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PUBLIC INTEREST AND THE QUESTION OF LOCUS STANDI

An era of rapid industrial progress, scientific development, globalization, i.e. of phenomena whose consequences transcend national boundaries, increasingly raise questions about the eligibility to participate in proceedings, not only of those that are directly, but also of those that are indirectly affected; in many cases it happens that an entire community suffers because of misdeeds caused by public authorities. This paper is based on the assumption that a distinction should be made in the approach to private and public law because they protect different goods. If parties in the process may only be the ones that have an individual, personal, and concrete interest, who then may represent groups or individuals that for various reasons cannot do it by themselves? How can we determine the substance of the public interest, how do we preserve it? The paper will attempt to answer these and similar questions by highlighting the very na ture of the public interest, the comparative legal arrangements, and the dividing line between the procedural and substantive content of individual cases.

Key words: *Standing. Public law. Public interest. Nature of things.*

1. INTRODUCTION

Legal protection means the right to demand protection from public authorities in case of any breach of compromise or right. The fundamental human right to justice is apparent in several international documents as well as in constitutions of states. Public law contains rules that are established by state authorities with the use of power (*ius imperium*), which is applied to a broader range of people than in legal relations in civil law. It essentially deals with the public interest, which is *per se* a very vague legal concept that needs concrete substance. Since concern for the public interest is in the hands of public authorities, a question arises

whether the right to protect or promote the public interest in the public (as well as civil) domain depends on a substantive right, or whether there may also exist separate procedural rights that may be exercised by persons that do not represent the public authorities.

It cannot be overlooked that 'the right to effective judicial protection is one of the cornerstones of societies governed by the rule of law and judicial access is a key aspect of that right'.[1] An era of rapid industrial progress, scientific development, globalization, i.e. of phenomena whose consequences transcend national boundaries, increasingly raise questions about the eligibility to participate in proceedings, not only of those that are directly, but also of those that are indirectly affected; in many cases it happens that an entire community suffers because of misdeeds caused by public authorities. Who will protect a community (when the state refuses to admit its mistakes) if not the community itself? Have political terms of office become too long for people who can have their say only every four years at the elections? Public and private law have their own subjects to safeguard. This paper is based on the assumption that a distinction should be made in the approach to private and public law because they protect different goods. If parties in the process may only be the ones that have an individual, personal, and concrete interest, who then may represent groups or individuals that for various reasons cannot do it by themselves? How can we determine the substance of the public interest, how do we preserve it? The paper will attempt to answer these and similar questions by highlighting the very nature of the public interest, the comparative legal arrangements, and the dividing line between the procedural and substantive content of individual cases. Can we really answer the question of *qui bono* with the same answer in the private as well as the public sphere? What measures are available to people if authorities pursue the common good in an unsatisfactory manner, due to lack of resources, people, a too broad scope of competences, lack of information, improper or even illegal behavior? Is it primarily a question of continuity of administrative law in its controlling function as the safeguard (only) in the interest of the parties in the procedure (resulting from the historic fight against abuse of power in the 18th century) or should it also follow the recent doctrines that try to go beyond a mere controlling function to the governing of society? This is the perspective of *Governing (Steuerung*)[2] which should provide new resources for an effective application of rules that are not applied at the expense of the parties in the proceeding, but to the benefit of society as a whole.

[1] E. Delaney, *Right to an Effective Remedy: Judicial Protection and European Citizenship* (Great Britain: Federal Trust for Education and Research, 2004).

[2] See M. Ruffert (ed.), *The Transformation of Administrative Law in Europe*, Sellier European Law Publishers GmbH, München 2007, 11.

2. PARTICIPATION IN THE PUBLIC INTEREST A PLATFORM

Most constitutions are based on the principle of sovereignty of the people, which has emerged from monarchic sovereignty. Althusius, Locke and Rousseau mainly influenced this path where the last in his Social Contract (*Contrat Social*) defined the real and undisputed sovereignty of the people using his version of contractual theory. For our reading it is important that he has introduced the concept of general will (*volonté générale*), which differs from the common will (*volonté de tous*) since the former results from the latter; it is a will that is geared toward a greater good and consists of what remains from the common will when all oppositions of the particular good are excluded from it. 'Sovereignty is only the implementation of universal will, which is prone to equality'.[3] 'The will can be only the will of all people or just of one part. In the first case the expressed will is the act of sovereignty and it is the law, [while] the second case represents only the special will or an act of administration, therefore it is only decree'.[4] The power is therefore in the hands of the people that have delegated it (*potestas delegare*) to representative bodies, which must implement it for the common good. Thus the general will becomes a synonym for the public interest, and the public interest for the common good.

