagie and Others*¹²³ was another landmark decision.¹²⁴ According to *Innes CJ*, the principle of South African law was that “a private

¹¹³ 1879 (9) Buch 2.

¹¹⁴ Glazewski *Environmental Law in South Africa* (2013) 7-34.

¹¹⁵ Glazewski J “Environmental Justice and the new South African democratic legal order” 1999 (1) *Acta Juridica* 18; 1879 (9) Buch 2 at 6.

¹¹⁶ 1907 TS 427.

¹¹⁷ 1907 24 SC 470.

¹¹⁸ Glazewski 1999 (1) *Acta Juridica* 18-19.

¹¹⁹ 1907 24 SC 470; confirmed by the Appellate Division in the case of *Roodeport-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87.

¹²⁰ Plasket C “Representative Standing in South African Law” 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 262.

¹²¹ Beck A “Locus standi in judicio or ubi ius ibi remedium” 1983 (100) *SALJ* 279; Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 263; 1910 TS 372 at 379.

¹²² Devenish 2005 (38) *De Jure* 31; Bray 1989 (XXII) *CILSA* 39; Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 263.

¹²³ 1918 AD 616.

¹²⁴ Murombo 2010 (6/2) *LEAD* 170.

individual can only sue on his own behalf, not on behalf of the public".¹²⁵ In summary, all of these landmark decisions shaped South African jurisprudence for many decades and illustrated a severe regression concerning public interest litigation.

After the aforementioned cases manifested a highly individualised view of locus standi, the latter case *Wood and Others v Ondangwa Tribal Authority and Another*¹²⁶ constituted the first expansive exception.¹²⁷ The Appellate Division recognised the interest of the plaintiff, a morally courageous bishop, who acted on behalf of members of his church who had been subjected to brutal public floggings during detention.¹²⁸ On a positive note, it must be appreciated that the Appellate Division adopted such a liberal approach in the context of Apartheid.¹²⁹ However, it is important to bear in mind specific conditions. First, each plaintiff had to convince the court that the affected person is not able to bring an action itself; secondly, the plaintiff had to satisfy the court that it had good reason for making the application; and thirdly, the plaintiff had to establish that the affected person would have made the application itself had this been possible.¹³⁰ Despite these hurdles, this decision presented an opportunity to set a precedent to liberalise the traditional rule.¹³¹ Unfortunately, in various subsequent decisions, the Appellate Division limited its application to matters involving violations of life, liberty or physical integrity.¹³²

*Bamford v Minister of Community Development and State Auxiliary Services*¹³³ was another innovative judgment regarding locus standi.¹³⁴ *Watermeyer JP* stated that the relevant legislation conferred a right 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 actual damage.¹³⁵ Although the decision did not fully pave the way for an unrestricted public interest litigation, its reasoning was highly differentiated and marked an important step to liberalising the traditional requirements.

¹²⁵ 1918 AD 616 at 623; *Murombo* 2010 (6/2) *LEAD* 168.

¹²⁶ 1975 (2) SA 294 (A).

¹²⁷ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-2; 1975 (2) SA 294 (A).

¹²⁸ *Devenish* 2005 (38) *De Jure* 32.

¹²⁹ *Devenish* 2005 (38) *De Jure* 32.

¹³⁰ 1975 (2) SA 294 (A) at 311F-G.

¹³¹ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-3.

¹³² *Murombo* 2010 (6/2) *LEAD* 169; Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-3; *Christian League of Southern Africa v Rall* 1981 (2) SA 821, 826-7 (O); *Ahmdiyya Anjuman Ihaati-Islam Labore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855, 864E-F (C).

¹³³ 1981 3 SA 1054 (C).

¹³⁴ *Devenish* 2005 (38) *De Jure* 32.

¹³⁵ *Bray* 1989 (XXII) *CILSA* 40; 1981 3 SA 1054 (C) at 1060.

The more liberal approach was confirmed in various cases such as *Mgedle v Administrator, Cape*¹³⁶. Whereas in *Bamford's* case, the plaintiff did not even allege that he had ever visited the park or that he intended to use it, the plaintiffs in *Mgedle* had indeed alleged that they would one day wish to exercise the right to submit representations.¹³⁷ In *Veriava and Others v President, SA Medical and Dental Council, and Others*¹³⁸, the court held that where it appeared that the legislature had prohibited an act in the interest of any person or class of persons, then the intervention of the court could be sought by any such person to enforce the prohibition without proof of special damage.¹³⁹ These judgments emphasised the far less restrictive approach towards locus standi requirements, although they did not fully facilitate public interest litigation.

While all the previously discussed cases dealt with public interest litigation in general, in *von Moltke v Costa Aerosa*¹⁴⁰, the traditional requirements were still apparent in the environmental context.¹⁴¹ Although the building operations appeared to be illegal, the court refused to grant the interdict and held that the plaintiff must show some injury peculiar to itself.¹⁴² Despite the increasingly liberal stance, these judgments still required a direct and substantive interest on the part of the plaintiff. In *Milani and Another v South African Medical and Dental Council and Another*¹⁴³, the court reaffirmed this position.¹⁴⁴ Hence, locus standi requirements still caused difficulties when a plaintiff in an administrative dispute is not personally involved in an individual relationship with the authority.¹⁴⁵

3.1.2. Historic constraints for public interest environmental litigation

The traditional South African approach posed severe obstacles in terms of the three key elements relating to locus standi. Concerning the issue which kind of interest is sufficient to found locus standi, South African law traditionally obliged an individual to show some degree of personal interest in the challenged administrative action.¹⁴⁶ It was not possible for a plaintiff to approach a court on the basis that the defendant simply violated the law, if there was a lack of personal interest.¹⁴⁷ Regarding the question which persons/entities were accorded locus standi, this was restricted to individuals. Hence, South African courts used to have a highly restrictive attitude towards the issue of locus standi before

¹³⁶ 1989 1 SA 752 (C) at 758D-759B.

¹³⁷ Devenish 2005 (38) *De Jure* 33.

¹³⁸ 1985 (2) SA 293 (T).

¹³⁹ 1985 (2) SA 293 (T) at 315.

¹⁴⁰ 1975 (1) SA 255 (C).

¹⁴¹ Glazewski *Environmental Law in South Africa* (2013) 7-35.

¹⁴² Glazewski 1999 (1) *Acta Juridica* 19; 1975 (1) SA 255 (C) at 258.

¹⁴³ 1990 (1) SA 899 (T).

¹⁴⁴ 1990 (1) SA 899 (T) at.

¹⁴⁵ Devenish 2005 (38) *De Jure* 33.

¹⁴⁶ Glazewski *Environmental Law in South Africa* (2013) 5-12; *von Moltke v Costa Aerosa* 1975 (1) SA 255 (C); Bray 1989 (XXII) *CILSA* 33.

¹⁴⁷ Loots „Standing, Ripeness and Mootness“ in *Constitutional Law of SA* (2008) 7-2.

the Interim Constitution was introduced in 1993.¹⁴⁸ Meeting these traditional requirements mostly proved to be a significant hurdle for public spirited citizens and environmental NGOs.¹⁴⁹ At least, courts sometimes relaxed the rigidity of the rule and allowed actions without requiring the sufficient interest test.¹⁵⁰ Nevertheless, such actions were limited to matters regarding violations of life, liberty or physical integrity.¹⁵¹ Lastly, regarding the question of procedural issues, there were no specific requirements to widen access to court to a larger amount of people and facilitate public interest environmental litigation at all. Hence, it can be concluded that despite a more positive trend in South African jurisprudence towards the end of the common-law era, litigating in the public interest was still doomed to failure.

3.2. Post-Constitutional context

3.2.1. Overview of the legal framework

3.2.1.1. Constitutional dispensation

Section 7(4)¹⁵² of the Interim Constitution fundamentally altered the restrictive common-law rules. Section 7(4)(b) Interim Constitution (IC) granted locus standi to persons acting in their own interests, associations acting in their members' interests, persons acting on behalf of other persons, persons acting as members of or in the interests of a group or class of persons, and, decisively for this dissertation, persons acting in the public interest. Section 38 FC only contains minor changes to section 7(4) IC and confirmed the wide extension of locus standi in this provision.¹⁵³ The provision in section 38(d) FC is the most extensive of the five grounds since it appears to provide for an unrestricted public interest action.¹⁵⁴ Both individuals and NGOs can approach a court to bring an action in the public interest.¹⁵⁵ Section 38(d) FC presents a remarkable opportunity for public-spirited citizens and environmental NGOs to promote and enforce the interests of the environment even in cases where the health of humans is not affected by the degrading activities.¹⁵⁶ Consequently, section 38(d) has

¹⁴⁸ Loots „Standing, Ripeness and Mootness“ in *Constitutional Law of SA* (2008) 7-2.

¹⁴⁹ Amechi 2015 (23.3) *AJICL* 397; *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 at 574I.

¹⁵⁰ Amechi 2015 (23.3) *AJICL* 397.

¹⁵¹ *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A); *Namibian National Students' Organisation (NANSO) v Speaker of the National Assembly for SWA* 1990 (1) SA 617 (SWA).

¹⁵² Section 7(4) IC: “(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 own name; (iv) a person acting as a member of or in the interest of a group or class of persons; or (v) a person acting in the public interest.

¹⁵³ Cote D & Van Garderen J “Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest” 2011 (27) *S. Afr. J. on Hum. Rts.* 171; Kotze L & du Plessis A “Some brief observations on fifteen years of environmental rights jurisprudence in South Africa” 2010 (3) *J. Ct. Innovation* 163.

¹⁵⁴ Loots “Standing, Ripeness and Mootness” in *Constitutional Law of SA* (2008) 7-11.

¹⁵⁵ Glazewski *Environmental Law in South Africa* (2013) 7-36.

¹⁵⁶ Amechi 2015 (23.3) *AJICL* 398.

reinstated the historical *actio popularis* of Roman and early Roman-Dutch law, whereby every person's interest in the lawful performance of government activities was accepted.¹⁵⁷ Hence, in theory, the constitutional provision provides for a highly progressive public interest litigation. However, the actual meaning of the liberalised requirements in practice depends upon the way in which the courts interpret the words public interest.¹⁵⁸

However, one must note that the locus standi provisions of section 38(d) FC only apply in the case of an infringement of a right entrenched in Chapter 2.¹⁵⁹ Otherwise the common-law rules continue to apply.¹⁶⁰ This fact could pose a severe disadvantage to public interest litigants. Nevertheless, since section 39(2) FC requires that courts should have due regard to the spirit of the Bill of Rights in the interpretation of any legislation and the development of the common law, the common-law requirements should be liberalised as well.¹⁶¹ The liberalisation of the common-law rules has already been considered by the courts.¹⁶²

In the environmental context, another remarkable feature of the Final Constitution is the recognition of a substantive right to a healthy environment in section 24 FC.¹⁶³ The wide locus standi provisions of section 38 FC arguably correlate with section 24 FC.¹⁶⁴ Section 24 FC has enabled plaintiffs concerned about environmental protection to litigate in the case of any infringement of this right. In environmental litigation, locus standi is significantly easier to secure as a result of section 24 FC.¹⁶⁵ Thus, a drastic revision of the common-law restrictions to facilitate meaningful environmental protection has taken place.¹⁶⁶

3.2.1.2. National Environmental Management Act

The NEMA included section 32(1)¹⁶⁷ to provide for extensive locus standi requirements in environmental matters.¹⁶⁸ This section extends the circumstances in which relief may be granted to include a breach of

¹⁵⁷ Devenish 2005 (38) *De Jure* 42-43.

¹⁵⁸ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-11.

¹⁵⁹ Glazewski *Environmental Law in South Africa* (2013) 7-36; Kotze & du Plessis 2010 (3) *J. Ct. Innovation* 164.

¹⁶⁰ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-13.

¹⁶¹ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-13.

¹⁶² Glazewski *Environmental Law in South Africa* (2013) 7-36; *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others* 1996 (3) SA 1095 (Tk).

¹⁶³ Amechi 2015 (23.3) *AJICL* 397.

¹⁶⁴ Kotze 2008 (14) *Tilburg L. Rev.* 321.

¹⁶⁵ Van der Linde & Basson "Environment" in *Constitutional Law of SA* (2008) 50-54.

¹⁶⁶ Devenish 2005 (38) *De Jure* 37.

¹⁶⁷ Section 32(1) NEMA: "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 provision 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

any provision of NEMA or any other provision of a statute intended to protect the environment.¹⁶⁹ Hence, it amplifies the constitutional clause in section 38 FC, which directly only grants locus standi for threats to rights in the Bill of Rights.¹⁷⁰ Section 32(1) grants locus standi to persons acting in their own interest, on behalf of another person's interest, in the interest of or on behalf of a group or class of persons, in the public interest and in the interest of protecting the environment. While section 32(1)(d) enables plaintiffs to litigate in the public interest similarly like section 38(d) does, section 32(1)(e) NEMA even provides broader locus standi. It allows any person or group of persons to seek appropriate relief in case of any breach of NEMA, its section 2 principles, or any provision of any statutory provision pertaining to environmental protection.¹⁷¹ The only condition is that the person acts in the interest of protecting the environment.¹⁷² Hence, section 32 has broadened the locus standi of persons seeking to vindicate not only in the public interest¹⁷³, but in the interest of protecting the environment¹⁷⁴ as well.¹⁷⁵ The liberalisation in section 38(d) FC, combined with the expanded opportunities provided for in section 32(1) NEMA, has increased the chances for public interest environmental litigants in theory.¹⁷⁶ Again, the actual significance in practice depends on the interpretative approach by the courts.

