

COMPARING STANDING REGIMES FROM A SEPARATION OF POWERS PERSPECTIVE

Tom Zwart, Faculty of Law, Utrecht University

1. INTRODUCTION

In this increasingly global legal community where jurisdictions frequently interact, the law relating to *locus standi* at first sight stands out as unfit for comparison.¹ The apparent lack of a single, defining rationale would make it hard to compare standing regimes. Different, and at times conflicting, justifications have been provided for having standing rules. Thus, it has been suggested that standing requirements protect the courts from being flooded with cases; prevent valuable court time being wasted on frivolous complaints; keep “busybodies, cranks, and other mischief-makers”² from abusing the proceedings; and, finally assure the adverseness necessary for a clear presentation of the arguments on which courts depend.³

However, these traditional justifications for having standing rules are not altogether satisfactory. The fear that lowering the standing barrier will open the flood-gates of litigation is unfounded. As Deane J has put it eloquently, it is not very realistic to assume “the existence of a shoal of officious busybodies agitatedly waiting, behind the “flood-gates”, for the opportunity to institute costly litigation in which they have no legitimate interest”.⁴ Furthermore, the risk of an adverse cost order and the requirement of leave are far more effective deterrents to frivolous complaints than standing rules are.⁵ In addition, it is highly doubtful whether standing rules can discourage those busybodies intent on crossing the threshold of the courthouse, as the Irish *Riordan* cases demonstrate. Denis Riordan is a frequent litigant who has challenged official conduct in a series of cases, in which both the High Court and the Supreme Court have consistently accorded him standing. Recently, however, the Supreme Court had had enough.⁶ When Riordan challenged the impartiality of the judges who had decided a constitutional case, the Supreme Court issued an order restraining the appellant from ever bringing proceedings against officeholders, except with the prior leave of the Court. According to the Court, the reason for this rather drastic measure was

¹ I am grateful to Gordon Anthony and Tony Bradley for their encouragement, to Peter Leyland and Phil Thomas for their helpful comments and to Alison Doherty for her valuable assistance in preparing this article. I remain responsible for any errors.

² As they were called by Lord Scarman in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 653.

³ This point was raised by Justice Brennan in *Baker v Carr* 369 US 186 (1962) at 204.

⁴ *Phelps v Western Mining Corp Ltd* 20 ALR 183 at 189.

⁵ See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (1995), p 102.

⁶ *Riordan v An Taoiseach*, Supreme Court, 19 October 2001, <<http://www.bailii.org/ie/cases/IESC/2001/64.html>>.

that he had persistently abused the standing afforded by the courts to make scandalous allegations against the defendants. Finally, as Justice Scalia has pointed out, standing is ill designed to ensure the adversarial nature of the proceedings.⁷ In court, non-governmental organisations seeking to promote the common good, rather than to protect their own private interests, tend to be the most formidable opponents of government agencies. But standing rules usually discourage those organisations from initiating proceedings.

Therefore, the reasons traditionally given as justifications for having standing rules appear to be unconvincing. The aims said to be pursued by standing requirements could be achieved much more effectively by other means. It does not come as a surprise, therefore, that some have wondered whether standing is a cure in search of a disease.⁸ This paper argues, however, that there is a very sound constitutional reason for laying down standing requirements, *i.e.* the concept of separation of powers. If one accepts that the separation of powers is the “single basic idea”⁹ underlying the law on standing, it becomes possible to compare the existing standing regimes in different jurisdictions. A framework for such a comparison will be supplied at the end of this article. The observations made concern challenges to the validity of administrative action as well as to the constitutionality of legislation.

2. The relationship between standing and the separation of powers

The premise that standing and separation of powers are interrelated is not exactly new. The connection was first made by the United States Supreme Court in 1922, in a case called *Frottingham v Mellon*.¹⁰ However, it is Antonin Scalia who deserves credit for putting the relation between standing and separation firmly on the agenda. In 1983, while still a Circuit Court Judge, Scalia delivered a lecture at Suffolk University Law School, in which he demonstrated that standing serves as an element of the separation of powers. Since his elevation to the Supreme Court bench in 1986, Scalia has played a leading role in further developing this idea, culminating in the seminal case of *Lujan v Defenders of Wildlife*.¹¹

According to Justice Scalia, courts are expected to play the undemocratic part of protecting individuals and minorities against impositions of the majority.¹² The law of standing confines them to this traditional role. As a result, if an individual challenges a law’s requirement or prohibition of which he is the very object, he ought to have standing. However, when the plaintiff is complaining of an agency’s unlawful failure to impose a requirement or prohibition upon someone else, standing should be denied. Although the agency’s failure harms the plaintiff in the sense that, as a

⁷ Antonin Scalia, “The Doctrine of Standing as an Essential Element of the Separation of Powers” (1983) 17 *Suffolk U. L. Rev.* 881 at 891-892.

⁸ Andrew J. Roman, “Locus Standi: A Cure in Search of a Disease?” in *Environmental Rights in Canada* (Swaigen ed 1981), pp 11-59.