In the field of public law public authorities have a broad standing (within the jurisdiction) while subjects (whose rights have been violated or threatened, on whom obligations have been imposed, or who only protect their legal interest) have a narrower one. Given that the state should take care of the public interest through delegation of authority from the people to their representatives, there arises a question of the exclusivity of that legitimacy. Can a represented person act as an agent and *vice versa*? While in the first case this is always true, in the second case (in the relationship between the people and the state) it never is. Public authorities can only perform operations that are in the public interest. Who else than people will look after the public interest if the state does not take care of it (in a neutral way) satisfactorily?

Despite the fact that the state has a monopoly power, it is not omnipotent. It is only the strongest legal entity within its legal and state borders. It is plagued by the lack of resources, people, and sometimes will. The state should strive for good governance of society, rational use of resources, and efficiency. It depends on political parties, interest groups, and other centers of power. A good is never good enough, so the state's conduct could always be better. Subjective circumstances left aside, the objective ones in which states operate in themselves prevent the effectiveness of the public interest.

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[3] J. J. Rousseau, *Družbena pogodba*, Krtina, Ljubljana 2001, 31.

[4] J. J. Rousseau, 32.

3. ADMINISTRATIVE LAW IN RELATION TO CIVIL LAW

The relation of administrative law to civil law, of the public interest to the right, obligation, or to the individual's legal interest, could be described as a "strong family tie"; in the period of transition from absolutism to constitutionalism, it derived from the assumption that the state cannot be governed by different rules than other entities (the doctrine of equality of law for the state and its citizens was defended mainly by Dicey[5]); however, almost at the same time, at least in France, emerged the idea that in order to protect and promote the public interest the state must have a "stronger" will through laws in relation to individuals. For a long time this prevailing division between those two ideas was related to the character of legal norms and dealings with power: while in civil law dispositive norms should prevail, in administrative law imperative norms should. The former is dominated by the relationship of equality and the freedom of negotiation between the participants, while the latter is dominated by subordination and authority. Such division is suitable only as a starting point for our study because there are exceptions in both cases. They are somehow inversely proportional: norms of imperative nature are also present in civil law, but to a lesser extent than the dispositive ones; in administrative law or parallel to it, there are also dispositive norms, but to a lesser degree (e.g. liability in tort law, personal name) then the imperative ones.[6] Limits that could be resistant against effects from either side cannot be clearly and unambiguously set. Many property relations are placed in administrative rather than civil law.[7] The legal regime of the public good (*res in publico usu*) is barely mentioned by property codes, although it is the *in rem* institute and refers to a specific regulation in other laws. In the case of works on private land, the law may allow the status of public good, through which the state or local government pursues the public interest,[8] or it may enter into a special administrative arrangement (an administrative contract or a concession partnership) which establishes the rights and duties between private investors and a public entity concerning the building, maintenance and management of infrastructure and other facilities in the public interest; after a certain period,

[5] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* [1885], Elibron Classics, 2005.

[6] Imperative norms are sometimes exercised when the objective cannot be achieved through dispositive norms (e.g. expropriation of land because of the failure to reach an agreement on the purchase of land).

[7] E.g. obtaining the locational information for a specific area as a confirmation from official records under administrative law, registration of property in the land register through material (land registry) law, obtaining operating permits for the use of the facility through administrative law.

[8] See Article 21 in the Slovenian Construction Act (conditions for obtaining the status of the built public good).

the public entity gets the right of use or the right to the legal title (depending on various models of property rights and concession contracts). The boundary between administrative and civil law is determined by the method of formation (termination) of the legal relationship and the applicable jurisdiction related to that.

Substantive and procedural arrangements of standing in administrative law are taken from civil law and as such (with the same content) are still largely (*conservatively*) used. Administrative law has very little to say in other people's standings in the administrative processes that are not already covered by civil law. Comparison with civil law shows that other state authorities (usually that of the public prosecutor or the state attorney), which are not directly involved in the decision-making in administrative cases, in protecting the public interest (paradoxically) perform a better role than in administrative law. With regard to procedural and substantive legitimacy we may find that the rules of civil law at large offer a broader right of standing than those of administrative law, which is *per se* responsible for enforcing the (wider) public interest. The transfer of standing in administrative law into other state bodies is very rare. Reasons for limited and exceptional cases of standing in public law outside the explicit public authorities are based on the concept that all entitlements and obligations are imposed almost exclusively on those authorities. And from them the people expect good execution of their tasks.

