HAVE TREES GOT STANDING?

A BRIEF ACCOUNT OF LOCUS *STANDI* DOCTRINES AND CASE LAW IN THE ENVIRONMENTAL LITIGATION ON THE BASIS OF THE PRINCIPLE OF EFFECTIVENESS OF RIGHTS

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ABSTRACT
The paper presents an account of the challenges and potentialities of green litigation from the perspective of the effectiveness of rights and remedies, by focusing on the issue of *locus standi* in the legal reasoning of some relevant case law at a transnational and international level.
The analysis relies on theoretical tools such as the relationship between rights and remedies, the principle of effectiveness of protection and the question of who has the right to have rights, which translates, in legal terms, in the issue of *locus standi*.
These tools will be used to assess whether and to what extent the creative and dynamic reasoning of fully judicial bodies, such as domestic, international or supranational courts, is able to critically take into account the complexity of contemporary environmental litigation and to produce of an effective protection to the environment, particularly considering the doctrine and case law concerning the expansion of the notion of *locus standi* based on the principle of effectiveness.

KEYWORDS
Environmental law, green litigation, Wild law, Earth jurisprudence, European Court of Human Rights law, legal reasoning, doctrine of *locus standi* in international law

ISSN 1825-0173

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1. *Introduction*

Fifty years ago, Christopher D. Stone wrote a revolutionary article posing the relevant legal question: *Should Trees have standing?* (STONE 1972). The environmental (or green) litigation was at the very beginning of an intense activity which has led to the shaping of a plural and complex legislation, doctrine and case law. Stone highlighted one of the main relevant legal issue: who is the subject of the judicial protection of rights, who is the rights-holder and who is entitled to bring a case in front of a judge, articulating claims and obtaining a proceduralization of social and cultural conflicts. To put it in a nutshell, the question was how to effectively protect environmental rights in non-necessarily anthropocentric terms.

One of the pivotal points in Stone reasoning was the comparison with the evolution of children rights and the "creation" of non-human rights-holders. The whole history of rights, Stone declares, is a continuous expansion of the category of rights-holders, an evolution carried out by making "persons" of whoever (or whichever entity) was not a person in legal terms (STONE 1972, 451).

The article steered a theoretical reconsideration of the relationship between the human-made law and the rest of the (non-human) nature and to a new understanding of the connection between the human community and the Earth community in which it lives.

Finally, these same theoretical reflections led to the call for a new jurisprudence (BERRY 1999) which eventually was elaborated and defines as Earth Jurisprudence (CULLINAN 2003).

Elsewhere (CIUFFOLETTI 2019), we argued that, as denounced by the recent International Report on Environmental Law published by the United Nations Environment Programme (UNEP)[1], to due the proliferation of national and international legislation, of intergovernmental agreements, environmental laws and declaration of rights, a gap has opened up between written law and effective protection, which risks undermining the demands of what is defined as the "environmental rule of law" (UNEP 2019, 1).

The role of domestic, international and supranational courts in the elaboration of judical answers to the environmental issues posed by the contemporary world, appears, therefore, essential to fill the gap in terms of effectiveness and implementation of rights.

[1] United Nations Environment Programme, UNEP 2019, is a report that analyses the state of the art of environmental legislation and governments' commitments since the 1972 Stockholm Declaration to date. It is available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y (last accessed on 15 November 2020).

This is all the more relevant if we interpret the law as a tool to convert private troubles into public issues (MILLS 1959). Adopting this perspective, there seems to be a strategic advantage in reflecting on rights, their effectiveness and the work of the courts. This is particularly true if we consider the dynamic *cotè* of the law, which consists of litigation and the response of the courts through interpretation and legal reasoning. In this sense, in the wide domain of the environmental litigation, we can understand the legal instrument as a means for the proceduralisation of conflicts at multiple levels (social, cultural, plural and environmental).

We will try to assess the challenges and potentialities of the green litigation from the perspective of the effectiveness of rights and remedies, by focussing on the issue of *locus standi* in the legal reasoning of some relevant case law at a transnational and international level. We will use some theoretical tools such as the relationship between rights and remedies, the principle of effectiveness of the protection and the question of who has the right to have rights (ARENDT 1951), which translates, in legal terms, in the issue of *locus standi*. We will then briefly analyze the case of the so-called "Green Courts", in particular using the example of the Indian National Green Tribunal (NGT) in order to test the effectiveness of this new tool within the environmental litigation.

We will argue that the creative and dynamic reasoning of fully judicial bodies, such as domestic, international or supranational courts, is able to critically take into account the complexity of contemporary environmental litigation and to aim at the production of an effective protection to the environment, particularly considering the doctrine and case law concerning the expansion of the notion of *locus standi* based on the principle of effectiveness.