⁹ *Allen v Wright* 468 US 737 (1984) at 752.

¹⁰ 262 US 447 (1923).

¹¹ 504 US 555 (1992).

¹² Scalia, *op cit* n 7 at 894.

citizen, it deprives him of governmental acts which the Constitution and the laws require, such harm is majoritarian in nature. Nevertheless, it must be noted that whilst the plaintiff may have stronger views on constitutional regularity than the average citizen, it does not mean that he has also suffered more harm. All citizens have been affected to the same extent, and the issue should therefore be settled by the political process rather than by the courts.

According to Justice Scalia, that explains why “concrete injury” is the indispensable prerequisite of standing.¹³ The plaintiff is expected to show that he has suffered an injury which goes beyond the mere breach of the social contract resulting from the unlawful government action. Only such injury can set the plaintiff apart from the other citizens who also claim benefit of the social contract, and entitles him to curial protection against the democratic process. Since courts are designed to protect the individual against the people, they are very ill equipped to protect the rights of the majority. According to his Honour, judges are “selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate”. These characteristics enable judges to protect the individual against the majority, but make them unfit for deciding what is good for the people as a whole.¹⁴ The bottom line of Scalia’s philosophy is, that liberal standing rules will draw the courts into the areas set aside for the other two branches, *i.e.* the legislature and the executive.¹⁵ This will inevitably lead to overjudicialisation of the process of self-governance.¹⁶

Justice Scalia’s reservations about lowering the standing threshold may be translated into four more or less distinctive objections, which will be set out in the next paragraph.¹⁷ This description will draw mainly on the views expressed by Justice Scalia, both on and off the bench, but will also rely on case law and other sources.

3. Liberal standing rules pose a threat to the separation of powers

3.1 Lax standing rules convert courts into political forums

The first separation of powers objection against lowering the standing barrier is that it will turn courts into political forums at the expense of the other branches. If courts may be moved by anyone to address any issue, they will end up dealing with questions that are better left to the political departments. By confining the jurisdiction of the courts to those disputes which are

¹³ *Ibid* at 895.

¹⁴ *Ibid* at 896.

¹⁵ *Ibid* at 882-883.

¹⁶ *Ibid* at 881.

¹⁷ Earlier analyses of Justice Scalia’s views have been offered by Michael A. Perino, “Justice Scalia: Standing, Environmental Law, and the Supreme Court” (1987) 15 *B.C. Envtl. Aff. L. Rev.* 135, and Jonathan Poisner, “Environmental Values and Judicial Review after *Lujan*: Two Critiques of the Separation of Powers Theory of Standing” (1991) 18 *Ecology L.Q.* 335.

traditionally thought to be capable of resolution through the judicial process, the standing doctrine secures that they play a role consistent with the separation of powers.¹⁸ In the view of Justice Scalia, the doctrine of standing acts as a constitutional principle that prevents courts from undertaking tasks assigned to the political branches:

“It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”¹⁹

Although from a separation of powers perspective this seems a sound proposition, it has not gone unchallenged. In *Flast v Cohen*, a judgment handed down in the final year of the Warren Court, the Supreme Court made it clear that one should distinguish issues from persons.²⁰ According to the Court, if one wants to keep issues from coming to court which are not amenable to adjudication, restricting standing is not the solution. Even those who have a clear stake in the outcome may raise issues which are not suited for curial resolution. If a court is confronted with an issue that it feels belongs to one or the other co-ordinate branch, it should rely on the political question doctrine rather than on denying standing.

Not surprisingly, Justice Scalia disagrees with this type of analysis. Although by raising the standing threshold one might not be able to avoid completely that non-justiciable issues will be raised before the court, at least one can reduce to a minimum the chance of that happening:

“Nor is it true, as *Flast* suggests, that the doctrine of standing cannot possibly have any bearing upon the allocation of power among the branches since it only excludes *persons* and not *issues* from the courts. This analysis conveniently overlooks the fact that if all persons who could conceivably raise a particular issue are excluded, the issue is excluded as well (. . .). The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them.”²¹

Justice Scalia’s approach is supported by the fact that the number of issues deemed non-justiciable by the courts is steadily declining, making the political question doctrine less relevant.²² This development is not restricted

¹⁸ *Valley Forge Christian College v Americans United for Separation of Church and State* 454 US 464 (1982) at 472.

¹⁹ *Lewis v Casey* 518 US 343 (1996) at 349; see for a similar view Judge Bork’s dissent in *Barnes v Kline* 759 F.2d 21 (1985) at 44.

²⁰ 392 US 83 (1968) at 100.

²¹ Scalia, *op cit* n 7 at 892; emphasis by Justice Scalia.