4. THE PRINCIPLE OF LEGITIMATE EXPECTATIONS

People expect that an opposing party will not violate an agreement (*pacta sunt servanda*). Even in the principle of legitimate expectations, which has its origin in administrative law (it respects the principles of fairness and reasonableness in cases where people have expectations or an interest that public bodies will retain the present practice and keep their promises), we can clearly see that it is derived from civil law,[9] which

[9] The British development of the concept of legitimate expectations doctrine owes its establishment to estoppel developed by Lord Denning. In the case Reprotech (R *v the East Sussex County Council, ex p Reprotech (Pebsham) Ltd; Reprotech (Pebsham) Ltd v East Sussex County Council* [2002] UKHL 8)) Lord Hoffman pointed out that though estoppel and legitimate expectations are cousins, they have different personalities: 'Of course there is an analogy between the private law estoppel and legitimate expecta tions generated by a public authority, which rejection would imply an abuse of power /.../ but it is merely an analogy, since the legal remedies against public authorities must also take into account the interests of the general public'. More in: R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law,* Hart Publishing 2000, 50–52. There is also a direct link with the civil law concept of legal entitlement, which is the 'absolute right (usually cash) to benefits, such as social security and is approved as soon

protects mainly the interests of individuals and organizations, and also indirectly the wider public interest (i.e. that the state would not arbitrarily alter its practices in civil cases without the compelling public interest). The principle of legitimate expectations may be found in most legal systems (e.g. British legitimate expectations, German *Vertrauensschutz*, French *protection de la confiance legitime*) at the crossroads of civil and administrative law – if the former protects the interests of individuals in relation to the already established expectations, the latter may change them if such action is in the public interest (a quasi-retroactivity). The principle has been shaped as a general principle which is usually associated with a broader legal state. However, while protecting the rights of individuals, there still remains the unresolved question of who will protect the public interest if the state does not do this in an efficient way? This is a similar issue to that of the protection of supervisors; if the answer is supervisors themselves, then in the case of the public interest the answer is the people themselves.

The principle of legitimate expectations is closely linked to rights and duties: with regard to rights it refers to our request that the state will not change our position in the future if there is no legitimate reason; with regard to duties it refers to the state complying with our demands. Rights and duties do not have equal importance in civil and administrative law; while the case in civil law is primarily in its specific, concrete enforceability, in administrative (constitutional) law it is also in the abstract non-enforcement. In civil law we do not expect or demand from the opposite side to respect our human rights (if we cannot find a concrete right in law[10]), but our mutual agreed expectations (human rights are not the subject in an agreement). In administrative law we expect from the state to respect human rights, meet the public interest, earn our respect, and to be legitimate. Human rights are directly applicable which means that the state must respect them even if they belong to some individual that is in this country for the first time.[11] This is clearly reflected in the terms of human rights which go beyond concrete, contractual relationship of the parties involved.[12]

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as legal requirements are met'. B. A. Garner (ed.), *Black's Law Dictionary*, 8th ed., Thom son & West 2004, 573.

[10] In a contractual relationship we do not care about what others think about our freedom of conscience, religion, family life, etc.

[11] While in administrative law each state is obliged to respect the human right to freedom of conscience, even if the individual has never been or will never be in the coun try, in civil law this is unthinkable.

[12] The right may be 'something that is correct under the law, morality or ethics <to know right from wrong>; something which is attributed to a person only after its fair re quest, the legal guarantee, or moral principle <the right to freedom>; power, privilege or immunity, which is allowed to person under the law, legally enforceable requirement that

We usually understand the right as a legitimate request which obliges the other person to proceed in a certain way, or to omit an action. Since a right has its corollary in duty, it is expected from the state to apply public rights to our lives as part of its duty to protect and promote the public interest. Just as it is understood in civil law that sometimes we have to intervene in a particular situation in advance to protect our legal rights (i.e. we have a legal entitlement) because an act of another person will over time be resulting in the non-enforceability of our rights (in other words, when breach will finally be recognized, there will be nothing more to claim, that is why we want a temporary injunction), similarly, legitimate expectations in administrative law justify our demand for the state to take a specific action or to make an omission because over time there would be nothing left to enforce, or a restoration to the previous condition would be (almost) impossible.