Section 32 NEMA does not only extend the constitutional clause, but further enhances the position of potential litigants since it includes innovative provisions regarding the award of costs.¹⁷⁷ The issue of costs is of severe importance since public interest litigants are often under-resourced and hence often do not have the financial and temporal means to litigate. Consequently, costs can pose a severe obstacle when bringing public interest actions.¹⁷⁸ Section 32(2)¹⁷⁹ NEMA contains a progressive provision since it grants the courts the discretion not to award costs against plaintiffs litigating in the public interest or the interest of environmental protection.¹⁸⁰ Hence, this position may fundamentally

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.”

¹⁶⁸ Glazewski *Environmental Law in South Africa* (2013) 7-37; Kidd 2010 (13) (5) *PER/PELJ* 38; Murombo 2010 (6/2) *LEAD* 166.

¹⁶⁹ Kotze 2008 (14) *Tilburg L. Rev.* 321-322; section 32(1) NEMA.

¹⁷⁰ Glazewski *Environmental Law in South Africa* (2013) 7-37.

¹⁷¹ Van der Linde & Basson “Environment” in *Constitutional Law of SA* (2008) 50-54; Murombo 2010 (6/2) *LEAD* 166.

¹⁷² Van der Linde & Basson “Environment” in *Constitutional Law of SA* (2008) 50-54.

¹⁷³ Section 32(1)(d) NEMA.

¹⁷⁴ Section 32(1)(e) NEMA.

¹⁷⁵ Kidd 2010 (13) (5) *PER/PELJ* 32; Glazewski *Environmental Law in South Africa* (2013) 7-37.

¹⁷⁶ Kidd 2010 (13) (5) *PER/PELJ* 27.

¹⁷⁷ Glazewski 1999 (1) *Acta Juridica* 20.

¹⁷⁸ Glazewski 1999 (1) *Acta Juridica* 20.

¹⁷⁹ Section 32(2) NEMA: “A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought (...), if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought”.

¹⁸⁰ Kotze L & Feris L “Trustees for the time being of the Biowatch Trust v Registrar: Genetic Resources and Others: Access to information, costs awards and the future of public interest environmental litigation in South Africa” 2009 (18) *RECIEL* 345.

improve the plaintiff's position who used to be more hesitant to litigate.¹⁸¹ Furthermore, sections 32(3)(a) and 32(3)(b)¹⁸² have implemented an innovative cost regime if the plaintiff secures the relief.¹⁸³

3.2.2. Evaluation of relevant court decisions

3.2.2.1. Interests sufficient to found locus standi

3.2.2.1.1. General public interest litigation

It is again essential to first deal with general public interest court decisions before specific environmental cases. The general landmark decisions clearly demonstrate the radical shift from the former common-law approach, which is also decisive for the environmental context.

The first landmark decision after the adoption of the Interim Constitution was *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others*¹⁸⁴ (*Ferreira* case). In the majority judgment, *Chaskalson P* argued that a broad approach would be consistent with the constitutional mandate given to this court which shall ensure that constitutional rights enjoy the full measure of protection.¹⁸⁵ In the dissenting judgment, *O'Regan J* stated that public interest litigation is a new departure in South African law and the public interest must be interpreted in the light of the special role courts play in a constitutional democracy.¹⁸⁶ While litigants would ordinarily be required to allege an infringement of a right, this is not necessary for public interest litigants.¹⁸⁷ They only need to allege that the challenged rule or conduct is in breach of a right contained in chapter 3 of the IC.¹⁸⁸ Furthermore, *O'Regan J* stated that the Court should require a plaintiff to show that it is genuinely acting in the public interest.¹⁸⁹ She named various relevant factors to determine this condition. The crucial issues are whether there is another reasonable and effective manner in which the action can be brought, the nature of the relief sought, the extent to which it is of general and prospective application, the range of affected persons or groups and the opportunity that they had to present evidence and argument to the Court.¹⁹⁰ This early judgment was particularly important for the facilitation of public interest litigation, since it did not only

¹⁸¹ Glazewski 1999 (1) *Acta Juridica* 20.

¹⁸² Section 32(3) NEMA: "Where a person or group of persons secures the relief sought (...), a court may on application – (a) award costs on an appropriate scale to any person or persons entitled to practice as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and (b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings".

¹⁸³ Glazewski 1999 (1) *Acta Juridica* 21.

¹⁸⁴ 1996 (1) SA 984 (CC) at 165.

¹⁸⁵ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 266; 1996 (1) SA 984 (CC) at 167.

¹⁸⁶ Devenish 2005 (38) *De Jure* 44.

¹⁸⁷ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 282; 1996 (1) SA 984 (CC) at 235.

¹⁸⁸ 1996 (1) SA 984 (CC) at 120H.

¹⁸⁹ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-11; Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 282.

¹⁹⁰ 1996 (1) SA 984 (CC) at 234.

accord with the progressive provisions of the Interim Constitution, but set the right tone for the subsequent court decisions and named specific factors how to determine whether someone is litigating in the public interest. It emphasised the notion that South African courts started to regard the new legislative approach to locus standi as appropriate.¹⁹¹ Concerning the issue which requirements must be met, it explicitly stated that public interest litigants do not have to assert an infringement of a right and furthermore named several factors to consider whether an action is brought in the public interest.

In *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and another*¹⁹² (*Campus Law Clinic* case), the court listed additional factors apart from the ones mentioned in the *Ferreira* case that must be taken into consideration: The degree of vulnerability of the people affected; the nature of the rights to be infringed; as well as the consequences of the infringement.¹⁹³

Another landmark decision in favour of the more liberalised approach towards locus standi was *Port Elizabeth Municipality v Prut NO & Another*¹⁹⁴ (*Port Elizabeth Municipality* case). The Court held that if an issue of public interest is at stake, a litigant can vindicate as long as there is a real, and not merely an academic issue.¹⁹⁵ *Froneman J* confirmed the judgment in *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another*¹⁹⁶, and *Pillay AJ* did in *Nomala v Permanent Secretary, Department of Welfare and another*^{197, 198}

The Constitutional Court, in *Lawyers for Human Rights and others v Minister of Home Affairs and another*¹⁹⁹ (*Lawyers for Human Rights* case), confirmed the notion that the courts generally followed the new legislative approach. It emphasised the importance that the litigant genuinely claims public interest standing and that the court must be satisfied that it is objectively in the public interest.²⁰⁰ On the other side, it would not be in the public interest if purely abstract issues were brought to court.²⁰¹ The Court held that it would be sufficient to show that the impugned statute violates the right.²⁰² Regarding the prerequisites of a plaintiff, it ruled that the claim must be genuine, cannot be purely abstract and the

¹⁹¹ Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-2 – 7-4; Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 260-261; *Beukes v Krugersdorp Transitional Local Council & Another* 1996 (3) SA 467 (W) at 474B-J; *McCarthy & Others v Constantia Property Owners' Association & Others* 1999 (4) SA 847 (C) at 855B-F; *Dawood and Another v Minister of Home Affairs & Others* 2000 (1) SA 997 (C) at 1028J-1030B.

¹⁹² 2006 (6) SA 103 (CC).

¹⁹³ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 285; Cote & Van Garderen 2011 (27) *S. Afr. J. on Hum. Rts.* 178; 2006 (6) SA 103 (CC) at 21.

¹⁹⁴ 1996 (4) SA 318 (E).

¹⁹⁵ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 283; 1996 (4) SA 318 (E) at 325J-326B.

¹⁹⁶ 2001 (2) SA 609 (E) at 625D-626H.

¹⁹⁷ 2001 (B) BCLR 844 (E).

¹⁹⁸ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 283-284.

¹⁹⁹ 2004 (4) SA 125 (CC).

²⁰⁰ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 284.

²⁰¹ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 284; 2004 (4) SA 125 (CC) at 18.

²⁰² Devenish 2005 (38) *De Jure* 45.

assertion of an objective violation is sufficient. Hereby, the Court set out further specific factors to determine the public interest.

On a rather negative note regarding the facilitation of public interest litigation, various court decisions have adopted a more restrictive approach.²⁰³ In *Prior v Battle and others*²⁰⁴, *Miller J* seems to have ignored the fact that public interest standing does not require the plaintiff to have a direct and substantial interest in the subject matter of the dispute.²⁰⁵ Besides, in *Maluleke v MEC, Health and Welfare, Northern Province*²⁰⁶, the plaintiff was not granted locus standi to litigate in the public interest either.²⁰⁷ The judgment still stuck with the traditional approach and required the plaintiff to assert special damage.

3.2.2.1.2. Public interest environmental litigation

A progressive judgment in the environmental context was the landmark decision in *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others*²⁰⁸ (*Wildlife Society* case) which expanded the common-law rules to locus standi to a wide extent.²⁰⁹ The Court stated that even if there are circumstances where section 38 FC does not apply and where a statute imposes an obligation on the state to take certain environmental measures in the public interest, a plaintiff should have locus standi in common law.²¹⁰ This statement is crucially important, since section 38(d) FC directly does not apply to all matters in which no constitutional right is infringed, and makes it possible for public-spirited litigants to bring an action on more occasions.²¹¹ Furthermore, the court also held that if a public interest organisation seeks to bring litigation, it must show that one of its objectives is to protect the environment.²¹² Hereby, the Court set specific criteria which creates more legal certainty and proportionality. Besides, *Pickering J* discussed the main argument against the adoption of a more liberal approach – that the opening floodgates will cause an uncontrollable extent of litigation -, arguing that it is “sometimes necessary to open the floodgates in order to irrigate the arid ground below them”.²¹³ He stated that in case “cranks and busybodies would indeed flood the courts with vexatious or frivolous applications, an appropriate order of costs would

²⁰³ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 285.

²⁰⁴ 1999 (2) SA 850 (Tk).

²⁰⁵ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 285-286

²⁰⁶ 1999 (4) SA 367 (T).

²⁰⁷ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 286; see also Plasket C “Standing, welfare rights and administrative justice” 2000 (117) SALJ 647.

²⁰⁸ 1996 (3) SA 1095 (Tk).

²⁰⁹ Loots “Standing, Ripeness and Mootness” in *Constitutional Law of SA* (2008) 7-13.

²¹⁰ Glazewski *Environmental Law in South Africa* (2013) 7-36; 1996 (3) SA 1095 (Tk) at 1105A-B.

²¹¹ Confirmed in *McCarthy and others v Constantia Property Owners’ Association and others*, 1999 (4) SA 847 (C); *Beukes v Krugersdorp Transitional Local Council and another*, 1996 (3) SA 467 (W).

²¹² 1996 (3) SA 1095 (Tk) at 1106.

²¹³ Van der Linde & Basson “Environment” in *Constitutional Law of SA* (2008) 50-54; 1996 (3) SA 1095 (Tks).

prevent them from doing so".²¹⁴ Thus, the Court also addressed the main concerns against widening access to courts and named options to solve this issue. Overall, the *Wildlife Society* case is the most important judgment in the environmental context and early set a progressive tone for many court decisions to follow.

Another progressive judgment was the recent case *Lionswatch Action Group v MEC Local Government, Environmental Affairs and Development Planning and Others*²¹⁵ (*Lionswatch* case), in which the plaintiff did not purport to litigate in terms of section 32(1)(d) NEMA, but section 32(1)(e).²¹⁶ *Binns-Ward J* argued that in case of a juristic person as plaintiff, it does not matter for the purposes of locus standi in terms of this provision whether the litigation does not serve the interests of the person.²¹⁷ He explicitly stated that a litigant is not deprived of locus standi by virtue of the fact that acting to protect the environment falls outside its objects.²¹⁸

Not all environmental court decisions have been in accordance with the liberalised approach to locus standi, though. The traditional legal position was still evident in *Verstappen v Port Edward Town Board and Others*²¹⁹ (*Verstappen* case), in which the plaintiff sought an interdict against the defendants for the unlawful operation of a waste disposal site without a permit issued in terms of section 20(1) of the Environmental Conservation Act²²⁰ of 1989.²²¹ The court argued that the plaintiff had not shown sufficient special damage.²²² In many other cases the broadened locus standi requirements have only been a preliminary issue. In *All the Best Trading CC t/a Parkville Motors v S N Nyagar Property Development and Construction CC*²²³, for instance, the court did not grant the plaintiff locus standi since the suit did not turn on the advancement of environmental rights, but only around the firm's financial interests.²²⁴

The examined cases illustrate that the progressive statutory provisions have not always led to a proper interpretation by the courts. Although the recent case of *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd*²²⁵ (*Tergniet* case) is not of an administrative nature, it is of particular

²¹⁴ 1996 (3) SA 1095 (Tks).

²¹⁵ 2015 ZAWCHC 21.

²¹⁶ 2015 ZAWCHC 21 at 21-22.

²¹⁷ 2015 ZAWCHC 21 at 22.

²¹⁸ 2015 ZAWCHC 21 at 22.

²¹⁹ 1994 (3) SA 569 (D).

²²⁰ Environmental Conservation Act, 73 of 1989.

²²¹ Amechi 2015 (23.3) *AJICL* 399.

²²² Amechi 2015 (23.3) *AJICL* 399; 1994 (3) SA 569 (D) at 574C/D-E and 574I.

²²³ 2005 (3) SA 396 (T).

²²⁴ Van der Linde & Basson "Environment" in *Constitutional Law of SA* (2008) 50-55; 2005 (3) SA 396 (T).