²² See Rachel E. Barkow, “More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy” (2002) 102 *Colum. L. Rev.* 237.

to the United States judges elsewhere also look less inclined to reserve areas for the other branches.²³

3.2 Lax standing rules transfer responsibility for implementing legislation from the executive to the courts

The second objection that is raised against lowering the standing threshold is that it may compromise the executive's responsibility for law enforcement. Justice Scalia has pointed out that liberal standing rules, in his view, mistakenly, allow plaintiffs to bring cases in which they complain of an agency's unlawful failure to impose a requirement or prohibition on someone else.²⁴ This is especially the case with statutory provisions that confer upon a private person the ability to bring an executive agency into court to compel its enforcement of the law against a third party. According to Justice Scalia, if such provisions were commonplace the role of the executive in the system of separated powers would be greatly reduced and that of the judiciary greatly expanded. In *Lujan* his Honour explained why:

“To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to “take Care that the Laws be faithfully executed,” Article II, § 3”²⁵

In his dissenting opinion in *Federal Election Commission v Akins* his Honour elaborated on this issue:

“A system in which the citizenry at large could sue to compel Executive compliance with the law would be a system in which the courts, rather than of the President, are given the primary responsibility to “take Care that the Laws be faithfully executed,” Article II, § 3”²⁶

In the Australian case of *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* Justice McHugh has made a similar point.²⁷ According to his Honour, an ordinary member of the general public will have standing in the civil courts only if he is able to show an interference or a threatened interference with a private legal right. Civil courts will only enforce the public law of the community or oversee the enforcement of the civil or criminal law, if necessary to protect the rights of individuals who have fallen victim to a breach of law.²⁸ According to his Honour, under the doctrine of separation of powers the enforcement of the

²³ See for example *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; Conseil d'Etat 25 September 1998, *M. Mégret*, AJDA 1999, p 240; Laurence Baghestani-Perrey and Michel Verpeaux, “Un Nouvel Abandon Partiel de la Notion d'Acte de Gouvernement” (1999) 15 *RFD adm.* 345.

²⁴ Scalia, *op cit* n 7 at 894.

²⁵ 504 US 555 (1992) at 577.

²⁶ 524 US 11 (1998) at 36.

²⁷ (1998) 194 CLR 247 at 276.

²⁸ His Honour appears to have been inspired by the views expressed by Justice Scalia, see Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2000), p 517.

public law is a responsibility of the executive. It falls to the Attorney-General to determine whether civil proceedings should be initiated to enforce the public law of the community.²⁹

His Honour has pointed out that this task has been conferred on the executive because not enforcing laws has an important political dimension. First of all, at the general level, non-enforcement of legislation can be an element of social change, often preceding its repeal. Furthermore, particular circumstances of a case may make it undesirable to enforce a law even when it looks as though it has been breached. It is precisely for this reason that the Attorney-General enjoys a discretion. According to his Honour, it should therefore be up to the Attorney-General, who is answerable to the people, rather than to unelected judges to decide whether a particular law should be enforced.

However, there is another side to this coin. As Sunstein observed, the unwillingness of the executive to implement a statute amounts to rewriting it, which can be considered equally damaging to the separation of powers.³⁰ If the legislature has passed a particular act, the executive is not allowed to mount its opposition by not enforcing it. Perhaps surprisingly, Justice Scalia is not impressed by this kind of argument. In his view, non-enforcement of legislation enables the law to be adjusted to social change and may pave the way for its repeal:

“Does what I have said mean that, so long as no minority interests are affected, “important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?” Of *course* it does – and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday’s herald is today’s bore – although we judges, in the seclusion of our chambers, may not be *au courant* enough to realize it. The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed – and had the first not been possible the second might never have occurred.”³¹

3.3 Lax standing rules permit disputes to go to court which are unfit for adjudication

The fact that relaxed standing rules may cause the court’s decisions to affect parties not involved in the litigation is the third concern from a separation of powers perspective. The United States Supreme Court has pointed out repeatedly that the standing requirements are meant to ensure that cases will

²⁹ (1998) 194 CLR 247 at 276.

³⁰ Cass R. Sunstein, “What’s Standing after *Lujan*? Of Citizen Suits, “Injuries”, and Article III” (1992) 91 *Mich. L. Rev.* 163 at 217-218.

³¹ Scalia, *op cit*, n 7 at 897; emphasis by Justice Scalia.

only be brought by those who have a direct stake in the outcome.³² In other words, the law on standing should prevent the court's decision from affecting parties other than the litigants.