5. THE BASIS FOR DETERMINING THE CONTENT OF THE PUBLIC INTEREST

How can criteria be determined for issues that we would like to exercise in the public interest cases? The Slovenian legal system derives from a conservative (administrative-legal pre-WW2 Austrian) understanding of standing, and correlated to that, administrative matters that are dealing with rights, obligations, or legal benefits[13] of natural or legal persons or other clients in the field of administrative law. A case is considered an administrative one if regulations provide that an authority is obliged to use the administrative procedure in some matters, make a decision in an administrative proceeding, promulgate an administrative decision, or if the protection of the public interest derives from "the nature of things". Therefore, if some other enactment does not clearly provide that the disputed matter in a particular area is an administrative matter, it is considered an administrative one when it protects the public interest. However, by such circular reasoning we are proving one and the same thing: that only public institutions can determine the content of the public interest, that they are the only ones that know what is best for society. But what is best when it comes to global warming with rising sea levels, changes in ocean currents and other weather phenomena, to scarcity and

someone will do or not do in their behavior; recognized and protected interest, in which the intervention is a violation'. B. A. Garner, *supra* n 9, 1374.

[13] The person who proves the legal interest by claiming that he enters into the process to protect his legal interests (a side participant) also has the right to attend the proceedings. The legal benefit is direct and determined in law or under other regulation that underpins personal gain. A person who requests participation in the process must specify his legal interest in his application (Article 43 of the Slovenian Administrative Procedure Act).

waste of natural resources, pollution, public health and (incurable or massive) diseases of populations, growing inequality between people, migration, unemployment, aging of population, and to other risks of bigger proportions? With the passing of time everything becomes much more complex in areas that are not yet „mature enough„ for an individual legal protection (e.g. micro parts of pesticides that are or could be harmful to human health in connection with other causes) on the basis of the legal interest. Harlow and Rawlings describe the today's process of transforming judicial review from a "drainpipe", formalist model into a funnel model (the limitation of the ambit of adjudication associated with the establishment of significant judicial 'no-go areas' put in issue the real accountability of political actors) where courts have abandoned some of the strict procedural certainties. They have put aside the prevailing private-interest rationale and gave explicit recognition to the role of pressure groups as the 'public interest advocates'. Reflecting and reinforcing the rise of a rights-based approach to judicial review, there has emerged a third ideal type, the '(American) freeway' where, participative and pluralist in orientation, this 'interest-representation' model ultimately stands for judicial review as a surrogate political process.[14] 'There is a general judicial consensus that the law related to standing has become increasingly relaxed. /.../ The cases therefore evidence a judicial tendency to liberalise the standing rules governing both traditional and modern remedies'.[15] Douglas speaks about the sufficient interest where standing is based 'on the importance of the interest, where the interest is consistent with relevant legislative purposes, or with fundamental legal policy'.[16] It seems that judges allow the sufficiency of interest by looking at the purpose, object and subject matter of the Act as a whole. This base is used also as a failure to take into account relevant considerations, which represents one part (the other is taking an irrelevant consideration into account in the exercise of power) of improper exercise of discretion. This standard is accomplished when the facts for it outweigh those against it; it could be paired with the civil judicial standard of the balance of probabilities (i.e. as "more likely than not"). This standard of proof leads us back to "the nature of things" (*de rerum natura*), to the nature of the public interest. There are many descriptions of the public interest, probably as many as there are authors who regard this notion from their respective points of view, so it is perhaps more appropriate if we consider it from the perspective of its core elements.

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[14] See C. Harlow, R. Rawlings, *Law and Administration,* 3rd ed, Cambridge Uni versity Press 2009, 672 674.

[15] R. Douglas, 'Standing'. In H. P. Lee, M. Growes (Eds.), *Australian Administra tive Law. Fundamentals, Principles and Doctrines,* Cambridge University Press 2007, 164.

[16] Ibid, 166 168.