²²⁵ 2009 (10083/2008) ZAWCHC 6.

importance. It has recently caused possible hurdles and locus standi is still identified as possible procedural impediment to effective public interest environmental litigation.²²⁶ Whereas the first plaintiff is a voluntary association that represents the interests of two residential areas located close to the site of the defendant's pole treatment facility, the other plaintiffs are residents in these areas.²²⁷ The plaintiffs sought the termination of the defendant's operations since they allegedly violated provisions of the Atmospheric Pollution Prevention Act²²⁸ (APPA).²²⁹ Since the first plaintiff had a fluid membership and lacked a constitution, it was argued by the defendant that it lacked a substantial and sufficient interest and hence the capacity to sue.²³⁰ The Court stated that APPA was only promulgated in the interest of persons and communities living close to any premises where scheduled processes that result in the release of noxious or offensive gasses are performed.²³¹ Although the court eventually granted all plaintiffs locus standi, its approach must be evaluated to be anachronistic and flawed.²³² Since the Court argued that the plaintiffs only have an interest because APPA was enacted in the interests of neighbours of polluting activities, and did not mainly rely on section 38(d) FC and section 32 NEMA in the end, the decision could have been made during the common-law era.²³³ This judgment is essential for the question what kind of interest a plaintiff has to show. The Court did not base its argumentation on the public interest, which would have been obvious and did not lead to a coherent judgment at all.

3.2.2.2. Persons/entities which have locus standi

In the first crucial court decision after the constitutional shift, the *Ferreira* case, *Ferreira* was granted to litigate in the public interest as individual according to section 7(4) IC.²³⁴ The municipality in the *Port Elizabeth Municipality* case had locus standi according to the same provision.²³⁵ In the *Verstappen* case, the Court did not rely on the Interim Constitution at all and did not grant the individual locus standi in the end.²³⁶ In the *Campus Law Clinic* case, the Campus Law Clinic was a voluntary association which had legal personality and the right to sue and be sued.²³⁷ It was accorded locus standi as section 38(d) FC provides for.²³⁸ *Lawyers for Human Rights* was a NGO with the objectives to promote and enforce human rights and was granted locus standi as prescribed by section 38(d) in the *Lawyers for Human*

²²⁶ Kidd 2010 (13) (5) *PER/PELJ* 27.

²²⁷ Kidd 2010 (13) (5) *PER/PELJ* 27.

²²⁸ Act 45 of 1965.

²²⁹ Kidd 2010 (13) (5) *PER/PELJ* 27-28.

²³⁰ 2009 (10083/2008) ZAWCHC 6 at 16-18.

²³¹ 2009 (10083/2008) ZAWCHC 6 at 20.

²³² Kidd 2010 (13) (5) *PER/PELJ* 30.

²³³ Kidd 2010 (13) (5) *PER/PELJ* 30.

²³⁴ 191 (1) SA 984 (CC).

²³⁵ 1996 (4) SA 318 (E) at 325E-F; Loots "Standing, Ripeness and Mootness" in *Constitutional Law of SA* (2008) 7-11.

²³⁶ 1994 (3) SA 569 (D); Amechi 2015 (23.3.) *AJICL* 399.

²³⁷ 2006 (6) SA 103 (CC) at 2.

²³⁸ 2006 (6) SA 103 (CC) at 2.

Rights case.²³⁹ While all of these court decisions corresponded with the new progressive legislative provisions of the Interim and Final Constitutions (except for the *Verstappen* case), one should take a more specific look at two court decisions dealing with locus standi requirements for environmental NGOs litigating in the public interest. On the one hand, the *Wildlife Society* case dealt with a NGO whose main object was to promote environmental conservation.²⁴⁰ It must be considered as a highly progressive judgment not only due to the fact since it granted locus standi in a matter in which no constitutional provisions were affected, but only the common-law rules continued to apply. Furthermore, it must be appreciated that it was the first landmark decision to explicitly grant locus standi to an environmental NGO litigating in the public interest. On the other hand, the *Tergniet* case dealt with an environmental NGO representing the interests of residents of the areas Tergniet and Toekoms.²⁴¹ Regarding the facilitation of public interest environmental litigation, it is rather counterproductive to base the argumentation on the possible effect of a facility on the people living close-by instead of on the public interest. It is essential to note that if the plaintiff were an environmental NGO, it would seemingly not have had locus standi on the basis of this reasoning.²⁴² However, the term anyone in section 38 FC includes everyone acting in the public interest and an association acting in the interest of its members, but does not require a specific legal personality.²⁴³

3.2.2.3. Procedural issues relating to locus standi

In *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye*²⁴⁴, the Court stated that the main test regarding costs awards lies in whether the plaintiff acted reasonably out of a concern for the public interest of protecting the environment and had made all due efforts to use other reasonable means.²⁴⁵ The Court decided not to award costs against the plaintiff despite its failed application since it argued that NGOs should not have the unnecessary hurdle when they act in a manner designed to hold the state accountable.²⁴⁶ Consequently, the Court adopted a progressive approach regarding locus standi, but still laid out specific conditions which must be met.

In the case *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and others*²⁴⁷ (*Wildlife and Environmental Society* case), the applicant had to pay the defendants' costs after it had withdrawn the application before the hearing.²⁴⁸

²³⁹ 2004 (4) SA 125 (CC) at 49.

²⁴⁰ 1996 (3) SA 1095 (Tk) at 463.

²⁴¹ 2009 (10083/2008) ZAWCHC 6 at 17.

²⁴² Kidd 2010 (13) (5) *PER/PELJ* 31.

²⁴³ Kidd 2010 (13) (5) *PER/PELJ* 31-32.

²⁴⁴ 2002 (1) SA 478 (CPD).

²⁴⁵ Kotze & Feris 2009 (18) *RECIEL* 345; 2002 (1) SA 478 (CPD) at 491.

²⁴⁶ Kotze & Feris 2009 (18) *RECIEL* 345-346; 2002 (1) SA 478 (CPD) at 493C-D.

²⁴⁷ 2005 (6) SA 123 (E).

²⁴⁸ Couzens E "Costs, with pained regret: *Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape, and Others* 2005 (6) SA 123 (E) 1" 2007 *SAJELP* 221.

This costs order was made despite the judge's acceptance that the institution of the proceedings had been bona fide and notwithstanding the provisions of section 32(2) NEMA.²⁴⁹ *Pickering J* was of the view that the application had been ill-advised because of foreseeable disputes of fact.²⁵⁰ The judge argued it would neither be fair nor in the interests of justice for the defendants to be deprived of the costs in opposing an application which was doomed to failure from its inception.²⁵¹ In the more recent *Lionswatch* case, *Binns-Ward J* referred to this judgment and did not make an order in respect of the costs of the defendants' counter-application, after this had been withdrawn as well.²⁵²

An even more important decision regarding cost awards was promulgated in *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources and Others*²⁵³. The Constitutional Court argued that if a plaintiff brings a constitutional matter to court bona fide and not vexatiously, it should not bear the costs of a negative cost order where it loses the case.²⁵⁴ It held that litigants should on the one hand not be treated disadvantageously in costs awards simply because they are pursuing commercial interests.²⁵⁵ On the other hand, they should not be looked upon with favour since they are fighting for the poor and lack funds themselves.²⁵⁶ In *Affordable Medicines Trust and Others v Minister of Health and Another*²⁵⁷, the Constitutional Court already held that, as general rule in constitutional matters, an unsuccessful litigant against the state should not be ordered to pay the costs.²⁵⁸ In the *Biowatch* case, the Court further ruled that an application against the state should not be frivolous, vexatious or manifestly inappropriate, and one should not expect that the worthiness of the cause will immunise a plaintiff against a costs award.²⁵⁹ The action brought before the court must be genuine and substantive and truly raise constitutional considerations.²⁶⁰ The judgment must be regarded as innovative, since it set out an equitable rule for public interest litigants whose main concern is often the burdensome cost of litigation. The Constitutional Court accepted the fact that the issue of costs awards in public interest litigation would have an impact on justice and that an onerous costs award against a successful party may possibly not advance justice.²⁶¹ On a rather negative note, the Court stated that it is not the character of the litigants, but rather the nature of the issue that should be crucial. This notion must be criticised. In reality, it would often be the poor and disadvantaged who would bring an action in the

²⁴⁹ Couzens 2007 SAJELP 223-224.

²⁵⁰ 2015 ZAWCHC 21 at 28.

²⁵¹ 2005 (6) SA 123 (E) at 143H-144B; Couzens 2007 SAJELP 224.

²⁵² 2015 ZAWCHC 21 at 30-31.

²⁵³ 2009 (10) BCLR 1014 (CC).

²⁵⁴ Cote & Van Garderen 2011 (27) S. Afr. J. on Hum. Rts. 172.

²⁵⁵ 2009 (10) BCLR 1014 (CC) at 17.

²⁵⁶ 2009 (10) BCLR 1014 (CC) at 17.

²⁵⁷ 2006 (3) SA 247 (CC).

²⁵⁸ Muroombo T & Valentine H "SLAPP suits: An emerging obstacle to public interest environmental litigation in South Africa" 2011 (27) SAJHR 99; 2006 (3) SA 247 (CC) at 21.

²⁵⁹ 2006 (3) SA 247 (CC) at 24-25.

²⁶⁰ 2006 (3) SA 247 (CC) at 24-25.

²⁶¹ Kotze & Feris 2009 (18) RECIEL 344.

public interest.²⁶² It appears to be almost impossible for a court to consider the status of parties as a separate issue to the nature of the dispute since these two issues mostly correlate.²⁶³ The nature of public interest litigation necessarily also includes the character of the parties since disadvantaged parties should be dealt with in a more favourable manner in costs awards to the extent that considerations of fairness would allow this.²⁶⁴

²⁶² Kotze & Feris 2009 (18) *RECIEL* 345.

²⁶³ Kotze & Feris 2009 (18) *RECIEL* 345.

²⁶⁴ Kotze & Feris 2009 (18) *RECIEL* 345.

4. German approach to locus standi

This section examines the German approach to locus standi in the context of public interest environmental litigation. First, it deals with the context prior to the EU influence and outlines the traditional approach. It illustrates how administrative law doctrines stemming from the nineteenth century manifested themselves in both the *Grundgesetz* and the *Verwaltungsgerichtsordnung*²⁶⁵ (Code of Administrative Court Procedure, abbreviated as VwGO). Secondly, this section addresses the context post the EU influence, presenting the legal framework and examining this framework with reference to court decisions. It includes the relevant provisions of the Aarhus Convention, the recent EU directives and the UmwRG and addresses the issue how the three key elements influencing locus standi have been dealt with by the courts. Hereby, it again examines whether the courts have coherently interpreted these provisions regarding the facilitation of public interest environmental litigation.

4.1. Pre-EU context

4.1.1. Overview of the traditional approach

The German particularity of the “individual public right” (*subjektives öffentliches Recht*) has coined administrative law in Germany and led to its highly individualised system of judicial review since the nineteenth century.²⁶⁶ Since the term is absolutely foreign to South African law and no exact English translation exists, one must consider German legal history for further clarification.²⁶⁷ The classic definition of an individual public right, coined by *Ottmar Bühler* in the early twentieth century, is “the legal position of the subject vis-à-vis the state according to which the subject can claim something from the state or is entitled to do something vis-à-vis the state on the basis of a cogent legal provision that is intended to protect the subject’s individual interests”.²⁶⁸ The concept originated in the constitutional monarchy of the late nineteenth century when the judiciary provided protection for citizens’ rights against the monarchic executive.²⁶⁹ The individual public right was originally conceptualised as a corresponding term for the traditional private right.²⁷⁰ There were two competing approaches to theorise judicial review in Germany around this time. On the one hand, according to the Prussian law scholar *Rudolf von Gneist*, the law creates an objective order and the role of the administrative judiciary is not

²⁶⁵ Verwaltungsgerichtsordnung (Code of Administrative Court Procedure), January 21, 1960, BGBl. I., 17.

²⁶⁶ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 225-226.

²⁶⁷ Bauer H *Geschichtliche Grundlagen der Lehre vom subjektiven öffentlichen Recht* (Historical bases of the doctrine of the individual public right) (1986).

²⁶⁸ Greve MS “The non-reformation of administrative law: Standing to sue and public interest litigation in West German environmental law” 1989 (22) *Cornell Int’l L.J.* 200; see also: Bühler O *Die subjektiven öffentlichen Rechte und ihr Schutz in der deutschen Verwaltungsrechtsprechung* (Individual public rights and their protection in German administrative adjudication) (1914).

²⁶⁹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 225, 228; Greve MS 1989 (22) *Cornell Int’l L.J.* 233.

²⁷⁰ Franzius 2016 *UPR* 1-2.

only to protect individuals, but also to objectively control the administration.²⁷¹ On the other hand, mainly *Otto von Sarwey* and *Otto Bähr* held that the protection of individual rights was the crucial point.²⁷² Eventually, the second approach prevailed and became the core of administrative judicial review.²⁷³ It is essential to comprehend the historic origins of this dogmatism to have an idea how deeply entrenched the concept still is in today's German jurists' minds and jurisprudence.

The approach towards *locus standi* requirements after the foundation of the Federal Republic of Germany in 1949 referred to the origins of the individual public right and must be understood in contrast to the legal regime of the *Third Reich* from 1933-1945. During the *Third Reich*, judicial protection against acts of public authorities²⁷⁴ was largely withheld.²⁷⁵ While Nazi jurists denounced the model of an individual public right as a "liberal-bourgeois monstrosity", they found the objective legality model to be theoretically compatible with the organisation of the "New State".²⁷⁶ An administrative judiciary under the state's control ensured strict legality and enhanced their authority in their view.²⁷⁷ After this dreadful experience, it was considered to be essential to guarantee a general right of access to justice against acts of public authority.²⁷⁸ It was incorporated into article 19(4)²⁷⁹ of the *Grundgesetz* in 1949.²⁸⁰ Since the legislative is the primary addressee of this constitutional provision, it is its task to determine the access to courts.²⁸¹ Subsequently, this constitutional provision was endorsed in section 42(2)²⁸² VwGO in 1960.²⁸³ Unless this provision is fulfilled, a court cannot render an action admissible.²⁸⁴ The question

²⁷¹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 228-229; von Gneist R *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland (The constitutional state and the administrative courts in Germany)* 270 (1879).