The importance of this point can be explained by using Fuller's concept of polycentricity. According to Fuller, a situation is polycentric, or 'many centred', when it concerns a number of interacting factors, *i.e.* when it involves many affected parties or a somewhat fluid state of affairs or both.³³ In getting this point across he relied on the following analogy:

“We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap.”³⁴

According to Fuller, there are polycentric elements in almost all problems submitted for adjudication.³⁵ However, cases which are *substantially* polycentric are unsuited to solution by adjudication, because the issues are not clear-cut and because it is impossible to determine the range of persons affected by the outcome. Polycentric problems cannot, therefore, be adequately addressed by the adversarial presentation of proof and arguments by two opposing litigants, which is the essence of the adjudicative process. According to Fuller, such problems should not be left to the courts but to managerial direction or contract,³⁶ including the political contract, *i.e.* the deal made by lawmakers.³⁷ In brief, problems characterised by a significant polycentric element should be solved by the political branches rather than the courts. In a sense all public law litigation tends to be polycentric, regardless of the standing threshold. As Fuller has observed, “[T]he instinct for giving the affected citizen his “day in court” pulls powerfully towards casting exercises of governmental power in the mold of adjudication, however inappropriate that mold may turn out to be.”³⁸ Chayes has pointed out that cases resulting in a determination of the constitutional invalidity of legislation may affect many who were not represented in the proceedings.³⁹ These phenomena are further amplified by the concept of *stare decisis* and similar, more informal, concepts developed in civil law systems.

Although Fuller has not pronounced himself on the relation between polycentricity and standing, it seems obvious that liberal standing rules will increase the number of disputes with a significant polycentric character

³² *Sierra Club v Morton* 405 US 727 (1972) at 740.

³³ Lon L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 *Harv. L. Rev.* 353 at 395 and 397.

³⁴ *Ibid* at 395.

³⁵ *Ibid* at 397.

³⁶ *Ibid* at 398-399.

³⁷ *Ibid* at 400.

³⁸ *Ibid* at 400.

³⁹ Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89 *Harv. L. Rev.* 1281 at 1294.

going to court. As Justice O' Regan pointed out in the South African case of *Ferreira v Levin*, in litigation of a public character the relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people.⁴⁰ A low standing threshold will attract cases brought by parties who do not have a direct stake in the outcome. Although they do not, therefore, have an exclusive interest, they are able to address the court exclusively. Many absentees who have not been heard and whose interests have not, therefore, been taken into account, will be bound by the outcome of the case. The *Lujan* case, for example, was brought by an environmental organisation which claimed that a change in U.S. law might cause harm to certain endangered species. One of the members of the organisation testified that a development project in Sri Lanka, which was funded by the U.S., threatened the habitat of the Asian elephant and the leopard. It is important to note that those benefiting from the project and those who might feel that the animals posed a threat to other species or to certain types of vegetation were not represented.

The judge will have to decide the case on the basis of the evidence put forward by the parties, and unlike those involved in drafting legislation and rulemaking, he cannot rely on a comprehensive record. He will therefore take a decision which will have ramifications for many, without being able to have regard for the bigger picture. A format devised for solving disputes between two opposing litigants is ill-equipped for dealing with broader public interest questions affecting many. These public interest cases are therefore better left to the political process in which everybody is able to participate, either directly or through his representative.

3.4 Lax standing rules convert courts into supervisors of the political branches

The fourth, and arguably most serious, separation of powers objection raised against relaxing standing requirements is, that it may confer on the judiciary a watchdog role which cannot be reconciled with its proper constitutional function. As Justice Scalia has repeatedly pointed out, structurally monitoring the lawfulness of acts by the government is not the primary function of the courts. In the lecture delivered at Suffolk University Law School, his Honour has emphasised that courts should not review the lawfulness of governmental action other than to judge a claim of injury.⁴¹ Courts should not therefore convert the sometimes inescapable necessity of considering the validity of statutes into a continuing mission to do so, because that would contravene the concept of separation of powers.⁴²

Justice Scalia's views find support in *Frothingham v Mellon*, a case decided in 1922 by the United States Supreme Court.⁴³ The Court considered that in a system of separated powers neither department may control, direct, or restrain the action of the other. It pointed out that it has no power per se to review and annul Acts of Congress on the ground that they are unconstitutional. That question will only arise when the plaintiff claims to

⁴⁰ 1996 (1) SA 984 (CC) at 1103.

⁴¹ Scalia, *op cit* n 7 at 884.

⁴² *Moore v House of Representatives* 733 F 2d 946 (1984) at 964.

⁴³ 262 US 447 (1923) at 488-489.

have suffered some direct injury as a result of such an Act. In other words, courts should restrict themselves to deciding judicial controversies, and should not assume a position of authority over the governmental acts of another and co-equal department. In *Laird v Tatum* the Court again emphasised that under the separation of powers, courts are not allowed to monitor either the executive or the legislature, as it blurs the lines between the branches:

“Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the “power of the purse”; it is not the role of the judiciary, absent actual present or immediately injury resulting from unlawful governmental action.”⁴⁴

As the Supreme Court pointed out in *US v Richardson*, this may mean that an unlawful act will go unchallenged, because nobody can claim to have suffered injury as a result of it.⁴⁵ However, the Court held that the absence of any particular individual or class to litigate an issue gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. In its view, any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the national government by means of lawsuits in federal courts. In his concurring opinion Justice Powell draws attention to the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a non-representative, and in large measure insulated, judicial branch.⁴⁶

With this view the separation of powers suffers when courts start to see it as their mission to correct constitutional and legal errors, while using cases as pretexts for doing so;⁴⁷ *i.e.*, when the plaintiff becomes a vehicle through which the courts may deal with an unlawful act, an extra rather than the lead actor.