By doing so, we can still use the work of Aristotle for determining the nature of things because he provides essential elements for the description of all things. Aristotle deals with things and their external motion in *Physics* (*Physica*).[17] He insists on a clear separation between the core material and shape, which if they are combined represent the nature of individual things. He has emphasized the difference between things as they are and with respect to their final intent. In the third section of the second book of *Physics* he states that it is necessary to use four different explanatory principles as regards the question of the cause of existence of certain things. Each thing (animal, plant, etc.) should have four causes: the material cause (the contents – *causa materialis*), the formal cause (the form – *causa formalis*), the moving cause (a force that causes the merging of content and form – *causa efficiens*), and the final cause (the goal – *causa finalis*). The reasons for all four properties are essential elements of each case of existence and nature of things. Aristotle believes that any absence or modification of any of these elements leads to the existence of different types. Explanation of all four causes is of overall importance and captures the reality of the things themselves (it shows us the nature of things).

Aristotle‘s view on the nature of things should be sufficient for our treatment of causes and modes of their interaction in the public interest. When can the (sufficient) public interest derive from the nature of things? It should contain the above-mentioned four reasons. It should appear with a real or potential content and form (both matter and form will depend on circumstances and areas as well as on the possibility of their interaction – how the form affects the content and *vice versa*), which should be coupled with a common connecting element (operations of public authorities) and with the final goal (the good of society as a whole, the common benefit). It turns out that (contrary to our expectations) there must always be operations of public authorities for the common good, but this is not the whole nature of things (in the functioning of public authorities the combination of shape and appearance of that functioning is present – the content and form of government action is affected by the underlying motion that is the reason that in turn affects the original content and format on which it operates – that is, how and by what means the public authority acts on the original form and its matter to derive the common good from these activities), there must also be a connection to the scope and substance of the matter we want to have influence on.

In conjunction with the standing of subjects outside the public authorities, the protection of the public interest should be (according to the nature of the public interest) present if the scope of the public interest is so important that we can talk about benefits for society as a whole, when

[17] Available at: *http://classics.mit.edu/Aristotle/physics.2.ii.html#187* (6.12.2010)

an area is sufficiently regulated, when the incidence in an area is such that it can be understood by an individual or an organization in all dimensions of that area (he/it must have sufficient information; there must exist his/its past efforts or experiences in the area), if the operation of public authorities is not satisfactory or effective, when the society as a whole will benefit from a particular operation of the state [18] (if a person has a benefit or detriment, the law already gives him standing *ex lege*).

6. *LOCUS STANDI* IN FRANCE AND GREAT BRITAIN

After providing the platform for identifying areas where the nature of the public interest should be located, let us take a look at the arrangements of the right of standing in individual countries. By doing that we will be able to compare theoretical reasoning with practical legal arrangements. A legal system is designed to safeguard and protect the rights of concrete natural and legal persons. A court must pay special attention to assessing whether there is a legal interest; the request should be carefully reviewed, moreover, it should be assessed what might happen if the court rejects it. Up to our times, standing or *locus standi* has been mostly synonymous with the legal interest, but as we will see, it is changing into something more dynamic, flexible, or deliberative, into something that also constitutes one of the elements of representative democracy.

6.1 France

In France, an individual cannot challenge the legislature‘s rules because of the separation between regulations and administrative acts in Articles 34 and 37 of the Constitution. In the context of administrative law (*droit administratif*) an individual must prove his legal interest, the interest for operation (*l‘intérêt à agir*). In France as in other states, the right to subjective process is divided from substantive law. The admissibility of the action depends on the presence of the legal interest (if there is no interest, there is no action – *pas d‘intérêt, pas d’action*), arising from Article 31 of the Law on Civil Procedure.[19] The Article recognizes the right to sue persons who can demonstrate an interest and the ability

[18] So distant neighbors could not invest remedies or participate in the proceedings concerning the area of influence on the other two neighbors if the area of influence does not extend to the plot of this neighbor; society as a whole does not benefit from such an intervention.

[19] The right of action is available to all those who have the legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons whom it authorizes to raise or oppose a claim, or to defend a particular interest.