2. *Rights and Remedies. A brief assessment from a comparative point of view.*

Traditionally, there is a structural difference in the way civil law and common law systems interpret the relationship between rights and remedies (MATTEI 1987; DAVID 1980).

In common law systems the concept of legal remedy is deeply rooted in both legal thought and legal discourse. Indeed, the classical paradigm of the English common law (SANTORO 2008) was characterized by a dynamic and functional approach, inspired by the principle of effectiveness, articulating rights as public and judicial claims. In this perspective, remedies played a much more central role than abstract rights and duties. As noted (see ADAR, SHALEV 2007 for a comparative legal perspective), this was due, in large part, to the technical procedural system known as the "writs system", that governed the English civil procedure for about 700 years and until the nineteenth century (BAKER 2002)[2]. Procedural features of rights can be said to be an essential tool for the protection of substantial rights, so much so that in common law a subjective right can be said to exist because there is a writ that makes it operational.

This internal and profound relationship between a right and a remedy is in direct compliance with the famous Latin maxim: "*ubi ius ibi remedium; ubi remedium ibi ius*" evoked by Blackstone's assertion that « [i]t is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded» (BLACKSTONE 1765, III, 23).

According to this perspective, legal remedies are means of protecting legal entitlements. A remedy is the practical and tangible aspect of the legal right, which gives it meaning and power. A legal right that is not protected and enforced by the legal system is therefore not a right at all, but only a chimera, a claim or an interest that has no legal *status*.

[2] The common law system relies on a system of forms of actions, still very influential in the common law practice («The forms of action we have buried, but they still rule us from their graves», MAITLAND 1909) and linked with the ability of equity to provide a legal answer to situations and positions not protected at law.

Civil law countries, on the contrary, adopt an opposite conceptualization, considering the relationship between individual rights and forms of action as a hierarchical one. Individual rights are the projection of a legislative norm, whose implementation is the logical consequence of their same creation. In this context, action constitutes nothing else but the realization in the trial of the law and it is granted whenever a right exists. It is therefore the individual right that determines the amplitude and the content of the judicial protection.

The dialectic between these two ideal types constitutes an interesting perspective if we consider the environmental litigation. In light of the multilayered notion of effectiveness, the common law perspective of remedies and forms of action could be the privileged point of view in order to understand the challenges posed by modernity and globalization to the environment. Those challenges have been managed by the judicial discourse though a dynamic reasoning and argumentative fluidity, mainly due to the need to make the mere declaration of rights effective. We can say that, like other areas of the new semantics of rights, the judicial protection of the environment was built up over time through the creative elaboration of courts.

In this sense, the imaginative forces of law (DELMAS-MARTY 2004) were able to take advantage of the substantial but above all the procedural tools available in order to find forms of protection, even in situations of legal vacuum, or rather, in situations where the formal declaration of rights was not followed by the necessary set of remedies to make that very rights effective.

One clear example of the legal necessity of discussing about the effectiveness of rights in the new environmental litigation is the recent decision of the European Court of Human Rights (hereinafter ECtHR or the European Court or simply, the Court) on the Italian case of Ilva, Taranto[3].

With a ruling that is likely to reopen the debate that has developed in recent years on the case of Ilva di Taranto – and in particular on the so-called "*salva-Ilva*" (saving Ilva) legislation, which has allowed and still allows the continuation of production activities despite the seizures ordered by the Taranto judiciary in the context of the "*Ambiente svenduto*" (devalued environment) investigation – the Strasbourg Court unanimously found a violation of Article 8 of the European Convention of Human Rights (hereinafter, ECHR or the Convention) (right to privacy). Italy was condemned for failure to adopt appropriate measures to protect the environment from polluting emissions from the steelworks, and consequently for failing to protect the "welfare" ("*bienêtre*", § 174) of the inhabitants in the areas surrounding the plant.

What is more interesting for our analysis is that the European Court also found that there was a violation of the right to an effective remedy (Article 13 of the Convention), having found that there were no internal remedies through which the inhabitants themselves could have complained about the unfinished implementation of the environmental restoration plan and obtained measures to reclaim contaminated areas.