4. Liberal standing rules serve to protect the separation of powers

But the story does not end here. Although lowering the standing threshold might be detrimental to the concept of separation of powers in one way, it may benefit it in another. In order to clarify this point we have to remind ourselves of the aim of judicial review. In the seminal case of *Marbury v Madison* Chief Justice Marshall made it clear that the review of the constitutionality of legislation serves to keep Congress within the powers defined and limited by the Constitution.⁴⁸ Louis Jaffe made a similar point with regard to the executive when he emphasised that we rely on the courts

⁴⁴ 408 US 1 (1972) at 15.

⁴⁵ 418 US 166 (1974) at 179.

⁴⁶ *Ibid* at 188-189.

⁴⁷ *Valley Forge Christian College v Americans United for Separation of Church and State* 454 US 464 (1982) at 489.

⁴⁸ 5 US 137 (1803) at 176-177.

as the ultimate guardian of the limits set upon executive power by the constitutions and legislatures.⁴⁹ Aman and Mayton are perhaps even more to the point when they make the following observation:

“A primary purpose of judicial review is to ensure that agencies do not go beyond their statutory powers in carrying out their tasks. If an agency could freely take actions that were *ultra vires*, that is, beyond its statutory authority, its decisions would completely undermine the separation of powers principle upon which the Constitution is based. Article I, §1, for example, vests all legislative power in the elected representatives of a bicameral legislature. Agencies are to implement these statutes and neither amend nor ignore them.”⁵⁰

One of the aims of judicial review, therefore, is to keep the executive and the legislature within the confines of their powers. Since authorities that act outwith their powers might trespass on the territory reserved for the other branches, judicial review is an important means to preserve the separation of powers. From this perspective the more opportunity there is for review, the better this aim is being pursued. Or, put differently, the lower the standing threshold, the better the separation of powers will be preserved. Liberal standing rules serve the separation of powers, because they enable courts to review whether or not the authority has acted *ultra vires* in more cases than would be possible under strict standing rules. When there is a prima facie case that an authority has acted *ultra vires*, it is immaterial who brings the action, as long as somebody does. Thus, in the Indian case of *Gupta v Union of India* Chief Justice Bhagwati stated that to deny public interest standing would be to leave the observance of the law to the ‘sweet will’⁵¹ of the authority bound by it, and to render the promise of judicial review but a ‘teasing illusion’.⁵² His Honour made the following observation:

“Now if breach of such public duty were allowed to go unredressed because there is no one who has received a specific legal injury or who was entitled to participate in the proceedings pertaining to the decision relating to such public duty, the failure to perform such public duty would go unchecked and it would promote disrespect for the rule of law.”⁵³

Similarly, the Canadian Supreme Court was prepared to recognise citizen’s actions, because it felt that unlawful acts performed by government bodies ought not go unchallenged.⁵⁴

Consequently, since the separation of powers requires unlawful acts to be corrected, the standing rules should allow for actions brought in the public

⁴⁹ Louis L. Jaffe, *Judicial Control of Administrative Action* (1965), p 321.

⁵⁰ Alfred C. Aman, Jr. and William T. Mayton, *Administrative Law* (2001), p 445.

⁵¹ AIR 1982 SC 149 at 190.

⁵² *Ibid* at 190.

⁵³ *Ibid* at 191.

⁵⁴ *Thorson v Attorney-General of Canada* 43 DLR (3d) 1 at 7; *Minister of Justice of Canada v Borowski* 130 DLR (3d) 588 at 593.

interest. In paragraph 6 this proposition, together with the thesis that lax standing rules may compromise the separation of powers, will be transformed into a suitable framework for analysing standing law. However, before that some proof has to be submitted that the separation of powers angle on standing issues is not unique to the U.S., but can also be applied with some success in other jurisdictions.

5. A little local difficulty?

On the basis of the authorities presented thus far one might get the impression that the separation of powers perspective on standing is a U.S. invention that might be of questionable validity to other jurisdictions. Tribe has even gone so far as to suggest that the separation of powers angle is a recent invention by the Supreme Court, which is closely associated with Justice Scalia.⁵⁵ Although Justice Scalia's contribution to this concept can hardly be overestimated, Tribe appears to have overlooked the fact that the Supreme Court has linked standing to the separation of powers as early as 1922 in *Frottingham*.

But the question whether the connection can play a useful role in jurisdictions outside the U.S., which may lack a strong separation of powers tradition, is a legitimate one. For example, is the English law on standing susceptible to analysis from a separation of powers perspective? It is submitted that it does.