²⁷² Greve 1989 (22) *Cornell Int'l L.J.* 236; von Sarwey O *Das öffentliche Recht und die Verwaltungsrechtspflege (The public right and the administrative jurisdiction)* (1880); Bohr O *Der Rechtsstaat: Eine publicistische Skizze (The constitutional state: A public sketch)* (1864).

²⁷³ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 229; Seibert 2013 *NVwZ* 1040.

²⁷⁴ The Nazis introduced so-called *justizfreie Hoheitsakte* (state acts against which no judicial remedy was available); Mangold 2014 (21) *Ind. J. Global Legal Stud.* 230; also see Ipsen HP *Politik und Justiz: Das Problem der justizlosen Hoheitsakte (Politics and justice: The problem of political acts without judicial control)* (1937).

²⁷⁵ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 230.

²⁷⁶ Greve 1989 (22) *Cornell Int'l L.J.* 238.

²⁷⁷ Greve 1989 (22) *Cornell Int'l L.J.* 238.

²⁷⁸ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 230; Leidinger T "Das Trianel-Urteil des EuGH und seine Folgen für das deutsche Verwaltungsrechtssystem (The Trianel judgment of the ECJ and its impacts on the German system of administrative law)" 2011 *NVwZ* 1346.

²⁷⁹ Article 19(4) *Grundgesetz*: "Should any person's rights be impaired by public authority, he may appeal to the courts."

²⁸⁰ Greve 1989 (22) *Cornell Int'l L.J.* 201; Seibert 2013 *NVwZ* 1040.

²⁸¹ Leidinger 2011 *NVwZ* 1346.

²⁸² Section 42 VwGO: "(1) An action can seek to have an administrative measure set aside (action for annulment) or to have the adoption of an administrative measure ordered in the event of a refusal or failure to act (action for enjoiner). (2) Except where otherwise provided by law, such an action is admissible only if the plaintiff asserts that his rights have been impaired by the administrative measure or by the refusal or failure to act."

²⁸³ Porsch 2013 *NVwZ* 1393.

²⁸⁴ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 231.

of admissibility in section 42(2) is reflected in the regulation of an action's merits in section 113(1)²⁸⁵ VwGO.²⁸⁶ It leads to two consequences: It is not possible to bring an action without relying on the possible impairment of an individual right; and the plaintiff will not win its case if the act of the public authority was simply unlawful.²⁸⁷ The focus on the traditional concept of the individual public right was still apparent. There are three prerequisites to have an individual public right: A cogent legal provision, conferring legal power, and protecting individual interests.²⁸⁸ This requirement led to the establishment of the *Schutznormtheorie*, which has become another German particularity.²⁸⁹ Whereas no translation exists in English, it literally translates as "protective norm theory", although the translation "impairment of rights doctrine" focuses on its core principle and serves as better definition.²⁹⁰ The core of this doctrine is that a legal norm exclusively protects the individual interest and confers the legal power to enforce this individual interest in case of an impairment.²⁹¹ This has been established jurisprudence of the *Bundesverwaltungsgericht* (Federal Administrative Court of Germany, abbreviated as BVerwG).²⁹² Behind this doctrine was the theoretical notion that judicial control of the administration is not the purpose of litigation, but merely an incidental effect of the protection of individual rights.²⁹³ Generally, the compliance with laws by the administration should not concern the citizen.²⁹⁴ Another notion was that the administrative judiciary has to be substantively independent from the bureaucracy.²⁹⁵

It is essential to note that there is no substantive right to a healthy environment implemented in the *Grundgesetz*. Article 20a²⁹⁶ GG only declares the protection of the natural foundations of life and animals to be a national objective of the German state without conferring any rights to the individual.²⁹⁷ This provision was not included in the section of basic rights in the *Grundgesetz* on purpose and does

²⁸⁵ First sentence of section 113(1) VwGO: "In so far as the administrative measure is unlawful and the plaintiff's rights have thereby been impaired, the court shall set aside the administrative measure together with any internal appeal decision where appropriate."

²⁸⁶ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 231.

²⁸⁷ Greve 1989 (22) *Cornell Int'l L.J.* 201-202; Franzius 2016 *UPR* 6.

²⁸⁸ Wahl R "Vorbemerkung § 42 Absatz 2" (Preface section 42(2)) in Schoch F et al (eds) *Verwaltungsgerichtsordnung: Kommentar* (Code of Administrative Court Procedure: Commentary) (2016); Franzius 2016 *UPR* 2.

²⁸⁹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 231.

²⁹⁰ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 231.

²⁹¹ Schmidt-Kütters T "§ 42" (Section 42) in Posser H & Wolff HA (eds) *Beck'scher Online-Kommentar VwGO* (Beck's Online Commentary VwGO) (2016) at 151.

²⁹² BVerwG, Judgment of 16 September 1993, 4 C 28/91, 1994 *NJW* 1546; BVerwG, Judgment of 19 January 1996, 11 B 90/95; 1996 *NJW* 1297; BVerwG, Judgment of 16 March 1989, 4 C 36/85, 1989 *NVwZ* 1157; BVerwG, Judgment of 18 July 1967, I C 9/66, 1968 *NJW* 218.

²⁹³ Franzius 2016 *UPR* 1.

²⁹⁴ Wegener BW "Die europäische Umweltverbandsklage (The European representative environmental action)" 2011 *ZUR* 364.

²⁹⁵ Greve 1989 (22) *Cornell Int'l L.J.* 237.

²⁹⁶ Art. 20a GG: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

²⁹⁷ Scholz R "Art. 20a" (Article 20a) in Maunz T & Dörig G (eds) *Grundgesetz: Kommentar* (Basic Law: Commentary) at 32.

not extend the legal protection by statutory administrative law regarding environmental protection.²⁹⁸ Hence, a plaintiff cannot simply claim a violation of this constitutional provision to have locus standi.

4.1.2. Historic constraints for public interest environmental litigation

The traditional German approach posed significant constraints in terms of the three key elements relating to locus standi. Concerning the issue which kind of interest is sufficient to found locus standi, German law always demanded from a plaintiff to prove an infringement of its own individual right. Regarding the question which persons/entities were accorded locus standi, NGO's or other public-spirited plaintiffs could not litigate in the public interest. Contrasting with the concept of public interest environmental litigation, it was merely believed to be the obligation of the administration to consider general public interests as an agent of the public.²⁹⁹

The impact of the specific German conception particularly becomes visible in environmental law.³⁰⁰ Some environmental provisions indeed serve the protection of the individual.³⁰¹ However, most areas of environmental law do not constitute individual rights.³⁰² The crucial issue is whether public interest litigation fits into such a highly individualised concept.³⁰³ Since environmental protection is regarded as general public interest, it was difficult to conceptualise any type of public interest litigation.³⁰⁴ A landowner's decision to cut down trees on his property without a permit was none of his neighbour's legal business.³⁰⁵ An administrator's decision to build a highway through a national park could hardly be reviewed by the judiciary, since no private property rights were violated.³⁰⁶ Since the growing environmental awareness in the 1970s, some courts began to grant locus standi as long as the claims raised were not clearly without merit.³⁰⁷ Plaintiffs were granted locus standi under provisions without a protective purpose, but explicitly serving to protect the public.³⁰⁸ However, a trend towards more judicial control of administrative decisions was reversed from the 1980s on when the judiciary limited environmental litigants' access to court by imposing substantial pleading requirements upon them.³⁰⁹

²⁹⁸ Scholz "Art. 20a" (Article 20a) in Grundgesetz: Kommentar (Basic Law: Commentary) at 33.

²⁹⁹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 235; Franzius 2016 *UPR* 2.

³⁰⁰ Seibert 2013 *NVwZ* 1040.

³⁰¹ Wegener 2011 *ZUR* 364.

³⁰² Leidinger 2011 *NVwZ* 1346.

³⁰³ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 233.

³⁰⁴ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 235.

³⁰⁵ BVerwG, Judgment of 25 June 1975, VII B 84/74, 1975 *NJW* 2356.

³⁰⁶ Greve 1989 (22) *Cornell Int'l L.J.* 202.

³⁰⁷ Greve 1989 (22) *Cornell Int'l L.J.* 210.

³⁰⁸ BVerwG, Judgment of 9 July 1982, 7 C 54/79, 1982 *NVwZ* 625; OVG Mynster, Judgment of 7 July 1976, VII A 1804-75, 1976 *NJW* 2363.

³⁰⁹ Greve 1989 (22) *Cornell Int'l L.J.* 212; BVerwG, Judgment of 18 May 1982, 7 C 42/80, 1983 *NVwZ* 34; BVerwG, Judgment of 17 February 1984, 7 C 8/82, *NVwZ* 1984 373.

Lastly, regarding the question of procedural issues, there were no attempts to alleviate access to court and facilitate public interest environmental litigation. Thus, despite some positive developments, the concept of public interest environmental was thoroughly different in nature in the traditional German legal system and doomed to failure.

4.2. Post-EU Context

4.2.1. Overview of the legal framework

4.2.1.1. Aarhus Convention

International law has had a significant influence on locus standi requirements in German environmental law, with the Rio Declaration³¹⁰ as starting point and the Aarhus Convention as driving force. International law has striven for the goal of providing NGOs with wider access to courts.³¹¹ The Rio Declaration and the Aarhus Convention demand signatory parties to empower environmental NGOs to seek judicial review of administrative decisions.³¹² It is essential to note that the most common legal mechanism used by the Aarhus Convention is representative environmental action - hence public interest litigation only by environmental NGOs -, and not general public interest environmental litigation carried out by individuals as well like in South Africa.³¹³ These slightly different terms are distinguished in this dissertation. Hence, widening access to courts has not only taken place under different historical circumstances in Germany and South Africa, but has taken slightly different directions as well.

The adoption of the Aarhus Convention was supposed to realise principle 10³¹⁴ of the Rio Declaration, aiming to provide “wide access to justice for the public concerned”.³¹⁵ The “public concerned” is defined in a rather broad manner in article 2(5)³¹⁶ Aarhus Convention (AC) and includes environmental NGOs.³¹⁷ Both the EU and Germany were signatory parties of the Aarhus Convention. It obliges

³¹⁰ Rio Declaration on Environment and Development, June 14, 1992, 31 ILM 874.

³¹¹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 224.

³¹² Mangold 2014 (21) *Ind. J. Global Legal Stud.* 224.

³¹³ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 224; “representative environmental action” is a literal translation of the German term *Umweltverbandsklage* and is used throughout this dissertation; another possible translation is “public interest litigation for environmental NGOs”.

³¹⁴ Principle 10 of the Rio Declaration: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities (...). States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings (...) shall be provided”.

³¹⁵ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 241.

³¹⁶ Article 2(5) AC: “The public concerned means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”.

³¹⁷ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 239.

signatory parties to provide environmental NGOs with access to judicial procedures.³¹⁸ The Aarhus Convention foresees a compliance mechanism in its article 15.³¹⁹ Communications can be brought before the Committee by members of the public concerning a signatory party's compliance with the Convention.³²⁰ Nevertheless, as international law body, its findings cannot be enforced like the judgments of the ECJ can. Hence, this dissertation focuses on the rulings of the latter. Articles 9(2) and 9(3) are of vital importance. While article 9(2)³²¹ requires access to justice for specific decisions listed in the Convention, article 9(3)³²² introduces a general obligation to provide wider access to justice for all other environmental decisions. Regarding the impact on German legislation, it is essential to read the wording "maintaining impairment of a right" in alternative (b) of article 9(2) together with the half-sentence "where the administrative procedural law of a party requires this as a precondition".³²³ Although the Aarhus Convention seems to offer wide flexibility to implement it into national law, the purpose of the Convention prevents the signatory parties from implementing its provisions too restrictively. Another crucial issue is how to regulate the costs of environmental proceedings.³²⁴ The Aarhus Convention addresses this issue in its article 9(4)³²⁵. The scope and the definition of the rule that the costs in environmental proceedings must not be prohibitively expensive is essentially important.³²⁶

4.2.1.2. Recent EU directives

EU law has fundamentally influenced locus standi requirements in German environmental law as well. In general, EU law has influenced German environmental law since article 25 of the Single European

³¹⁸ Mýller 2011 (23) *JEL* 506; Eckes C "Environmental policy "outside-in": How the EU's engagement with international environmental law curtails national autonomy" 2012 (13) *German L.J.* 1155; Rehbinder E "Judgment on German implementation of the Aarhus Convention" 2011 (41) *Envtl. Pol'y & L.* 144.

³¹⁹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 251.

³²⁰ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 251.

³²¹ Article 9(2) AC: "Each Party shall, within the framework of its national legislation, ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law (...), to challenge the substantive and procedural legality of any decision, act or omission (...). What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. (...)."

³²² Article 9(3) AC: "In addition (...), each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

³²³ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 240.

³²⁴ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 41; Mýller 2011 (23) *JEL* 508.

³²⁵ Article 9(4) AC: "(...) the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. (...)."

³²⁶ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 41.