The Court, discussing the exhaustion of domestic remedies (Article 34 of the Convention), clearly affirms that:

> «the applicants' complaints concern the lack of measures to ensure the clean-up of the territory concerned. It also notes that the clean-up of the affected area has been an objective pursued for several

[3] *Cordella and Others v. Italy*, nn. 54414/13 and 54264/15, 24.1.2019. The case concerned on-going air pollution by a steelwork, operating since 1965 in Taranto (Puglia) and owned by a former public company which was privatised in 1995. In 1990 a resolution of the Council of Ministers identified the town of Taranto and four other neighbouring municipalities as being at "high environmental risk" on account of the emissions from the steelworks. In 1998 the President of the Republic approved a decontamination plan. In 2015, as a result of its insolvency, the company was placed in compulsory administration, and the administrator was granted exemption from administrative and criminal liability in introducing the planned environmental measures. Various civil or criminal proceedings were brought in front of the domestic courts. Nonetheless, the toxic emissions persisted. The applicants were several dozen physical persons who live or lived in the more or less immediate vicinity of the steelworks. They complained about a lack of action by the State to avert the effects of the factory's toxic emissions on their health.

> years by the competent authorities, albeit without success. Having regard also to the evidence submitted by the applicants and in the absence of relevant case-law precedents, the Court considers that no criminal, civil or administrative measures could meet that objective in the present case»[4].

It is noteworthy that the European Court denounces and censors not only the lack of legislative remedies, but the significant lack of "relevant domestic case-law precedents".

On the contrary, a clear example of the strategic use of remedies by the domestic legal reasoning is the Indian paradigm of environmental law protection. In particular, India, as we shall see, is a relevant context for assessing the ability of the judiciary to achieve, through procedural means, the effectiveness of rights though remedies (despite formal declarations of rights "on paper")[5].

3. *Who has the right to have rights in Environmental litigation. The theme of* locus standi

One paradigmatic issue in examining the transnational environmental case law and litigation is the notion of *locus standi*. Or, in other terms, how environmental protection causes can be built from a non-anthropocentric perspective. In legal realistic terms, this means: who can bring legal actions in front of a judge to turn their private troubles into public matters.

As said, Stone invites us to reflect on the continuous historical expansion of the category of possessor of rights. Starting with the example of children rights, Stone affirms that:

> «We have been making persons of children although they were not, in law, always so. And we have done the same, albeit imperfectly some would say, with prisoners, aliens, women (especially of the married variety), the insane, Blacks, foetuses, and Indians» (STONE 1972, 451).

The essay was written in haste to be able to influence a decision pending before the US Supreme Court, *Sierra Club v. Morton*[6], a case concerning a group of environmentalists trying to oppose a Disney entreprise inc. real estate project in the Mineral King valley, a wilderness in Sierra Nevada, California. The appeal was rejected by the Ninth Circuit Court: the Sierra Club had no legal standing to bring the matter before the courts because it could not prove that it was an aggrieved party, *i.e.* that it had an interest... in practice, however, no one had a direct interest and no one could contest the choice of the US Forest service to authorize the Disney real estate project.

Stone proposed to grant legal standing directly on inanimate bodies through a system of guardianship, *i.e.* protection, with the appointment of a guardian for inanimate bodies. This reasoning, though not accepted by the majority of the U.S. Supreme Court, is proposed in a dissenting opinion by Justice Douglas, who affirms:

> «The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? – Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King v. Morton*».

[4] *Cordella and Others v. Italy*, cit., §123, (emphasis added).

[5] The "Indian Paradigm" for the effectiveness of the protection of environmental rights will be analyzed, *infra*, at para. 4.

[6] *Sierra Club v. Morton*, 405 U.S. 727 (1972). The case *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

The need to find a legal argument capable of strategically expanding the notion of legal standing in order to cover situations otherwise deprived of legal protection[7] is at the core of the seminal work by Stone.

Interestingly enough, this is also one relevant issue for the European system of rights protection. Particularly, the European Court has discussed the argument of *locus standi* in a case (*Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*)[8], concerning Article 2 of the Convention, protecting the right to life, in a situation in which the direct victim[9] was a deceased, mentally and physically disabled orphan, institutionalized since the birth and lacking any family or contact with the outside world. It is interesting to analyze this case since it tells us about the reasoning abilities of the courts, in this case of an international-regional court, to discuss the very right access to justice in terms of effectiveness of the protection in cases in which the "victim" has no voice.

As a matter of facts, according to Article 34 of the Convention, every natural person as well as every non-governmental organization (NGO) or group of individuals can apply to the European Court. Article 34 of the ECHR provides that the Court «may receive application from person, nongovernmental organization or group of individuals claiming to be victim of a violation by one of the High Contracting Parties». NGOs may, therefore, institute cases before the Court as victims themselves or as direct representative of victims, thus excluding the same possibility of *actio popularis*[10].