First of all, there is growing evidence that the concept of separation of powers plays a part in English law. There is some authority to suggest that the concept of separation of powers is part of British law. In *R.v Her Majesty's Treasury, ex parte Smedley*, Sir John Donaldson MR described the separation of powers as "a constitutional convention of the highest importance".⁵⁶ In *Duport Steels v Sirs*, Lord Diplock emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers.⁵⁷ In the same case Lord Scarman referred to "the constitution's separation of powers".⁵⁸ In addition, commentators increasingly explain elements of public law in terms of separation of powers.⁵⁹

It has been suggested that the separation of powers implies that courts should have the power to review the constitutionality of legislation.⁶⁰ If that were to be the case, there would be no place for the principle in British constitutional law under the Sovereignty of Parliament. One could argue, on the other hand, that the Sovereignty of Parliament, by clearly indicating which line the executive and the judiciary are not allowed to cross, can be considered an important element of the separation of powers. That is the way in which the Dutch Supreme Court, which operates under a system not dissimilar to the

⁵⁵ Laurence H. Tribe, *American Constitutional Law* (volume 1; 2000), pp 388-389.

⁵⁶ [1985] QB 657 at 666.

⁵⁷ [1980] 1 WLR 142 at 157.

⁵⁸ *Ibid* at 169.

⁵⁹ See e.g. Ivan Hare, "The Separation of Powers and Judicial Review for Error of Law" in *The Golden Metwand and the Crooked Cord* (Forsyth and Hare ed, 1998), pp 113-139; Lord Steyn, "The Case for a Supreme Court" (2002) 118 *LQR* 382.

⁶⁰ Eric Barendt, *An Introduction to Constitutional Law* (1998), pp 7 and 39.

Sovereignty of Parliament, perceives its lack of power to invalidate Acts of Parliament.⁶¹ More importantly, however, both Sir John Donaldson in *Smedley*⁶² and Lord Woolf, writing extra-judicially,⁶³ appear to adhere to this view.

Although close ties exist between the executive and the legislature in the United Kingdom, this does not mean that there is no role to play for the separation of powers. Frequent interaction between both branches of government has become a fact of political life in most modern democracies, even those, like the United States, with a strong commitment to the concept. But as long as it is accepted that there are boundaries between both departments which ought not to be transgressed, the separation of powers is a viable doctrine. The case of *R. v Secretary of State for the Home Department, ex parte Fire Brigades Union*, which concerned separation of powers in anything but name,⁶⁴ proved that the concept is still very much a live issue in the area of executive-legislative relations.

Even if one would be unwilling to accept that the separation of powers is an important characteristic of British and English law generally, it would be difficult to deny that it has a major impact on the relations between courts and administrative authorities, the area most relevant to the issue of standing. Thus, Nolan LJ (as he then was) has made the crucial observation that the proper constitutional relationship of the executive with the courts is that courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the court as to what its lawful province is.⁶⁵ In addition, both Lord Scarman in *Nottinghamshire County Council v Secretary of State for the Environment*⁶⁶ and Leggat LJ in *R v Secretary of State of the Environment, ex parte Hammersmith and Fulham London Borough Council*⁶⁷ expressed the view that the question of the scope of review is closely linked to the issue of separation of powers. In an illuminating contribution on this topic, Lord Woolf has convincingly argued that the relationship between the executive and the courts is being determined by the separation of powers concept.⁶⁸

Secondly, there is some evidence to suggest that separation of powers considerations have played a part in English discussions on standing. The idea that unlawful government conduct should not go unchallenged and that a standing lacuna should therefore be avoided, in particular has received some support. In the seminal case of *R. v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses*, Lord

⁶¹ *Harmonisatiewet* (1989) NJ 469.

⁶² [1985] QB 657 at 666.

⁶³ "Separation of Powers in the United Kingdom: The Role Played by Courts in the United Kingdom" in *Courts and Policy, Checking the Balance* (Gray and McClintock ed., 1995), pp 168-182, in particular at 172.

⁶⁴ [1995] 2 AC 513; the concept was referred to by one of the dissenters, Lord Mustill, at 567, but within a different context.

⁶⁵ *M v Home Office* [1992] QB 270 at 314-315; the point had originally been made during argument by counsel, Stephen Sedley QC.

⁶⁶ [1986] 1 AC 240 at 250.

⁶⁷ [1991] 1 AC 521 at 543.

⁶⁸ "Judicial Review – The Tensions between the Executive and the Judiciary" (1998) 114 *LQR* at 579.