Act transferred the competence to regulate environmental matters to the EC in 1986.³²⁷ Since then, environmental law has been of crucial importance for the Europeanisation of German law.³²⁸

The main change regarding representative environmental action came with the EU Directives implementing the AC. The EU was obliged to implement its article 9(2) into EU law, which it did in Directive 2003/35/EC.³²⁹ Directive 2003/35/EC amended the EIA Directive 85/337/EEC. While article 1(2) of the amended EIA Directive mirrors article 2(5) AC in defining the “public concerned”, Directive 2003/35/EC also inserted article 10a into the EIA Directive.³³⁰ Article 10a(3)³³¹ explicitly demands an interpretation to grant “wide access to justice”.³³² Furthermore, the European Commission proposed a directive to implement article 9(3) of the AC into EU law in 2003.³³³ However, the proposal never became a directive since the Member States argued that access to national courts was within their competence.³³⁴ In Germany, this particular provision has not been implemented either since the general opinion has been that the general procedural rules are sufficient.³³⁵

Regarding the legal translation of article 9(4), this provision was implemented into article 10a(4) of EU Directive 85/337/EEC as amended, which is now article 11(4)³³⁶ of Directive 2011/92/EU³³⁷. The requirement “not prohibitively expensive” is again essential. However, none of these provisions has been implemented into German law.³³⁸

³²⁷ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 233.

³²⁸ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 233.

³²⁹ Reh binder 2011 (41) *Envtl. Pol'y & L.* 145.

³³⁰ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 245-246.

³³¹ Article 10a(3) of Directive 85/337/EEC: “What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. (...)”.

³³² Mangold 2014 (21) *Ind. J. Global Legal Stud.* 246.

³³³ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 20; COM (2003) 624 final.

³³⁴ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 21.

³³⁵ Bunge T “Der Rechtsschutz in Umweltangelegenheiten in Deutschland – Stand und offene Fragen” (Legal protection in environmental matters in Germany – Status quo and open questions) 2015 *ZUR* 532, 539-540.

³³⁶ Article 11(4) of Directive 2011/92/EU: “The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority (...). Any such procedure shall be fair, equitable, timely and not prohibitively expensive.”.

³³⁷ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1.

³³⁸ Glinski C & Rott P “Private enforcement of the public interest and the europeanisation of administrative law – The Trianel judgment of the ECJ” 2011 (2) *Eur. J. Risk Reg.* 614.

4.2.1.3. Representative environmental action in German law

Representative environmental action was first introduced on a provincial level in German law in the early 1980s. The first national regulation of the matter was section 61(1)³³⁹ of *Bundesnaturschutzgesetz*³⁴⁰ (Federal Nature Protection Act, abbreviated as BNatSchG) which came into force in 2002.³⁴¹ However, plaintiffs are only allowed to challenge decisions in plan approval procedures and exemptions from nature protection prohibitions.³⁴² Hence, this provision only had a limited scope of application and did not fully introduce representative action into German environmental law.

A more significant change regarding representative environmental action came with the implementation of the Aarhus Convention. Germany has been under a dual obligation to implement both this Convention and the corresponding EU law into its domestic law.³⁴³ It implemented Directive 2003/35/EC into the UmwRG.³⁴⁴ According to section 1(1), this act applies to remedies against administrative decisions which include an obligation to carry out an EIA.³⁴⁵ The meanwhile outdated version of section 2(1) is of crucial importance.³⁴⁶ It is important to note the (also outdated) wording in section 2(5)³⁴⁷ UmwRG as well.³⁴⁸ In essence, these provisions required the infringement of provisions that protect individual rights.³⁴⁹ The German implementation led to an odd hybrid and a large degree of ambiguity. On the one hand, environmental NGOs are not required to maintain an impairment of their own right, while, on the other hand, such actions will only be successful if provisions that protect individual rights

³³⁹ Section 61(1) BNatSchG: "Independently of any impairment of its own rights, a (...) recognised association may bring actions in accordance with the Verwaltungsgerichtsordnung challenging (...) (2) planning approval decisions (...); now amended and similarly phrased in section 64 BNatSchG, July 29, 2009, BGBl. I, 2542.

³⁴⁰ Bundesnaturschutzgesetz (Federal Nature Protection Act), March 25, 2002, BGBl. I, 1193 (outdated version annulled by the act of 2009).

³⁴¹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 233-234; Reh binder 2011 (41) *Envtl. Pol'y & L.* 145; Wegener 2011 *ZUR* 364.

³⁴² Wegener 2011 *ZUR* 364; Seibert 2013 *NVwZ* 1041.

³⁴³ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 248.

³⁴⁴ Glinski & Rott 2011 (2) *Eur. J. Risk Reg.* 609.

³⁴⁵ Schmidt A & Kremer P "Das Umwelt-Rechtsbehelfsgesetz und der "weite Zugang" zu Gerichten: Zur Umsetzung der auf den Rechtsschutz in Umweltangelegenheiten bezogenen Vorgaben der sog. öffentlichkeitsrichtlinie 2003/35/EG" (The Environmental Appeals Act and the "wide access" to courts: The implementation of the provisions of the so-called public participation Directive 2003/35/EC related to legal protection in environmental matters) 2007 *ZUR* 58.

³⁴⁶ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 248-249; Glinski & Rott 2011 (2) *Eur. J. Risk Reg.* 609.

³⁴⁷ Section 2(5) UmwRG (outdated version): "Actions brought in accordance with subparagraph 1 shall be deemed well founded, (1) in so far as the decision (...) infringes legislative provisions which seek to protect the environment, which confer individual rights and which are relevant to the decision and the infringement affects environmental protection concerns included in the objectives which the association, under its statutes, is committed to promote."

³⁴⁸ Reh binder 2011 (41) *Envtl. Pol'y & L.* 145.

³⁴⁹ Wegener 2011 *ZUR* 363; Bunge 2015 *ZUR* 533.

³⁴⁹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 248.

are infringed.³⁵⁰ Hence, for the first time, the German legislature introduced representative environmental action on a wider level. Nevertheless, the significant influence of the individual public right concept was still apparent and continued to pose a great obstacle to NGOs.

4.2.2. Evaluation of relevant court decisions

4.2.2.1. Interests sufficient to found locus standi

4.2.2.1.1. Djuurgarden Case ECJ

The first landmark decision of the ECJ regarding the concept of representative environmental action was the case *Djuurgarden*³⁵¹ in 2009. The Swedish legislation only allowed locus standi for environmental NGOs with at least 2000 members.³⁵² The ECJ stated that EU law precludes a provision of national law which restricts locus standi in this manner.³⁵³ Although article 10a of the EIA Directive leaves it to the national legislatures to determine the exact conditions, the national rules must ensure wide access to justice and render effective the provisions of the EIA Directive.³⁵⁴ The Swedish prerequisite ran counter to this objective.³⁵⁵ On a positive note, the judgment was the first one to emphasise the role of small NGOs to enforce EU environmental law.³⁵⁶ However, the Court only provided limited guidance regarding the contradiction between the Member States' right to lay down the locus standi requirements and their obligations to ensure wide access to justice.³⁵⁷ Hence, the ECJ did not concisely interpret the new locus standi requirements and did not increase legal certainty either.

4.2.2.1.2. Slovak Brown Bear Case ECJ

The *Lesoochranarske Zoskupenie*³⁵⁸ case (*Slovak Brown Bear case*) concerned article 9(3) AC and its interaction with both EU and German law.³⁵⁹ The Slovak Supreme Court asked whether environmental NGOs may derive a right to bring proceedings under EU law relying on direct effect of article 9(3) AC.³⁶⁰ The Directive 92/43/EEC³⁶¹ applied in this context since the issue of the case was subject to its system

³⁵⁰ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 250.

³⁵¹ *Djuurgarden-Lilla Vortans Miljurskyddsforening*, ECJ, Judgment of October 15, 2009, C-263/08, ECLI:EU:C:2009:631.

³⁵² Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 32.

³⁵³ Myller 2011 (23) *JEL* 508.

³⁵⁴ Myller 2011 (23) *JEL* 508-509.

³⁵⁵ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 33.

³⁵⁶ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 37.

³⁵⁷ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 37.

³⁵⁸ *Lesoochranarske Zoskupenie*, ECJ, Judgment of March 8, 2011, C-240/09, ECLI:EU:C:2011:125.

³⁵⁹ Myller 2011 (23) *JEL* 515; Hamenstødt K & Ehnert T "Case C-240/09 *Lesoochranarske zoskupenie VLK v. Ministerstvo zivotneho prostredia Slovenskej republiky*, Judgment of the Court (Grand Chamber) of 8 March 2011" 2011 (18) *Maastricht J. Eur. & Comp. L.* 360.

³⁶⁰ Krawczyk D "The Slovak Brown Bear case. The ECJ hunts for jurisdiction and environmental plaintiffs gain the trophy" 2012 (14) *Env. L. Rev.* 54.

³⁶¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206.

of protection.³⁶² The ECJ established that it had jurisdiction to interpret article 9(3) since this provision does not only apply to situations falling within the scope of national law.³⁶³ Furthermore, although it held that article 9(3) does not have direct effect in EU law, it stated that the national courts have to interpret the domestic procedural rules in a way to enable environmental NGOs to challenge an administrative decision.³⁶⁴ If the national environmental law is based on EU environmental rules, then the Member States have an obligation to give access to justice full effect.³⁶⁵ Hence, the judgment led to a significant expansion of opportunities for private plaintiffs.³⁶⁶ Regarding the decision's impacts on German law, it does not directly affect the remedies included in the UmwRG, since this law did not implement article 9(3), but article 9(2) AC.³⁶⁷ Since article 9(3) applies to every infringement of environmental provisions based on EU law, German administrative courts now have to grant legal protection in any such case.³⁶⁸ However, the practical effect of article 9(3) can be questioned, since plaintiffs still have to convince the national courts of the objective of article 9(3) in order to be given locus standi.³⁶⁹ Regarding the question which interest the plaintiff had to show, the ECJ generally required national courts to widen access to courts according to article 9(3), but naturally left the specific requirements to the national court again.

4.2.2.1.3. Trianel case ECJ

The *Trianel* case, a German reference for a preliminary ruling from a regional court, focused on a coal-fired power station that Trianel intended to construct and operate.³⁷⁰ An environmental NGO argued that the granted permit for the project infringed the provisions transposing article 6(3) of the Directive 92/43/EEC into German law.³⁷¹ The ECJ ruled that article 10a of the EIA Directive precluded national legislation, which does not permit environmental NGOs to rely on the infringement of a rule stemming from EU law.³⁷² Applying a teleological approach, the ECJ interpreted article 10a of the EIA Directive in the light of the objective of article 9(2) AC.³⁷³ Both Article 10a of the EIA Directive and article 9(2) AC grant NGOs special treatment.³⁷⁴ Thus, the German rule in the UmwRG deprived environmental NGOs of the opportunity of playing the role granted to them.³⁷⁵ The impairment of a right of an environmental

³⁶² Mýller 2011 (23) *JEL* 515; Eckes 2012 (13) *German L.J.* 1166; Schlacke 2011 *ZUR* 313.

³⁶³ ECLI:EU:C:2011:125 at 42; Krawczyk 2012 (14) *Env. L. Rev.* 55.

³⁶⁴ Eckes 2012 (13) *German L.J.* 1166; Krawczyk 2012 (14) *Env. L. Rev.* 54, 56-57.

³⁶⁵ Mýller 2011 (23) *JEL* 516.

³⁶⁶ Krawczyk 2012 (14) *Env. L. Rev.* 53.

³⁶⁷ Klinger R "Erweiterte Klagerechte im Umweltrecht?" (Expanded locus standi in environmental law?) 2013 *NVwZ* 850.

³⁶⁸ Schlacke S "Störkung ýberindividuellen Rechtsschutzes zur Durchsetzung des Umweltrechts – zugleich Anmerkung zu EuGH, Urteil vom 8. Morz 2011 – Rs. C-240/09" (Strengthening supra-individual legal protection to enforce environmental law – concurrently comment on ECJ, judgment of 8 March 2011, C-240/09) 2011 *ZUR* 316.

³⁶⁹ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 40.

³⁷⁰ Mýller 2011 (23) *JEL* 509.

³⁷¹ Eckes 2012 (13) *German L.J.* 1169.

³⁷² Rehlinger 2011 (41) *Env'tl. Pol'y & L.* 147.

³⁷³ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 34.

³⁷⁴ Mýller 2011 (23) *JEL* 511.

³⁷⁵ Glinski & Rott 2011 (2) *Eur. J. Risk Reg.* 611; Mýller 2011 (23) *JEL* 511; ECLI:EU:C:2011:289 at 44; Porsch 2013 *NVwZ* 1394.

NGO cannot depend on conditions which only natural persons can fulfil.³⁷⁶ Regarding the impact on German environmental law, the prospects of success of environmental NGOs have significantly increased due to the judgment.³⁷⁷ Following the *Trianel* judgment, new legislation was issued in early April 2013.³⁷⁸ The new UmwRG omits the requirement of an impairment of an organisation's own rights in its new section 2(1)³⁷⁹.³⁸⁰ In section 2(5), impairment of right was removed as a prerequisite as well.³⁸¹ The ECJ specifically ruled that the German restriction to an infringement of individual rights is incompatible with EU law. Environmental NGOs must be granted such opportunities as well, taking into account the objectives of the Aarhus Convention and article 10a of the EIA Directive.

4.2.2.1.4. Air Pollution Control Plan case BVerwG

According to the judgment of the seventh chamber of the BVerwG of 5 September 2013³⁸² (*Air Pollution Control Plan* case), an expansion of locus standi for environmental NGOs is only possible within the legal framework of section 42(2) VwGO.³⁸³ The first option within this provision, "except where otherwise provided by law", is doomed to failure since no such provision exists. Section 64 BNatSchG³⁸⁴ and section 1 UmwRG did not apply to an action to annul an air pollution control plan.³⁸⁵ Locus standi of the NGO could be based on a claim that it is infringed in its own rights, though. The BVerwG understood the term individual public right in section 42(2) VwGO in a broader sense than ever before, leading to a dogmatic revolution.³⁸⁶ It referred to the *Janecek*³⁸⁷ judgment of the ECJ, according to which individuals as well as entities can enforce an air pollution control plan.³⁸⁸ Although entities cannot be concerned in their health like individuals can, they are explicitly mentioned as potential plaintiffs by

³⁷⁶ Reh binder 2011 (41) *Envtl. Pol'y & L.* 147.