In the *Câmpeanu* case, the Court granted standing to an NGO to act as a representative of a highly vulnerable person, with no next-of-kin, Mr Câmpeanu, a young Roma man with severe mental disabilities, infected with HIV, who spent his entire life in the care of the State authorities and who died in hospital at the age of 18, as a result of neglect. He had no relatives, legal guardians or representatives, was abandoned at birth and lived in various public orphanages, centres for disabled children and medical facilities, where he did not receive proper health and educational treatment.

Undoubtedly this case falls into the category of what Dworkin calls "hard cases", since it does not fit into any of the categories covered by the Court's case-law and thus raises an interesting question about the functioning of the Convention related to the standing of an NGO which can't be assumed as the direct, indirect or potential victim.

The issue at stake here is the principle that the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory[11] and the necessity of ensuring that the conditions of admissibility governing access to the Court are interpreted in a consistent manner. The Court considered that Mr Câmpeanu was in facts the direct victim, within the meaning of Article 34 and that the NGO (Centre for Legal Resources) could not be considered as an indirect victim within the meaning of its case-law since the NGO had not demonstrated a sufficiently "close link" with the direct victim, nor had it argued that it has a "personal interest" in pursuing the complaints before the Court, considering the definition of these concepts in the Court's case-law.

Finally, the Court decided for the admissibility of the NGO's application as a representative of the deceased, lodged with the Court after his death without any power of attorney, since:

[7] It must be noted that along with the dynamic nature of the case law on testing and expanding the notion of *locus standi* in international law, an interesting field of study in order to assess the role of NGOs in decoding and protecting public interests are the so-called compliance mechanisms established by various Environmental treaties. For an account, see FITZMAURICE, REDGWELL 2000.

[8] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, [GC], no. 47848/08, 14 July 2014.

[9] On the multiple notion of victims, as well as for the inadmissibility of *actio popularis* in the Strasbourg system of rights protection according to the caselaw of the Court, see COUNCIL OF EUROPE 2020 and HARRIS et al. 2018.

[10] See references in the above footnote.

[11] See *Artico v. Italy*, no. 6694/7413 May 1980, § 33, Series A no. 37 and the authorities cited therein.

> «To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law (see paragraphs 59 and 60 above; see also, mutatis mutandis, P., C. and S. v. the United Kingdom, cited above, and The Argeş College of Legal Advisers v. Romania, no. 2162/05, § 26, 8 March 2011). Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the Convention, nor with the High Contracting Parties' obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court».

As a matter of fact, the Court is ready to soften the rigidity of Article 34 rule concerning the *locus standi* in view of the «exceptional circumstances of this case and bearing in mind the serious nature of the allegations» (*Centre for Legal Resources*, § 112), which translated into a possible rule of reasoning in cases of highly vulnerable persons and for cases concerning violations of the most important fundamental rights, such as Article 2 and 3 of the Convention.

It appears clearly how the Court tried to affirm the exceptionality of this situation in order to reduce and limit the possible development of this case as a precedent in its case law. This same point is highly criticized, in his dissenting opinion, by Judge Pinto de Albuquerque:

> «My point of discontent lies in the fact that the majority chose to approach the legal issue at stake in a casuistic and restricted manner, ignoring the need for a firm statement on a matter of principle, namely the requisites for representation in international human rights law. The judgment was simply downgraded to an act of indulgence on the part of the Court, which was willing to close its eyes to the rigidity of the requirements of the concept of legal representation under the European Convention on Human Rights ("the Convention") and the Rules of Court in "the exceptional circumstances of this case" (see paragraphs 112 and 160 of the judgment), and to admit the CLR as a "de facto representative of Mr Câmpeanu" (see paragraph 114 of the judgment). To use the words of Judge Bonello, this is yet another example of the "patchwork case-law" to which the Court sometimes resorts when faced with issues of principle».

The dissenting opinion, on the contrary, proposes a principled reasoning, affirming that:

> «When confronted with a situation where the domestic authorities ignored the fate of the alleged victim of human rights violations, and he or she was unable to reach the Court by his or her own means or those of a relative, legal guardian or representative, the Court has to interpret the conditions of admissibility of applications in the broadest possible way in order to ensure that the victim's right of access to the European human rights protection system is effective. Only such an interpretation of Article 34 of the Convention accommodates the intrinsically different factual situation of extremely vulnerable persons who are or have been victims of human rights violations and are deprived of legal representation».

Yet, it can be discussed that the potentiality of this case lies in the possibility to set a precedent for cases characterized by high vulnerability and by the lack of an effective protection. Even this "strictly opportunistic and utilitarian case-sifting methodology"[12] can be used in analogous cases, discussing the inability to have a voice and to be heard. This case is also the first example

12 Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, cited, P.Pinto de Albuquerque, Dissenting Opinion.

of a sort of loosening of the rigidity of the rule of legal standing in front of the Court in light of the principle of effective protection, first of all the right to access to justice.