for interest (*intérêt pour agir* or *la qualité pour agir*). Participation depends on the legal existence of a legal or natural person, within which also the heirs of a deceased person and groups without legal personality (a community of individuals, companies in the startup phase) may be involved in the process. The titular must show that the interest protected by law is a personal and direct interest (nobody can act as an agent – *nul ne plaide par procureur*). In addition to the individual participation in the frame of the legal interest, common actions are possible within the capacity for the interest, i.e. the eligibility for operation (*la qualité pour agir*). Such qualification results from the application and enables the submission and treatment of action. The property of such qualification is a result recognized by law or is present in the activities that are open to the interested parties who can justify a cause of action. The law gives rise to certain groups, which represent a real collective interest of the group, without being required to demonstrate the personal interest for the action: e.g. workers unions,[20] and associations that prevent racism,[21] sexual or family violence,[22] protect or help children at risk and victims of harassment,[23] address crime against humanity or war crimes,[24] discrimination based on sex or customs, living habits,[25] the defense of nature and the environment[26], or protect consumers.[27] 'If an individual wishes to gain his favor, he must demonstrate the personal interest for his personal right. For all other cases, especially in cases of claims for abuse of power (*recours pour exces de pouvoir*), there is a more liberal interpretation, through which courts uphold the interests that are not too vague or too indirect'.[28] In France then a liberal[29] concept of the legal interest dominates where the criterion is sufficient connection with an individual case.

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[20] Article L2131 1 du Code du travail.

[21] Article 2 1 du Code de procédure pénale.

[22] Article 2 2 du Code de procédure pénale.

[23] Article 2 3 du Code de procédure pénale.

[24] Article 2 4 du Code de procédure pénale

[25] Article 2 6 du Code de procédure pénale.

[26] Article L142 1 du Code de l'environnement.

[27] Article L421 1 du Code de la consommation.

[28] R. Chapus, *Droit administratif general*, 10[E] ed., Montchrestien 1996, 723.

[29] The interest can be invoked not only for material, but also for moral reasons (CE 8 Februar 1908 *abbe Deliard*, Rec. 127); although the interest is personal this does not mean that it must be exclusive; it is connected also to the quality of the public service (CE 21 December 1906, *Syndicat du quartier Croix de Seguey Tivoli*, GAJA, n. 16), to the inhabitants in a specific community (CE 29 March 1901, *Casanova*, GAJA, n. 8), to tho se who have the sufficient interest for annulation of decisions, relative to the functioning of service in the community (CE 10. februar 1950, *Gicquel*, Rec. 100); the interest cannot only be personal, but also a public one (CE 7. junij 1902, *Maire de Neris les Bains*,

6.2 Great Britain

In British administrative law, an applicant must have a sufficiently large (sufficient) interest for the issues to which the application relates.[30] The requirement of „sufficient interest„ was created by the interpretation of the American courts[31] and later transferred to Britain: Lord Diplock in the case of *Inland Revenue Commissioners Appellants in the National Federation of Self-employed and Small Businesses Ltd.* [1981] 2 W. L. R. 722 said that

> 'it would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.'

Lord Scarman in the above-mentioned case gave his perception of the adequacy of the interest:

> '[t]he sufficiency of the interest is a mixed question of law and fact. The legal element in the mixture is less than the matters of fact and degree: but it is important, as setting the limits within which, and the principles by which, the discretion is to be exercised ... The one legal principle, which is implicit in the case law and accurately, reflected in the rule of court, is that in determining the sufficiency of an applicant's interest it is necessary to consider the matter to which the application relates. It is wrong in law, as I understand the cases, for the court to attempt an assessment of the sufficiency of an applicant's interest without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima facie case, or reasonable grounds for believing that there has been a failure of public duty, the court would be in error if it granted leave. The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. But, that being said, the discretion belongs to the court: and, as my noble and learned friend Lord Diplock has already made clear, it is the function of the judges to determine the way in which it is to be exercised'.

It looks that the House of Lords has developed a two-step test from that case:

GAJA, n. 9), where it is important enough (CE 13. februar 1930, *Dufour*, Rec. 176). J. Waline, *Droit administratif,* Dalloz 2010, 618.

[30] When AJR procedure was introduced in 1978, an American style test of 'suffi cient interest' was included on the advice of the Law Commission (Law Commission's Report on Remedies in Administrative Law [1976, Law Com. No. 73, Cmnd. 6407]). Set out in s. 31(3) of the Supreme Court Act 1981, the test is mandatory: the court 'shall not grant leave /.../ unless it considers that the applicant has a sufficient interest in the matter to which the application relates'.

[31] See *Sierra Club v Morton* 405 US 727 (1972) or *Lujan v Defenders of Wildlife* 504 US 555 (1992).

1) Standing is not a preliminary question, which would be independent of the merits of a claim. The question of sufficient interest cannot be audited only in the abstract, but together with the legal and factual context in relation to all the various factors to which the parties point. 2) After examining the facts, the court considers whether the public authority breached its powers. If it turns out that there is a fairly large violation, court proceedings are initiated.