³⁷⁷ Henning B "Erweiterung der Klagerechte anerkannter Umweltverbände – Chance auf mehr Umweltschutz oder Investitionshindernis?" (Expansion of locus standi of recognised environmental NGOs – A chance for more environmental protection or an obstacle for investments?) 2011 *NJW* 2768.

³⁷⁸ Seibert 2013 *NVwZ* 1041.

³⁷⁹ Section 2(1) UmwRG (current version): "A German or foreign association (...) may, without having to assert that its own rights have been violated, file appeals in accordance with the Verwaltungsgerichtsordnung against a decision (...) if the association (1) asserts that a decision (...) violates statutory provisions that protect the environment and could be of importance for the decision (...).".

³⁸⁰ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 257.

³⁸¹ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 257.

³⁸² BVerwG, Judgment of 5 September 2013, 7 C 21/12, 2014 *NVwZ* 64.

³⁸³ Bunge T "Zur Klagebefugnis anerkannter Umweltverbände: Das Urteil des Bundesverwaltungsgerichts vom 5. September 2013 (Locus standi of recognised environmental NGOs: The decision of the Bundesverwaltungsgericht of September 5 2013)" 2014 *ZUR* 4; Schlacke S "Zur fortschreitenden Europoisierung des (Umwelt-) Rechtsschutzes: Schutznormdoktrin und Verfahrensfehlerlehre erneut unter Anpassungsdruck" (On the progressing Europeanisation of (environmental) legal protection: Protective norm doctrine and procedural error doctrine under adjustment pressure) 2014 *NVwZ* 13; Lau M "Das Urteil des BVerwG vom 5.9.2013 oder vom Versuch, den „slowakischen Braunbären“ zu zohmen?" (The BVerwG judgment of 9/5/2013 or about the attempt to domesticate the "Slovak Brown Bear"?) 2014 *NVwZ* 638.

³⁸⁴ Current version of 2009.

³⁸⁵ Bunge 2014 *ZUR* 4; Schlacke 2014 *NVwZ* 13.

³⁸⁶ Schlacke 2014 *NVwZ* 13.

³⁸⁷ *Dieter Janecek v Freistaat Bayern*, ECJ, Judgment of July 25, 2008, C-237/07, ECLI:EU:C:2008:447.

³⁸⁸ Schlacke 2014 *NVwZ* 13.

the ECJ.³⁸⁹ The BVerwG stated that this argumentation had led to an extension of legal protection beyond the assertion of individual legal positions.³⁹⁰ According to the ECJ, an entity is entitled to take ownership of another interest.³⁹¹ Such a legal authority can be qualified as individual public right, whereas the BVerwG coined the term “procuratory” legal status.³⁹² This legal status must be recognised as individual public right within section 42(2) VwGO in conformity with EU law.³⁹³ The BVerwG argued that only such organisations can take ownership which are recognised as environmental NGOs in section 3 UmwRG.³⁹⁴ Apart from restricting locus standi to environmental NGOs, the BVerwG judgment specifically illustrated how environmental NGOs can be accorded locus standi within the German system, having the role of a “procurator” and being entitled to assert an infringement beyond the violation of its own individual rights.

4.2.2.1.5. Determination of Air Routes Case BVerwG

The judgment of the fourth chamber of the BVerwG of 12 November 2014³⁹⁵ (*Determination of Air Routes* case) concerned the claim of a recognised environmental NGO against the determination of air routes.³⁹⁶ The BVerwG ruled that determinations of air routes do not require an EIA and hence section 1 UmwRG is not applicable.³⁹⁷ It denied granting locus standi based on section 42(2) VwGO and section 3 UmwRG, since it relied on Directive 2002/49/EC on environmental noise, arguing that its provisions do not allow a resident or user to claim protection.³⁹⁸ In the end, it granted locus standi only due to violations against sections 64, 63(2) no. 5 BNatSchG.³⁹⁹ The judgment must be criticized for not granting locus standi according to the UmwRG, since it is still disputed in both EU and German law whether the determination of air routes requires an EIA.⁴⁰⁰ Concerning the admissibility of the matter, the possibility of such a requirement is sufficient.⁴⁰¹ It unjustifiably restricted locus standi for environmental NGOs to individual rights and fell behind the *Air Pollution Control Plan* judgment.⁴⁰² This requirement can hardly be reconciled with article 9(3) AC.⁴⁰³ This BVerwG judgment restricted the

³⁸⁹ Lau 2014 NVwZ 638.

³⁹⁰ Bunge 2014 ZUR 4; Sauer M “Rechtsschutz in Umweltangelegenheiten im Umbruch? Versuch eines überblicks zum Stand der Diskussion“ (Legal protection in environmental matters in an upheaval? Attempt of an overview on the status of the discussion) 2014 ZUR 197.

³⁹¹ Lau 2014 NVwZ 638.

³⁹² Bunge 2014 ZUR 5.

³⁹³ Schlacke 2014 NVwZ 13.

³⁹⁴ Bunge 2014 ZUR 5; Schlacke 2014 NVwZ 13; Lau 2014 NVwZ 639; Sauer 2014 ZUR 197.

³⁹⁵ BVerwG, Judgment of 12 November 2014, 4 C 34/13, 2015 NVwZ 596.

³⁹⁶ Schlacke S “Klagebefugnis anerkannter Umweltverbände gegen Flugroutenfestlegung: Keine UVP bei Festlegung der Flugrouten (Locus standi of recognised environmental NGOs against the determination of flight routes: No EIA for determination of flight routes)” 2015 NVwZ 563.

³⁹⁷ BVerwG 2015 NVwZ 597.

³⁹⁸ BVerwG 2015 NVwZ 598.

³⁹⁹ BVerwG 2015 NVwZ 599.

⁴⁰⁰ Schlacke 2015 NVwZ 564.

⁴⁰¹ Schlacke 2015 NVwZ 564.

⁴⁰² Schlacke 2015 NVwZ 564.

⁴⁰³ Franzius 2016 UPR 20.

granting of locus standi to individual rights which environmental NGOs litigating in the public interest can normally not fulfil.

4.2.2.2. Persons/entities which have locus standi

In the first landmark decision of the ECJ concerning representative environmental action, the *Djuurgarden* case, an environmental NGO was granted locus standi to render effective article 10a of the EIA Directive.⁴⁰⁴ In the *Slovak Brown Bear* case, an environmental NGO had locus standi to give effect to article 9(3) AC.⁴⁰⁵ The *Trianel* case interpreted both article 10a of the EIA Directive and article 9(2) AC to grant another environmental NGO locus standi.⁴⁰⁶ In the *Air Pollution Control Plan* case, the BVerwG interpreted section 42(2) VwGO in a broader manner with reference to the new ECJ jurisprudence and an environmental NGO accordingly also had locus standi.⁴⁰⁷ Another environmental NGO was not accorded locus standi in the *Determination of Air Routes* case in the end, since the BVerwG relied on the traditional requirement of an individual right's infringement.⁴⁰⁸ Hence, these ECJ as well as BVerwG decisions only concern applications by environmental NGOs litigating in the public interest. The exclusion of individual plaintiffs is due to the fact that neither the Aarhus Convention nor the relevant EU Directives have explicitly demanded such a wide extension.

4.2.2.3. Procedural issues relating to locus standi

The scope of the rule established by the Aarhus Convention that the costs in environmental proceedings must not be prohibitively expensive is essentially important.⁴⁰⁹ The ECJ has delivered three landmark decisions on this matter.

The first case, *Commission v Ireland*⁴¹⁰, concerned the European Commission's claim that Ireland had not transposed various EU law provisions concerning access to justice into national law. The ECJ concluded it is clear from article 10a of the EIA Directive, that procedures established in the context of this provision must not be prohibitively expensive.⁴¹¹ The Court made it clear that a discretionary practice by the courts does not ensure environmental litigation not to be prohibitively expensive.⁴¹²

⁴⁰⁴ Mýller 2011 (23) *JEL* 508-509.

⁴⁰⁵ Eckes 2012 (13) *German L.J.* 1166.

⁴⁰⁶ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 34.

⁴⁰⁷ Bunge 2014 *ZUR* 4.

⁴⁰⁸ Schlacke 2015 *NVwZ* 564.

⁴⁰⁹ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 41.

⁴¹⁰ *Commission v. Ireland*, ECJ, Judgment of July 16, 2009, C-427/07, ECLI:EU:C:2009:457.

⁴¹¹ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 42.

⁴¹² Glinski & Rott 2011 (2) *Eur. J. Risk Reg.* 613.

In *Edwards and Pallikaropoulos*⁴¹³, the ECJ affirmed that the assessment of what must be seen as prohibitively expensive is not solely a matter of national law due to the need for the uniform application of EU law. According to the judgment, this requirement means that concerned persons should not be prevented from seeking a review by the courts due to the financial burden this might cause.⁴¹⁴

The case *Commission v United Kingdom*⁴¹⁵ concerned a so-called “protective cost order” in the law of the United Kingdom, which could be issued in order to limit the amount a public authority is able to recover.⁴¹⁶ The ECJ ruled that the lack of clear rules for giving such orders, as well as its discretionary and unpredictable nature, does not accord with the Directive 2003/35/EC.⁴¹⁷ Assuring possible plaintiffs reasonable predictability of the total cost is essentially necessary.⁴¹⁸

Concluding, these judgments concerning the costs of environmental proceedings are essentially important since they outlined several conditions embedded in the requirement that proceedings must not be prohibitively expensive and clarified the meaning of the EU implementation of articles 9(4) and 9(5) AC.⁴¹⁹

In Germany, litigation costs play a significant role in court procedures as well since the loser-pays rule applies.⁴²⁰ The losing party has to pay for court fees, attorney fees of the other party, its own attorney fees and the costs of the evidence collection.⁴²¹ In environmental matters, German administrative courts take into account the index of litigation values for administrative courts.⁴²² This index mentions a range between 15,000 and 30,000€ for representative actions.⁴²³ The ECJ requires that the litigation costs of all possible court instances have to be included to evaluate the question of prohibitively expensive litigation.⁴²⁴ The crucial issue with representative environmental action is that the costs are usually a lot higher, especially due to extensive evidence collection.⁴²⁵ The ECJ also took into consideration whether

⁴¹³ *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, ECJ, Judgment of April 11, 2013, C-260/11, ECLI:EU:C:2013:221.

⁴¹⁴ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 43-44.

⁴¹⁵ *European Commission v United Kingdom*, ECJ, Judgment of February 13, 2014, C-530/11, ECLI:EU:C:2014:67.

⁴¹⁶ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 44.

⁴¹⁷ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 44.

⁴¹⁸ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 45.

⁴¹⁹ Hjalmarsson 2014 (19) *E. & Central Eur. J. on Env'tl. L.* 48.

⁴²⁰ Glinski & Rott 2011 (2) *Eur. J. Risk Reg.* 613.

⁴²¹ Kremer P "Anmerkung zum Urteil des EuGH vom 13.2.2014 – Rs. C-530/11 und vom 11.4.2014 – Rs. C-260/11" (Comment on judgment of the ECJ of 2/13/2014 – legal matter C-530/11 and of 4/11/2014 – legal matter C-260/11) 2014 *ZUR* 348.

⁴²² Kremer 2014 *ZUR* 348; Berkemann J "Das 'nicht übermäßig teure' gerichtliche Verfahren im Umweltrecht (The 'not prohibitively expensive' court procedure in environmental law)" 2014 *JM* 473.

⁴²³ Berkemann 2014 *JM* 473.

⁴²⁴ Kremer 2014 *ZUR* 348.

⁴²⁵ Berkemann 2014 *JM* 473.

the national law offers legal aid.⁴²⁶ However, not a single German court has granted an environmental NGO legal aid, particularly due to the fact that the conditions of sections 116(1) no. 2⁴²⁷ and 114(1)⁴²⁸ *Zivilprozessordnung*⁴²⁹ (Code for Civil Procedure, abbreviated as ZPO) are usually not fulfilled.⁴³⁰ The purpose of section 116 ZPO that legal entities should not litigate at the expense of the public, is legitimate per se.⁴³¹ Concerning environmental NGOs, it is absurd since these are called upon articulating the interests of the public according to article 9 AC, Directive 2011/92/EU and the UmwRG.⁴³² The OVG Münster avoided dealing with this issue and simply referred to a limited litigation value “on the lower margin of the scope usually applicable for procedures of such kind”.⁴³³ However, this judgment is fundamentally unrealistic since the cost risk for representative environmental action is usually a lot higher.⁴³⁴

There are hardly further options to limit the cost risk in advance.⁴³⁵ Hence, the German system of litigation costs in environmental matters may not be compatible with EU law.⁴³⁶ However, the BVerwG ruled in its judgment of 15 September 2015⁴³⁷ that the German prerequisites do not violate EU law.⁴³⁸ It laid out several criteria to determine a “non-prohibitively expensive” litigation. The economic circumstances of the party, the prospects of success, the relevance of the legal dispute for environmental protection, the complexity of the law as well as the potentially malicious character of the remedy must be considered.⁴³⁹ Nevertheless, the plaintiff in this specific case did not substantially assert for an unjustified burden.⁴⁴⁰ The legislature is called upon appropriately implementing article 11(4) of Directive 2011/92/EU into domestic law.⁴⁴¹

⁴²⁶ Kremer 2014 *ZUR* 349.