From a comparative perspective, another system of international regional protection of rights, the Inter-American system stemming from the American Convention on Human Rights[13] (composed by the Inter-American Commission and the Inter-American Court) has traditionally opened up to NGOs and *actio popularis* in broad terms[14]. Unfortunately, individuals still do not have direct access to the Inter-American Court, but must first submit a petition to the Commission which can, following its Rules of Procedure, refer the case to the Court. The Commission's gatekeeping function weakens the effective protection of rights but it must be noted that the wide access of NGOs to the Commission has been able to perform an active role in the dynamic evolution of the Inter-American Court of Human Rights (CIUFFOLETTI 2019).

Similarly, the African Commission on Human and Peoples' Rights[15], established by the African Charter on Human and Peoples' Rights[16], has, over its 30 years of activity, given broad interpretation to the question of standing by adopting the *actio popularis* doctrine. Nevertheless, it must be reminded that the African Commission is a quasi-judicial body and not an international court.

As of today, the European Court seems to represent the most effective international regional system of rights protection in terms of *jus standi*[17] and the effective implementation of the rights to individual applications in front of the Court (as per Article 34 of the Convention).

Significantly, the European Court has discussed the legal standing of animals in a very interesting decision. The case concerned the obligation of a landowner opposed to hunting on ethical grounds, to tolerate hunting on his land and to join a hunting association[18]. In a passage of his partly concurring partly dissenting opinion, judge Paulo Pinto de Albuquerque, discussed the idea of expanding *locus standi* to animals within the contest of the ECtHR's jurisdiction and affirms that under the Convention, no legal standing for non-humans are admitted since, «"animal rights" are not legal claims attributed to animals and exercisable through a representative»[19]. The opinion makes direct reference to two cases[20] in which an animal protection activist brought a case to the

[13] American Convention on Human Rights. Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

[14] Article 44 of the ACHR: Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

[15] In June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, which came into force 25 January 2004. Very recently, the full judicial body of this international regional system, the African Court of Human and Peoples Rights, has issued new rules opening up to individual petitions. The newly established African Court of Justice and Human Rights is meant to replace the African Court of Human and Peoples' Rights and would therefore constitute a unique international judicial body combining the jurisdiction of the judicial organ of an intergovernmental organization with the jurisdiction of a regional human rights court. We shall see how this Court will interpret legal standing of individual and NGOs.

[16] African (Banjul) Charter on Human and Peoples' Rights. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[17] *Jus standi* being the right of direct access to Court of individuals, recognizing their international legal personality while *locus standi* grants full participation (of whichever form) to individuals in the Court's proceedings. *Jus standi* places the individual in a hierarchy above the State-centric conception of international law.

[18] *Herrmann v. Germany* [GC], no. 9300/07, 26.6.2012. The majority of the Court decided for a violation of Article 1 of Protocol No. 1 since the obligation for the applicant to tolerate hunting on his land interfered with the exercise of his right to the peaceful enjoyment of his property. The German hunting legislation could be said to constitute a means of controlling the use of property in accordance with the general interest within the meaning of Article 1 of Protocol No. 1. The case followed the precedent in *Chassagnou and Others v. France* [GC], 25088/94, 28331/95 and 28443/95, 29 April 1999.

[19] *Herrmann v. Germany*, cit., *Partly dissenting, partly concurring opinion of judge Paulo Pinto de Albuquerque*.

[20] *Balluch v. Austria*, no. 26180/08, application lodged on 4 May 2008 and *Stibbe v. Austria*, no. 26188/08, application lodged on 6 May 2008.

ECtHR on behalf of a chimpanzee. Both cases were rejected by a committee of the First Chamber for incompatibility *ratione materiae*. Clearly the case law of the Court is willing to expand the boundaries of *locus standi*, but not as far as to include non-humans or even accept representative of animals, along with the idea of guardianship proposed by Stone.

The opinion also discusses the "the fundamental incommensurability" of the positions of humans and animals or non-humans as enshrined «in the essentially different status (*Wesensverschiedenheit*) of humans who cannot be held responsible for their actions and animals. Children, the mentally ill and persons in a coma or a vegetative state are not in essence the same as animals»[21].