Diplock stated that he would consider it “a grave lacuna in our system of law if a pressure group (. . .) or even a single public-spirited taxpayer were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped”.⁶⁹ Other courts have since made similar statements.⁷⁰ The issue has also been raised by commentators, like De Smith, Woolf and Jowell.⁷¹ Hare has made the following observation:

“One of the principal justifications for judicial review is that all citizens have an interest in the administration acting lawfully and that the rule of law is damaged if illegality is allowed to occur without challenge.”⁷²

In addition, Schiemann J (as he then was), has drawn attention to the consequences of lowering the standing threshold for the proper constitutional role of the courts. Writing extra-judicially, he has remarked:

“One of the problems in these cases [*i.e.* brought by Private Attorney-Generals; TZ] is that the effects of judicial decisions rendered in administrative law litigation often go beyond the sphere of the parties actually present in the proceedings. Some of those persons affected by the final decision have not been heard by the court.”⁷³

In his famous judgment in *R. v Secretary of State for the Environment, ex parte Rose Theatre Trust Co* he expressed the following view:

“Finally, I ought to say that I recognise the force of Mr. Sullivan’s submission that since an unlawful decision in relation to scheduling either has been made (if the earlier part of my judgment be wrong) or may well be made in the future, my decision on standing may well leave an unlawful act by a minister unrebuked and indeed unrevealed since there will be those in the future who will not have the opportunity to ventilate – on this hypothesis – their well-founded complaints before the court. This submission is clearly right. The answer to it is that the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated.”⁷⁴

It is by no means argued that the English law on standing has been modelled on the separation of powers. But the fact that the concept has until now played a part, albeit a modest one, in the discussion on the English law of

⁶⁹ [1982] AC 617 at 644.

⁷⁰ See *e.g.* *R. v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1993] 1 WLR 872 at 890; *R. v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386 at 395.

⁷¹ *Judicial Review of Administrative Action* (1995), p 99.

⁷² “The Law of Standing in Public Interest Adjudication” in *Judicial Review in International Perspective* (Andenas ed, 2000), p 312.

⁷³ “Locus Standi” [1990] *PL* 342 at 349.

⁷⁴ [1990] 1 QB 504 at 522.

standing, and it is increasingly being referred to as an element of public law, justify the assumption that such an analysis will fall on fertile ground.

6. The concept of separation of powers as an explanatory tool

As the previous discussion has shown, the law on standing can promote the concept of separation of powers in either of two ways. Strict standing requirements will benefit the separation of powers by confining the courts to their proper constitutional role. Liberal standing requirements will favour the separation of powers by allowing the courts to keep the other branches within their constitutionally defined areas. These two approaches towards standing and separation of powers can serve as the basis of a framework for analysing and comparing different standing regimes.

Each of the views described above corresponds with a particular type of review.⁷⁵ The public interest model is aimed at protecting the legal order by weeding out unlawful administrative acts, regardless of whether they have caused injury. Consequently, the standing thresholds in the public interest models are low. In the private interest model the emphasis is on the adjudication of the plaintiff's claim of injury rather than correcting the unlawfulness of the government action. The illegality of the agency's action will only be reviewed if necessary to establish the validity of the plaintiff's claim, *i.e.* as a side-effect rather than the focus of the proceedings. The private interest model is therefore characterised by relatively high standing thresholds.

These two models can be regarded as the opposing ends of a sliding scale on which all the existing standing regimes can be placed. Thus, Germany and Scotland can be found near the private interest end of the scale, while Canada and India are at the other end.⁷⁶ Most other jurisdictions are somewhere in between. By identifying each country's location on the scale a valid comparison can be made between them. Although the sliding scale is a very helpful tool to analyse standing regimes from a comparative perspective, it does not imply that the underlying separation of powers concept played a major part in the development of those regimes. Often standing rules were not made by design but emerged as the result of gradual, incremental, development. If at all, separation of powers considerations usually start to play their part late in the day. However, the fact that most judges and legislators did not have the separation of powers issue on their

⁷⁵ This distinction has been inspired by German public law, *i.e.* objective review of lawfulness and protection of subjective rights, see Walter Krebs, "Subjektiver Rechtsschutz und Objektive Rechtskontrolle" in *System des Verwaltungsgerichtlichen Rechtsschutzes* (Erichsen, Hoppe and von Mutius ed, 1985) pp 192-194.

⁷⁶ See O. Kopp and W. Schenke, *Verwaltungsgerichtsordnung* (2000), pp 212-356; A.W. Bradley and C.M.G. Himsworth, "Administrative Law" in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Black ed, 2000), pp 122-155; Lord Hope of Craighead, "Mike Tyson Comes to Glasgow – A Question of Standing" [2001] *PL* 294; Peter W. Hogg, *Constitutional law of Canada* (1997), pp 1365-1376; David J. Mullan, *Administrative Law* (2001), pp 445-460; S. P. Sateh, *Judicial Activism in India* (2002), pp 195-248.

minds when they devised the standing rules, should not detract from the usefulness of the model.