⁴²⁷ Section 116(1) no. 2 ZPO: “Legal aid is granted on application to (...) 2. a legal entity (...) if the costs can neither be paid by itself nor by other parties economically participating in the matter of the legal dispute and if the omission of the legal prosecution or legal defence would contradict general interests.”.

⁴²⁸ Section 114(1) ZPO: “A party, which cannot pay for the litigation costs due to its personal and economic circumstances or to some part or only in rates, receives legal aid on application, if the legal prosecution or legal defence has a sufficient prospect of success and does not appear malicious. (...)”.

⁴²⁹ *Zivilprozessordnung* (Code of Civil Procedure), December 5, 2005, BGBl. I, 3202.

⁴³⁰ Kremer 2014 *ZUR* 349.

⁴³¹ Berkemann 2014 *JM* 473.

⁴³² Berkemann 2014 *JM* 473.

⁴³³ Berkemann 2014 *JM* 473.

⁴³⁴ Berkemann 2014 *JM* 473.

⁴³⁵ Kremer 2014 *ZUR* 349.

⁴³⁶ Kremer 2014 *ZUR* 349.

⁴³⁷ BVerwG, Judgment of 15 September 2015, 9 KSt 2/15 (9A 8/14), 2016 *NuR* 127.

⁴³⁸ 9 KSt 2/15 (9A 8/14) at 7 (legal database juris).

⁴³⁹ 9 KSt 2/15 (9A 8/14) at 8 (juris).

⁴⁴⁰ 9 KSt 2/15 (9A 8/14) at 9 (juris).

⁴⁴¹ Kremer 2014 *ZUR* 349.

5. South Africa's lessons for Germany

This section examines what lessons Germany can learn from South Africa's approach to locus standi in the context of public interest environmental litigation. Furthermore, it illustrates which obstacles there are in Germany to implementing these lessons. The section includes a general critical review and addresses the key elements which interests are sufficient to found locus standi, which persons/entities are accorded locus standi and which procedural issues relate to locus standi. In each of these four sub-sections both the opportunities arising from South Africa and the obstacles in Germany are addressed.

5.1. General critical review

5.1.1. Opportunities

Overall, it can be argued that the floodgates in South African jurisprudence have not opened and "busybodies" have not forced their way into the courts.⁴⁴² The courts have meanwhile adopted a far less formalistic approach to locus standi which has significantly reinforced the fundamental right of everyone to access a court.⁴⁴³ The development of a generous approach to locus standi has caused locus standi to be a much less significant obstacle than ever before.⁴⁴⁴

As *Krishna Iyer J* pointed out in the Indian case *Fertilizer Corporation Kamgar Union (Regd) v Union of India*⁴⁴⁵, "it is essential that the rule of law must wean the people away from the lawless street and win them for the court of law".⁴⁴⁶ The liberalisation of locus standi requirements enhances access to justice in a profound manner and hereby contributes to stability in society.⁴⁴⁷ In *Fose v Minister of Safety and Security*⁴⁴⁸ it was held that it is essential in a country like South Africa, due to its significant disparities of wealth, opportunity and hence access to court, that courts must ensure that infringed fundamental rights are vindicated.⁴⁴⁹ Otherwise, these rights would be at risk of being regarded by most South Africans as empty promises or even a charter of luxuries available to the rich and powerful.⁴⁵⁰ Many South Africans whose fundamental rights are violated may not actually be in a position to bring an action before court.⁴⁵¹ It is essential to consider that litigation is cost-intensive and only a few individuals have the

⁴⁴² Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 296.

⁴⁴³ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 296.

⁴⁴⁴ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 296.

⁴⁴⁵ 1981 (1) SCC 568.

⁴⁴⁶ 1981 (1) SCC 568 at 584.

⁴⁴⁷ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 298.

⁴⁴⁸ 1997 (3) SA 786 (CC).

⁴⁴⁹ 1997 (3) SA 786 (CC) at 69.

⁴⁵⁰ Plasket 2009 (62) *Ann. Am. Acad. Polit. Soc. Sci.* 298.

⁴⁵¹ Devenish 2005 (38) *De Jure* 37.

financial means which are required for complicated litigation.⁴⁵² Public interest NGOs can hence take up the task of litigating on behalf of vulnerable groups.⁴⁵³

The necessity of widening access to courts is obvious in South African environmental law as well. The anachronism of the common law must stand back to more liberalised approaches to public interest environmental litigation.⁴⁵⁴ In *Director: Mineral Development: Gauteng Region and Another v Save the Vaal Environment and Others*⁴⁵⁵, the Court held that the Final Constitution, by including the environmental right as a fundamental right, necessarily requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in South Africa.⁴⁵⁶ Furthermore, it argued that together with the change in the ideological climate must also come a change in the legal and administrative approach to environmental concerns.⁴⁵⁷ Both the highly progressive South African legislation regarding locus standi requirements in section 38 FC and section 32 NEMA and the generally affirmative jurisprudence of the last twenty years must be highly appreciated and the commitment to provide sufficient access to justice be treated with sincere admiration, taking into account the country's past. The crucial question is whether Germany can take a lesson from South Africa's radical approach and whether it is advisable or even legally required that it changes its traditionally restrictive approach in a similarly fundamental manner.

5.1.2. Obstacles

Having examined both German legislation, in particular section 42(2) VwGO and the former version of section 2 UmwRG, it has become apparent how persistent and nearly imperishable the German legal concepts of the individual public right and impairment of rights doctrine still prove to be. German jurisprudence has been reluctant to grant administrative courts the power to review non-individual infringements of rights out of fear of a politicisation of administrative jurisdiction.⁴⁵⁸ Due to the concept of the individual public right it has been possible to avoid meeting demands for more political participation and favour the rule of law instead of democracy.⁴⁵⁹ It has needed the explicit and unambiguous judgments of the ECJ, especially in the *Trianel* matter, to fundamentally challenge German legislation and eventually force it to drop the everlasting dependence on an infringement of individual public rights in environmental matters having a link to EU law. In a modern democracy, the legal position of the

⁴⁵² Feris L "Environmental Rights and Locus Standi", in: Paterson A and Kotze L (eds) *Environmental Challenges and Enforcement in South Africa: Legal Perspectives* (2009) 146.

⁴⁵³ Murombo 2010 (6/2) LEAD 176; Feris "Environmental Rights and Locus Standi" in *Environmental Challenges and Enforcement* (2009) 146.

⁴⁵⁴ Murombo 2010 (6/2) LEAD 172.

⁴⁵⁵ 1999 (2) SA 709 (SCA).

⁴⁵⁶ 1999 (2) SA 709 (SCA) at 20.

⁴⁵⁷ 1999 (2) SA 709 (SCA) at 20.

⁴⁵⁸ Franzius 2016 UPR 5.

⁴⁵⁹ Franzius 2016 UPR 7.

citizen vis-à-vis the administration cannot be restricted to the protection of individual matters anymore.⁴⁶⁰ Political participation and the changed status of the citizen demand the transformation of the individual public right to open it to the assertion of public interest issues.⁴⁶¹ Hence, Germany should take the new South African approach as positive example of how to reform traditionally restrictive locus standi requirements and widen access to courts also in matters where no individual rights are affected. However, one must note that there has not been such a radical constitutional shift in Germany unlike in South Africa in 1993 which marked a golden opportunity for the country to reform its legal system. Apart from that fact, it is also essential to take into account the fundamentally different social and economic structure of a highly industrialised nation with powerful and influential NGOs like Germany and of an emerging nation like South Africa.

5.2. Interests sufficient to found locus standi

5.2.1. Opportunities

Again, South Africa provides a good lesson regarding its legal framework. The progressive requirements regarding public interest environmental litigation are mentioned in both section 38(d) FC and section 32(1) NEMA. Section 38(d) FC accords locus standi to the persons acting in the public interest, but does not further specify this term. It is important to note that the provision of section 38(d) directly only applies in the case of an infringement of a right entrenched in Chapter 2 of the FC, but section 39(2) FC obliges courts to have due regard to the spirit, purport and objects of the Bill of Rights in the development of the common law. Hence, the common-law rules need to be interpreted in a broad manner, similarly to the ones laid down in section 38 FC as well. Furthermore, introducing a right to a healthy environment in section 24 FC enables litigants to bring an action in environmental matters affecting the public interest to a greater extent than ever before, since section 24 FC is one of the rights of Chapter 2. Concerning the requirements for public interest litigants in the environmental context, section 32(1)(d) - (e) NEMA go even further than section 38(d) FC does.

Regarding recent court decisions, a merely positive lesson can be taken as well. South African courts have generally affirmed the progressive approach taken in both the Interim and Final Constitutions and NEMA. In the landmark decision *Ferreira* as starting point, *O'Regan J* called public interest litigation a new departure in South African law and argued that it must be interpreted in the light of the new role of courts in a constitutional democracy.⁴⁶² Besides, she explicitly stated that public interest litigants do not need to assert an infringement of a right, which is the innovative cornerstone of public interest

⁴⁶⁰ Franzius 2016 UPR 5.

⁴⁶¹ Franzius 2016 UPR 5.

⁴⁶² Devenish 2005 (38) *De Jure* 44.

litigation.⁴⁶³ Equally decisively, she mentioned several factors to determine if an action was brought in the public interest, such as the fact whether there is another manner in which the action can be brought, the nature of the claim, the extent of applicability and the range of affected persons.⁴⁶⁴ Other factors were added to this list in the *Campus Law Clinic* case, such as the degree of vulnerability of the plaintiff, the nature of the rights and the consequences of the infringement.⁴⁶⁵ This list is of essential importance because it creates precedent and gives other courts specific guidance in subsequent decisions. The *Wildlife Society* case specifically concerned an environmental NGO and ruled that these must generally further the interests of environmental protection.⁴⁶⁶ Besides, there were other cases laying down further assessment options to evaluate whether the criterion public interest is fulfilled. While the *Prut NO* case argued that it must not merely be an academic issue, the *Lawyers for Human Rights* case confirmed this notion and coined the term “genuinely” claiming the public interest.⁴⁶⁷ The *Tergniet* case must be considered as a controversial decision, since it did not address the term public interest at all, although the case marked a golden opportunity to further elaborate on this issue.⁴⁶⁸ This shows that some South African judgments have still not given the progressive provisions in the Final Constitution and NEMA sufficient meaning, although many judgments have interpreted these provisions concisely.

5.2.2. Obstacles

Taking into account the resistance by German courts to question traditional doctrines and widen access to courts in public interest matters, and the fact that this has entirely been achieved due to the external influences of international and EU law, it is extremely unrealistic that the German legislature will abruptly implement such wide locus standi requirements as in South Africa. It should not entirely abandon its traditional doctrines of administrative law, which have generally proven efficient and created stability and legal certainty in the long run. Furthermore, it is decisive to note that even the ECJ has not completely given the impairment of rights doctrine a short shrift. It limited its incompatibility with EU law in environmental matters to the question of admissibility, but maintained its compatibility in the question of merits which is regulated in section 113(1) VwGO. It is important to note that the requirement of an individual right remains the same in the test of the merits.⁴⁶⁹ The claim of the plaintiff to annul a decision according to section 113(1) VwGO still depends on an individual right, even within the scope of the EIA Directive.⁴⁷⁰ Thus, the German legislature has not been required by EU law to abolish its traditional requirements altogether.

⁴⁶³ 1996 (1) SA 984 (CC) at 235.

⁴⁶⁴ Loots “Standing, Ripeness and Mootness” in *Constitutional Law of SA* (2008) 7-2 – 7-4.

⁴⁶⁵ Cote & Van Garderen 2011 (27) *S. Afr. J. on Hum. Rts.* 178.

⁴⁶⁶ 1996 (3) SA 1095 (Tk) at 1106.

⁴⁶⁷ 1996 (4) SA 318 (E) at 325J-326B.

⁴⁶⁸ Kidd 2010 (13) (5) *PER/PELJ* 31.

⁴⁶⁹ Franzius 2016 *UPR* 12.

⁴⁷⁰ Franzius 2016 *UPR* 12.

It is advisable for the German legislature and jurisprudence not to entirely abandon these doctrines, but rather reform them within the system of German administrative law with an open mind, which the BVerwG has partly proven to possess. The solution does not have to be to completely abolish this traditional concept, but to modernise it and acknowledge the formative capacity of the legislature and margin of interpretation of the jurisprudence.⁴⁷¹ The fundamental decision in favour of an individualised legal protection proves to be tenable, but should not be used as abstract aspiration.⁴⁷² National particularities such as the concept of the individual public right persist and should not be entirely neglected in legal implementations.⁴⁷³ The concept should not be revised, but its traditional focus on individual instead of “procuratory” matters should be adjusted.⁴⁷⁴ Integration, not isolation, is the aim.⁴⁷⁵ It is essential to deal with this systematic decision in a flexible manner.⁴⁷⁶ Representative environmental action of NGOs is the actual rescue of the impairment of rights doctrine since it logically matches it better than simply demanding a kind of interest in the matter.⁴⁷⁷

The Europeanisation of the impairment of rights doctrine has received considerable impetus due to the judgment of the BVerwG in the *Air Pollution Control Plan* case.⁴⁷⁸ Environmental NGOs can allege an infringement of all environmental provisions deriving from EU law since they are only trustees of the environmental protection interests and hold a procuratory legal status.⁴⁷⁹ However, both the *Grundgesetz* and the *VwGO* have traditionally not assigned the courts to review objective violations of rights. In line with a functioning legal protection system, it is first and foremost task of the legislature and not the courts to close this gap and promulgate adequate provisions.⁴⁸⁰ For now, it should be sufficient to expand the scope of section 1 UmwRG.⁴⁸¹

At least as much as concretising and thoroughly interpreting article 9(2) AC and the corresponding provisions of the UmwRG, the crucial challenge for German courts and the legislature is the implementation of article 9(3) AC. According to the *Slovak Brown Bear* case, only environmental provisions originating in EU law are concerned. A restrictive interpretation only granting locus standi when EU law is indirectly infringed, contradicts both the purpose and the wording of article 9(3), though.⁴⁸² This provision must be interpreted consistently both on an EU and on a national level.⁴⁸³

⁴⁷¹ Franzius 2016 UPR 5.