Animal rights, as well as environmental rights needs then to be interpreted, within the European Convention system, in the light of the obligations of Contracting Parties to commit to the full, effective and practical enjoyment of human rights and specifically of the right to a healthy and sustainable environment (CIUFFOLETTI 2019). The focus of the environmental protection at the international regional level of the Council of Europe is therefore to be put on the humans' full responsibility for the welfare of the environment and the destiny of other species:

> «This responsibility can be formulated legally in positive as well as negative terms. In negative terms, the safeguarding of the environment and animal life constitutes an implicit restriction on the exercise of human rights. In positive terms, it constitutes an inherent obligation on the Contracting Parties bound by the Convention. From this perspective, environmental rights and "animal rights" do not fit neatly into any single category or generation of human rights, but straddle all three classical categories, showing that international human rights law has considerable potential for environmental and animal protection»[22].

This example shows that in the domain of the legal reasoning of one of the most rights-effectiveness-driven and dynamic international Court, judicial imagination and legal effort formulated and encoded in the strict legal language are the best option we have in order to strive for environmental protection and litigation and hopefully challenge the rigidity of *locus standi* tradition by stressing the relevance of the *effet utile* of the European Convention.

4. *The Indian version: the Public Interest Litigation tool as a way to widen the notion of* locus standi *in environmental litigation cases.*

The Indian constitutional system embraces the concept of environment following the process initiated by the Stockholm Conference on the Human Environment in 1972. With the 42nd Amendment, the Indian Government introduced in the constitutional text Article 48A *Protection and improvement of environment and safeguarding of forests and wild life of the country* which reads «The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country».

The "green" revolution promoted by Indira Gandhi[23] and incorporated in the 42nd Amendment, showed a clear programmatic nature, without committing the Government to public spending. The constitutionalization of the environmental protection in India appeared a mere declaration of intents, built in such a way as to entail the highest political and public impact with the least public engagement and the annulment of any potential jurisdictionalisation of the matter. However, even

[21] *Herrmann v. Germany*, cit., *Partly dissenting, partly concurring opinion of judge Paulo Pinto de Albuquerque*.

[22] *Herrmann v. Germany*, cit., *Partly dissenting, partly concurring opinion of judge Paulo Pinto de Albuquerque*, emphasis added.

[23] Recently analyzed in RAMESH 2017.

the slightest manoeuvre in the constitutional text is able to cause unforeseeable consequences and the constitutionalization of the environmental protection has stimulated a vigorous environmental litigation in India which has forced the textual construction of Article 48, causing the full jurisdictionalisation of the matter through a dynamic and active case law (CIUFFOLETTI 2019).

The question was first raised in India in procedural terms, related to the possibility of using the instrument of Article 32 of the Constitution (which introduces the remedy against the violation of fundamental rights) to implement rights related to the environmental protection.

As a matter of fact, one of the most significant data in the analysis of the evolutionary trend of the Indian case law on rights related to environmental protection is the loosening of the classic principles of the *locus standi* before the Court through the instrument of the Public Interest Litigation (PIL). Baxi defines this strategic tool as a Social Action Litigation based on which the Indian Supreme Court opened up to become an easily accessible forum for the most marginalized social strata of Indian society (BAXI 1985).

Since the first "green" cases, from the *Dehradun* case[24] to the "*Mehta* cases"[25], the Supreme Court has recognized legal standing to act for the protection of rights related to the environment to collective subjects such as NGOs', associations for the protection of the environment or the rights of traditional populations.

As observed (SAHU 2008), this inclination to widen the mesh of legal standing, particularly in cases of environmental protection, has allowed the Indian green litigation and the case law of the courts to emancipate environmental rights from an anthropocentric perspective, allowing the protection of inanimate objects, specifically through the condemnation to repair environmental damage and to the *restitutio* of the natural environment in its previous condition.

In particular, in one of the first cases in which the Indian Supreme Court shows the need to break away from the formalistic approach to the *locus standi* doctrine[26], ratifying the P.I.L. strategy, *A.B.S.K. Songh (Railway) v. Union of India*[27], the Court explicitly rejects the Anglo-Hindu individualistic formant on procedural law and recalls the people-oriented profile of participatory justice, necessary to overcome the great social disparity of the Indian context and allow even the most marginalized and poor groups to bring cases relating to the violation of human rights before the Supreme Court of India[28].

In the judgment that has institutionalized the *locus standi* rule through PIL., *S.P. Gupta v. Union of India*[29], the Court analyzes the tendency of British and US courts to rigidly interpret the classic common law rules of the *locus standi*[30], with some significant exceptions (notably from a case of

[24] *Rural Litigation and Entitlement, Dehradun v. State of Uttar Pradesh*, AIR 1985 SC 652. The case concerned the effects of illegal limestone excavations on the Dehradun Valley ecosystem. The Court ordered the immediate interruption of the excavations and mines of limestone, treating the applicants' letter as a writ petition on the basis of Article 32 of the Indian Constitution. The procedural record clearly indicates that the Court regards the matter as a violation of a fundamental right. The question relates to the possibility of using the instrument of Article 32 of the Constitution, which introduces the remedy against the violation of fundamental rights, to implement rights related to the protection of the environment.