In theory, the public interest model and the private interest model appear to be mutually exclusive; one cannot raise the standing threshold and lower it at the same time. This does not preclude countries from adopting a standing regime in which both models are combined. That is exactly what has happened in South Africa, it mixes a public interest model in human rights cases with a more traditional private interest model in all other areas. At first sight in English law things are exactly the other way around: a combination of liberal standing requirements in general and a strict victim requirement under the Human Rights Act, 1998. However, it is argued that the restrictive interpretation usually ascribed to the victim requirement laid down in Section 7 of the Human Rights Act⁷⁷ does not necessarily flow from the case law of the European Court on Human Rights. Although most cases have been brought by petitioners who could claim a direct and personal stake in the outcome, the Strasbourg organs have also allowed actions of a public interest nature. In the *Kjeldsen* case, for example, two parents objected, on behalf of their daughter, to legislative and administrative matters which would make sex education a compulsory part of the curriculum in Danish state schools.⁷⁸ The Commission found that the victim-requirement had been met, although the girl had not taken part in the classes. In *Brüggemann and Scheuten*, two women alleged that the German Law on abortion contravened Article 8 of the Convention.⁷⁹ The Commission took the view that the applicants were entitled to claim to be victims, despite the fact that they did not claim to be pregnant, nor had they been refused a pregnancy termination, nor had they been prosecuted for unlawful abortion. The case of *Open Door and Dublin Well Woman* was brought by two organisations counselling pregnant women in Ireland, two trained counsellors working for one of the organisations, and two women.⁸⁰ The applicants complained of an injunction which had been imposed by the Irish courts on the two organisations restraining them from providing information to pregnant women concerning abortion facilities outside the Irish jurisdiction. The State party argued that the complaints submitted by the two women amounted to an *actio popularis* since they could not claim to be victims of an infringement of their Convention rights. The majority of the Court did not share this view and pointed out that, although it had not been asserted that the women were pregnant, it was not disputed that they belonged to a class of women of childbearing age which could be adversely affected by the restrictions imposed by the injunction.

⁷⁷ See e.g. Joanna Miles, "Standing under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication" (2000) 59 *CLJ* 133; Jane Marriott and Danny Nicol, "The Human Rights Act, Representative Standing and the Victim Culture" [1998] *EHRLR* 730; Michael Supperstone and Jason Coppel, "Judicial Review after the Human Rights Act" [1999] *EHRLR* 301 at 306-309; Stephen Grosz, Jack Beatson and Peter Duffy, *Human Rights* (2000), pp 75-88.

⁷⁸ Application No. 5095/71, Yearbook 15, pp 482-508.

⁷⁹ Application No. 6959/74, Yearbook 19, p 414; D. R. 5, p 115.

⁸⁰ A 246, para 44 (1992).

These and other examples⁸¹ make clear that the Strasbourg organs have allowed the occasional public interest case.

Although the location of a particular standing regime on this sliding scale will usually be the result of an incremental development, the considerations that have played a part can sometimes be made visible. Courts may, for example, be induced to lower the standing threshold when litigation costs are high, when leave is required or when remedies are discretionary.⁸² In India public interest actions were introduced in order to accommodate litigants with limited resources.⁸³

Sometimes these factors themselves are closely related to the concept of separation of powers. In Germany the high standing threshold has been associated with the intensity of the review exercised by the courts. Because their review is rather probing, courts try to maintain the proper balance by limiting access to it.⁸⁴ Lowering the standing barrier may also act as a substitute for checks and balances which are no longer effective. The Australian High Court has made it clear in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* that citizens can no longer be expected to rely upon the grant of the Attorney-General's fiat for challenging unlawful government action. This is caused by the fact that in Australia the Attorney-General is a member of the Cabinet who will be reluctant to put his ministerial colleagues in the dock. As a result, the standing rules should not be interpreted in too a restrictive way.⁸⁵ In *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* Justices Kirby and Callinan have identified some circumstances in which it is appropriate to rely on the enforcement of the law at the initiative of a private individual rather than the action of the responsible agency.⁸⁶ Inadequate resources and the fact that the agency has become too close to those officials against whom it should be enforcing the law, belong to this category. Finally, the 'chain-theory' developed by Lord Woolf prescribes that if other restraints on the executive are failing, the courts should compensate for that by scrutinising its actions. This implies that under these circumstances they should relax the standing requirements.⁸⁷

7. CONCLUSION

At first sight the multifarious functions attributed to *locus standi* make this area unfit for comparison. However, if one accepts the proposition that the concept of separation of powers serves as the exclusive rationale of standing, a useful comparison can be made between different standing regimes. On

⁸¹ See Tom Zwart, *The Admissibility of Human Rights Petitions* (1994), pp 50-71.

⁸² *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263.

⁸³ Sateh, *op cit* n 74 at 202.

⁸⁴ Schmidt-Assman, "Die Kontrolldichte der Verwaltungsgerichte: Verfassungsrechtliche Vorgaben und Perspektiven" (1997) *DVBl* 281 at 285.

⁸⁵ (1998) 194 CLR 247 at 263.

⁸⁶ (2000) 200 CLR 591 at 653-654 and 668-669.

⁸⁷ It is no coincidence that Lord Woolf mentions the *Gouriet* decision taken by the Court of Appeal as an example. That judgment was characterised by a very liberal approach towards standing (although see also the House of Lords' much restrictive approach on appeal at [1978] AC 435).

the basis of this premise a sliding scale can be developed with the public interest model and the private interest model serving as opposing ends. All the existing standing regimes are located on this sliding scale.