⁴⁷² Leidinger 2011 NVwZ 1351.

⁴⁷³ Mangold 2014 (21) *Ind. J. Global Legal Stud.* 261.

⁴⁷⁴ Franzius 2016 UPR 28.

⁴⁷⁵ Franzius 2016 UPR 5.

⁴⁷⁶ Leidinger 2011 NVwZ 1351.

⁴⁷⁷ Franzius 2016 UPR 7-8.

⁴⁷⁸ Schlacke 2014 NVwZ 13.

⁴⁷⁹ Schlacke 2014 NVwZ 16.

⁴⁸⁰ Schlacke 2014 NVwZ 16.

⁴⁸¹ Schlacke 2014 NVwZ 16.

⁴⁸² Bunge 2014 ZUR 9-10.

Furthermore, remedies against the infringement of environmental law of the Member States are subject matter of article 9(3) – hence EU as well as national provisions.⁴⁸⁴

It is important to note that the legislature is called upon implementing article 9(3) AC, which cannot be solely done by the courts.⁴⁸⁵ Article 9(3) is no other statutory provision in terms of section 42(2) VwGO either, since the norm does not have a direct effect.⁴⁸⁶ The *Air Pollution Control Plan* judgment still did not convince the Aarhus Compliance Committee.⁴⁸⁷ According to its decision, the scope of section 1(1) UmwRG must be extended due to the requirements by article 9(3) and the restriction to provisions which serve environmental protection must be changed due to article 9(2).⁴⁸⁸ The new draft of the UmwRG of September 2016 still does not fulfil these requirements since it does not include sub-statutory provisions such as ordinances, determinations of air routes and regulations of nature reserves.⁴⁸⁹ Another main issue remains how to define entitled plaintiffs. Article 9(3) AC intends to grant locus standi to “members of the public”, but allows states to determine the exact requirements. The Aarhus Convention offers flexibility, since states are not forced to introduce an *actio popularis*, but cannot lay down such restrictive criteria either that the assertion of an infringement of environmental provision is effectively precluded to almost all plaintiffs.⁴⁹⁰ It remains to be clarified whether it is sufficient to stick to the prerequisites included in section 42(2) VwGO in the context of individuals bringing an action in the public interest.⁴⁹¹ Individuals could only contribute to the purpose of article 9(3) AC to a very limited degree. On the one hand, only allowing environmental NGOs to litigate in the public interest can be appreciated, since they have the necessary expertise regarding environmental protection.⁴⁹² On the other hand, it must be noted that representative actions are only brought before court on several occasions, since such procedures often overstrain the personal and financial capacities of such NGOs.⁴⁹³ The risk of litigation costs forces environmental NGOs to carefully examine the chances of success of a remedy.⁴⁹⁴ Hence, the introduction of representative environmental action has

⁴⁸³ Bunge 2014 ZUR 9.

⁴⁸⁴ Bunge 2014 ZUR 10.

⁴⁸⁵ Sauer 2014 ZUR 202.

⁴⁸⁶ Franzius 2016 UPR 13.

⁴⁸⁷ Franzius 2016 UPR 13; findings and recommendations with regard to communication ACCC/ C/2008/31 concerning compliance by Germany, ECE/MP.PP/C.1/2014/9 of July 2, 2014, at 97.

⁴⁸⁸ Schlacke S “Bedeutung von Verfahrensfehlern im Umwelt- und Planungsrecht – unter besonderer Berücksichtigung des Gesetzentwurfs zum UmwRG vom 5.9.2016” (Meaning of procedural errors in environmental and planning law – in consideration of the draft law of the UmwRG of 9/5/2016) 2016 UPR 482-483.

⁴⁸⁹ Schlacke 2016 UPR 483.

⁴⁹⁰ Bunge 2015 ZUR 541.

⁴⁹¹ Bunge 2015 ZUR 541.

⁴⁹² Bunge 2015 ZUR 541.

⁴⁹³ Seibert 2013 NVwZ 1049.

⁴⁹⁴ Bunge 2015 ZUR 541.

not led to “opening the floodgates” yet and will not do so in the future either.⁴⁹⁵ An investigation undertaken in 2012 showed that since the *Trianel* judgment the number of remedies according to the UmwRG did not increase significantly.⁴⁹⁶ Several other investigations prove that environmental NGOs have exercised their right to bring an action in a reasonable manner.⁴⁹⁷

5.3. Persons/entities which have locus standi

5.3.1. Opportunities

On a positive note, Germany can learn a lot from South Africa’s clear and ambitious legal framework. The revolutionary wide locus standi requirements concerning public interest environmental litigation are explicitly laid down in both section 38(d) FC and section 32 NEMA. Since section 38(d) FC states that “anyone listed in this section” is entitled to bring an action before a court and section 38 mentions “persons” in its second sentence, it practically grants locus standi in an unlimited manner. While it does not state more precisely which persons or entities are accorded locus standi, it logically applies to a single person and a group of persons. Other entities are not explicitly excluded and can be subsumed under the terms “anyone” and “persons”, without further specifications about their legal structure. Hence, both individuals and environmental NGOs – which form the main focus and distinction of this dissertation - are implicitly included. Within section 32(1) NEMA, sections 32(1)(d) and (e) are of crucial importance in the environmental context. While section 32(1) explicitly mentions “any person or group of persons”, it naturally applies to both of these categories. Furthermore, environmental NGOs can be subsumed under the term “group of person”, since this category does not entail any further any restriction either. Regarding South Africa’s recent jurisprudence, there are both good and bad lessons for Germany. Many court decisions have affirmed the progressive wording of the legal framework. While most discussed cases do not explicitly distinguish between individual litigants and NGOs, it can be implied that the applicable provisions apply to both categories. A rather negative outcome, proving it remains essential to apply the provisions of both the Final Constitution and NEMA precisely, can be derived from the *Tergniet* case. Although the Court could have based its argumentation on an action brought in the public interest, it focused on the factor of the possible effect of the facility on the people living in the closer proximity. Thereby, it implicitly denied environmental NGOs locus standi in a similar situation since they could never fulfil this prerequisite.

⁴⁹⁵ Schwerdtfeger A “Erweiterte Klagerechte für Umweltverbände – Anmerkung zum Urteil des EuGH v. 12.5.2011 in der Rechtssache *Trianel*” (Extended locus standi for environmental NGOs – Comment on judgment of the ECJ of 5/12/2011 in the matter *Trianel*) 2012 *Eur* 89; Seibert 2013 *NVwZ* 1048.

⁴⁹⁶ Fyhr M et al “Verbandsklage nach UmwRG – empirische Befunde und rechtliche Bewertung” (Representative action in UmwRG – empirical findings and legal evaluation) 2014 *NVwZ* 1042.

⁴⁹⁷ Wegener 2011 *ZUR* 365; Schwerdtfeger 2012 *Eur* 89; Seibert 2013 *NVwZ* 1048.

5.3.2. Obstacles

It is essential to note that unlike in South Africa, which has provided for a practically unlimited locus standi clause in section 38 FC and extended the opportunity to litigate in the public interest even to individuals, neither the Aarhus Convention nor the various EU Directives have provided for such an extension. Instead, they emphasise the role of environmental NGOs to litigate in the public interest and widen access to courts in environmental matters. Hence, the German legislature has only been obliged to implement these relatively restrictive requirements into domestic law. Therefore, the legal figures of public interest environmental litigation (including individuals) and representative environmental action (excluding them) must fundamentally be distinguished. Taking into account these restrictive international and EU law obligations and the reluctance by German legislature and jurisprudence to abandon their traditional doctrines altogether, it is not advisable to change the whole German system for now for purposes of consistency and legal certainty. It should merely be the task of international and EU law bodies to make proposals to extend representative environmental action to individuals as well.

5.4. Procedural issues relating to locus standi

5.4.1. Opportunities

Germany can also take a positive lesson concerning the regulation of procedural issues: Regarding this question, the rules regarding litigation costs are essential. Section 32(2) NEMA is of crucial importance, since it grants the courts the discretion not to award costs against plaintiffs litigating in the public interest or the interest of environmental protection.

Regarding South Africa's recent jurisprudence, it offers rather positive lessons as well, despite some flaws. In the *Silvermine Valley* case, the court laid out how to assess the issue of litigation costs. It stated that the crucial test is whether the plaintiff acted reasonably out of a concern for the public interest and had tried out other reasonable means as well. In the *Wildlife and Environmental Society* and *Lionswatch* cases, the Court rationally argued it would not be fair to make a costs order in favour of a plaintiff if its action was withdrawn and doomed to failure as well. A landmark decision was the *Biowatch* case, which coined the requirement of "bringing a matter bona fide and not vexatiously" which every public interest litigant must meet. Furthermore, it differentiated that litigants should not have disadvantages regarding costs awards since they pursue commercial interests, but they should not be favoured either in case they pursue a "good cause" such as environmental protection. Subsequently, every court must focus on the nature of the issue, not the character of the parties. Although this may sound well-considered, it may also have a negative impact on other court decisions since public interest litigants such as NGOs often do not have the financial means and cannot be considered to be on the same level as well-resourced companies. In the end, the status of parties and the nature of the dispute

must be considered correlating, while the rule of law is still the decisive factor and public interest litigants should not be favoured in an over-extensive manner.

5.4.2. Obstacles

South African legislation, in particular section 32 NEMA, has provided for generous and far-reaching requirements to not put too much of a financial burden on litigants, and jurisprudence has generally approved this approach as well. In this sense, although the BVerwG still argues that the provisions of the ZPO are sufficient and neither the jurisprudence nor the legislature is of the opinion there is an urgent need to implement article 9(4) AC and article 11(4) of Directive 2011/92/EU into German law. Germany can take South Africa as positive example and implement progressive provisions which should be phrased in a similarly progressive manner like the ones in section 32 NEMA. Particularly in environmental matters, there is a huge financial risk for litigants due to the often-extensive evidence collection. There is no apparent reason why Germany could not provide for more concise and ambitious provisions than there are generally provided for in the ZPO.

6. Conclusion

This dissertation has examined how jurisdictions with formerly highly restrictive locus standi requirements have liberalised these and widened access to courts in the context of public interest environmental litigation. While South Africa has been able to overcome the fundamental obstacles to that kind of litigation during the common-law era in a more consistent and thorough manner due to the drastic constitutional shift from 1994 on, Germany has struggled at first to properly implement the innovative and progressive provisions of the Aarhus Convention and the subsequent EU Directives. It needed the determined jurisprudence of the ECJ, in particular in the *Trianel* case, to declare the relevant provisions of the UmwRG incompatible with EU law and remind Germany of its obligations to genuinely introduce representative environmental action.

While several South African court decisions have shown how some courts still struggle to efficiently interpret the provisions regarding public interest litigation, the highly ambitious legal framework and the generally positive jurisprudence trend must be appreciated and can provide a positive lesson to follow for Germany. Germany can definitely learn from South Africa that it is essential to realise a more comprehensible and unambiguous legal framework instead of entirely leaving it to the courts to develop the law regarding this issue. Such a legal framework would not only create justice for public interest litigants, but also legal certainty in general.

While the German legislature certainly has to take a more ambitious and consistent approach in this sense, it is essential to note that both the legal framework and jurisprudence on an international and EU level have not demanded the German legislature to provide for a practically unrestricted *actio popularis* like established in South African law. The Aarhus Convention appointed environmental NGOs to widen access to courts in environmental law and enhance the third pillar of the Convention. Both EU legislature and jurisprudence have followed suit and have not called upon introducing general public interest litigation, but solely representative environmental action with environmental NGOs as the key player. German jurisprudence has not made more radical demands either in the recent years.

Furthermore, the EU has not required Germany to entirely abolish its individualised system of judicial review and reliance on an impairment of an individual right in the merits of an action, by declaring the provision of section 113(1) VwGO compatible with EU law. Since Germany was forced to amend the UmwRG and remove the requirement of an impairment of an individual right in its section 2 following the *Trianel* judgment, it had to properly implement article 9(2) AC into domestic law. However, this only affects matters involving an EIA and based on EU law. An unambiguous implementation of the more general provision of article 9(3) AC remains to be seen still. This is again the task of the legislature and cannot be entirely left to the courts. It is essential to note that an implementation should not only

concern matters stemming from EU law, but solely German environmental law as well to not contradict the purpose and wording of article 9(3) AC.

Concerning the recent judgments of the BVerwG, the *Air Pollution Control Plan* case must be appreciated as consistent and innovative, by introducing the term of a “procucatory” legal position within section 42(2) VwGO. Nevertheless, it must be criticised that the judgment of the fourth chamber in the *Determination of Air Routes* case restricted granting locus standi to an impairment of individual rights and fell behind the previous decision.

Taking into consideration both German legislature and jurisprudence of the recent years, it is apparent how the German national particularities of the individual public right and impairment of rights doctrine have persisted and proven their general durability. Hence, it is essential that Germany reforms its legal system regarding representative environmental action not outside these doctrines, but adjusts it in a solid accordance with them. This would finally create more legal certainty and environmental justice.

Where there is a will, there is a way.

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