[25] The green litigation in India owes a great deal to Mahesh Chander Mehta, a lawyer at the Indian Supreme Court, who specialised in judicial protection of the environment and related rights since his youth. A search on the Indian Kanoon (the Indian Supreme Court judgement database) shows dozens of *M.C. Mehta v. Union of India* cases.

[26] As noted by DIVAN, ROSENCRANZ 2001, 120.

[27] *A. B. S. K. Songh (Railway) v. Union of India*, A.I.R. SC. 298, 317 (1981).

[28] *A. B. S. K. Songh (Railway) v. Union of India, cit.*: «Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through "class actions", "public interest litigation", and "representative proceedings". Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of "cause of action" and "person aggrieved" and individual litigation is becoming obsolescent in some jurisdictions».

[29] *S.P. Gupta v. Union of India*, AIR S.C. 149 (1982).

[30] Starting from the case *Ex Parte Sidebotham*, (1880) 14 Ch D 458, [1874-80] All ER 588 which defines the notion of

the Judicial Committee of the Privy Council[31] and a decision of the US Supreme Court on anti-discrimination[32]). The Court then reviews its own case law on legal standing and recalls how, even before the introduction of the PIL instrument, it had admitted *habeas corpus* petitions for the protection of the human rights of prisoners in cases of mistreatment or detention conditions in violation of human dignity, filed by other fellow inmates or university professors. This example shows the endogenous tendency to relax the rigidity of the *locus standi* according to two specific criteria. First, there must be a violation (actual or potential) of the constitutionally protected rights. Secondly, the direct victim must be in a condition of impossibility, due to poverty, marginality, disability, social or economic disadvantage, to refer the matter to the Court.

The Court's reflection starts from the variable, fluid and constantly changing social context to which a vital and evolving case law has the duty to respond. The Court does not hesitate to define its interpretative strategy as a judicial "revolution"[33], necessary for the definition of the boundaries of human rights and their effective protection.

5. *New fora for the Green Litigation. The case of the Indian National Green Tribunal*

The effectiveness and success of the Public Interest Environmental Litigation have exponentially increased the workload of the judges, especially those located at the top of the judicial system (this means, in India, State High Courts and Supreme Court). As a consequence, the Indian judicial system has been repeatedly criticized for the massive number of pending cases and, consequently, for its slowness (AMIRANTE 2012). In response to these criticisms, and under pressure from the Supreme Court itself, the Indian Parliament established in 2010 a special jurisdiction for the environment, the National Green Tribunal of India (NGT), whose specific mission, as can be seen from the explanatory memorandum to the founding law, is to ensure «the rapid and effective resolution of legal disputes relating to the protection of the environment and the conservation of forests and other natural resources»[34].

What is particularly interesting is that the creation of such a body, in India, had been highly supported and straightforwardly proposed by the same Indian Supreme Court, following various statements and *obiter dicta* of the same Court on the uncertainty and unpreparedness of the judiciary to ascertain issues of technical or scientific complexity in the field of environmental law. As affirmed by AMIRANTE (2012; 2019), the institution of a Green Tribunal is a clear judge-driven reform:

aggrieved party: «A "person aggrieved" must be a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something».

[31] *Durayappah v. Fernando* (1967) 2 AC 337.

[32] *Barrows v. Jackson* (1952) 346 US 249 3 97 Law Ed 1586. This is a very relevant case of institutional discrimination concerning the prohibition of the sale of real estate to non-Caucasians. The defendant in this case is entitled to apply for the protection of the equal protection clause for a group, the non-Caucasians, to which he does not belong: «We are faced with a unique situation in which it is an action of the State Court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any Court».

[33] *S.P. Gupta v. Union of India*, cit.: «The Court has to innovate new methods and devise new strategies for the purpose of providing access to justice to large masses of people who are denied their basic human rights and to whom freedom and liberty have no meaning. The only way in which this can be done is by entertaining writ petitions and even letters from public spirited individuals seeking judicial redress for the benefit of persons who have suffered a legal wrong or a legal injury or whose constitutional or legal right has been violated but who by reason of their poverty or socially or economically disadvantaged position are unable to approach the Court for relief».

[34] The National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010), vol. 19 (2010).

> «it must be noted that the main factor of the entire process for the establishment of the National Green Tribunal of India should be indicated in the judiciary itself, affirming – notably by several interventions of the Supreme Court of India – the relevance and necessity of a system of specialized environmental courts»[35].

This is true, and the Supreme Court started very early demanding a political action and legislative reforms for the creation of a mixed "green" jurisdiction (judicial and technical). In the very famous case *A.P. Pollution Control Board v. Nayudu*[36], the Supreme Court affirmed that such an environmental Court had been already requested in a previous case, *M.C. Mehta vs. Union of India and Shriram Foods & Fertilizers Case*[37], where the Court observed:

> «We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destructions and conflicts over national resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environmental Courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the Environment Court».

While *locus standi* within the NGT is very similar compared to that of the PIL in front of the Supreme Court and therefore offer a wide accessibility to this forum of justice, the issue remains open as to the analysis of the persuasive authority[38] of this body (YOUNG 2005; HART 1982).

If the mixed composition of this Tribunal[39] is an interesting and relevant feature in order to assess and achieve a new understanding in the relationship between science and law, nonetheless it forces us to discuss the issue of the effectiveness of the protection.

We can argue that the complexity of environmental conflicts in today's globalized world, in contemporary societies, in local communities is not only derived from the interconnection with scientific knowledge or uncertainty (which is part of the knowledge, as POPPER 1963 taught us), but mainly from still unsolved and relevant legal issues, such as the one proposed by Stone and by conflicting interests or human rights, such as religious, cultural, community or tribal rights (CIUFFOLETTI 2019).

As a matter of fact, some of the main cases faced by the NGT[40] have to deal with conflicting and competing rights. In these cases the language of rights, the language of the law (SANTORO 2008), seems to be the most appropriate way to deal effectively with these problematic issues. The judicial response, as a single case response, seems to have a persuasiveness able to govern the complexity of contemporary social, moral, cultural and religious conflicts (SANTORO 2008).

[35] AMIRANTE 2012, 455.

[36] *A.P. Pollution Control Board v. Nayudu*, (1999) 1 S.C.C. 140, 156.

[37] *M.C. Mehta vs. Union of India and Shriram Foods & Fertilizers Case*, 1986 (2) SCC 176 (at page 202).

[38] The main characteristic of the persuasive authority is defined in opposition with respect to the notion of binding authority. The persuasive authority, in fact, has no binding force in itself. Borrowing Young's analysis (in turn borrowed from Raz) on the concept of authority, we can say that cases with binding authority are authoritative purely by virtue of "what they are", rather than by virtue of "what they say" (YOUNG 2005). As far as persuasive authority is concerned, the opposite seems to be true: if the judge recognizes, in a non-binding source, a convincing, persuasive argument, then the above source acquires authority over that judge (see also HART 1982).

[39] The minimum composition of the Tribunal, as per section 4 of the National Green Tribunal Act, should vary from 21 to 41 members: a chairperson (judicial), 10 to 20 full-time judicial members, 10 to 20 expert members, all chosen by the Central Government.

[40] See AMIRANTE 2019 for a very accurate review of some relevant cases, such as the immersion of idols and the rat-hole mining cases.

The hybrid nature of this tribunals seems to be more exposed to the critics of "judicial overreach" as it disturbs the balance of power between the judiciary and the executive as envisaged in the Indian constitutional structure. As explained by GITANGJALI (2020), this poses serious risk in the operational capacity of the NGT:

> «Speaking truth to power can be perilous, as the NGT judges, chairman, lawyers, and litigants have discovered. The creation of a tribunal that seeks to change the face of environmental jurisprudence by providing access to justice for all has created a powerful group of "restraining forces"».

The problem is exactly this: legal language is not built on truth (ROSS 1959; SANTORO 2008) and as of today, the NGT, which needs a full house of twenty members to properly function, has been running on just six, since the Government is not filling the vacancies in the composition of the Tribunal. «Without the replacement of qualified bench members and the formal renewal of support from key actors who constitute the "restraining forces," the tribunal may fall into the Thucydides trap: a victim of its own success»[41].

6. *Conclusion*

The issue of *locus standi* in the environmental litigation seems to be an open legal perspective in order for the judicial discourse to operate strategically and include, through a creative interpretation and a dynamic case law, new forms of action and new remedies to comply with the principle of the effectiveness of rights protection.

The fascination of building a perspective of full ownership of human rights for non-human entities clashes with the pragmatic need of the Courts to identify the issue of legal standing and frame it in practical terms, using a pure legal language. At the same time, the proliferation of so-called green courts or tribunals as separated or semi-judicial body seems to be unable to manage the challenge of legal complexity and to tackle the real issue: the effective protection of rights.

We should rely on the imaginative forces of the law and on the imagination of the judicial discourse (COSTA 1995) in order to deal with the future challenges of the environmental litigation.

[41] GITANJALI 2020.

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