The British system much like the French one has a more and more liberal standing in public law. 'Prerogative legal remedies have always been more liberal than the standing of civil law remedies'.[32] The British system is moving away[33] from classic standing towards the assessment of the merits of the claim.

It looks that in the countries which do not have public participation in areas of preparation and adoption of general or secondary legislation, it is desirable that the system of standing is applied also for the cases of the public interest, i.e. in the sufficiently-important state's decisions (France[34], Great Britain). The dates of above-mentioned cases also show that the sufficiency of interest was accepted before the notions of NPM, Governance, Global Government and the like although they are similar in that they represent attempts to achieve a more effective government or to broaden the space or scope of operations. The sufficiency of interest has been established mainly because of the specific needs in a community's life.

7. CONCLUSION

In private law the direct beneficiaries of certain rights have an interest, while in public law all share the interest. *Locus standi* cannot be the same in both areas – the infringement of private rights should be

[32] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 9th ed., Oxford University Press 2004, 684.

[33] In recent years, the Parliament has passed Acts relaxing the strictness of the application of the rule by defining classes of persons who may commence proceedings. The Trade Marks Act 1994 allows "any person" to bring proceedings to recover loss su ffered by them as a result of an unjustified threat of trademark infringement. In the face of such provisions, courts maintain a jurisdiction to control their audiences. In such cases, a claimant will be required to show that he has been aggrieved by the threat of infringe ment in case that he was not a direct receiver of the threat. The Contracts (Rights of Third Parties) Act 1999 also defines classes of persons that may bring actions under a contract and thus have been granted locus standi where it otherwise would not exist due to the doctrine of privity of contract.

[34] Although France is under consideration to adopt public participation also: see 'Rapport public 2011: Consulter autrement, participer effectivement'. (Conseil d'État, Pa ris 2011).

treated in private law while abuse of public power in administrative law. *Locus standi* has been created in civil law, and therefore cannot be directly transferred to public law. Such immediacy neglects the dimension of the public interest that can still be described using the Aristotelian nature of things. The most recent additions to the modernization toward economic efficiency, privatization, and deregulation are citizens– and transparency-oriented. This paper confirms that the judicial protection in France and Britain, not only in the recent government documents in this field (e.g. the French statute concerning the rights of individuals against the administration – *Loi n. 2000–321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les Administrations*[35] – DCRA and the British concept of „Modernizing Government„[36]), allows a broader right of standing than the classic Germanic approach.[37] The responsibilities of public authorities are growing and consequences could be far reaching. If we advocate classic *locus standi* by granting more and more powers to public authorities, the public responsibility and accountability is smaller with every new assignment (the responsibility of government is a corollary of its powers). *Locus standi* can cause dismissal of even the most reasonable action against even an absurd abuse of power because „an individual has no legal interest.„ Regime of standing in public law should move from the sphere of interest into the merits of the case. The public interest in issues that are interesting for the people in the state and wider community (the environment, human health, rights, good governance of state or transnational communities) cannot be based on the demonstration of a specific state's intervention in the rights or interests of a particular individual, just like the public interest *per se* is not constituted only from the sum of individuals' wills. It is much more: by the strict standing even a large sum of petitioners (who can be counted in thousands) cannot provide sufficient ground for the commencement of proceedings. It turns out that the initiation of the case depends significantly on the substance which is behind the person's claim.

The rules of *locus standi* have been traditionally used with strictness in private law, but have often been relaxed in certain conditions in the presence of elements of public law, particularly where the individual freedom has been threatened. Issues relating to the protection of life, liberty, or physical integrity can be traced all the way back to the Roman times when in special cases it was considered that the procedure was nec-

[35] Available at: *http://www.legifrance.gouv.fr/affichTexte.do?cidTexte LEGITEXT 000005629288&dateTexte 20101217* (17.12.2010)

[36] Available at: *http://www.archive.official documents.co.uk/document/cm43/4310/4310.htm* (17.12.2010)

[37] Similarly, for transparency see R. Mathias, *The Transformation of Administra tive Law in Europe*, Sellier, European Law Publishers, 2007, 35. Beyond the academic concept called "*Steuerung*" (governing) Germany did not evolve. Id, 18.

essary because it was in the public interest.[38] A critical question touches on the issue of protection of areas and enforcement in areas that concern us all, where *locus standi* has become an opponent of the protection – opposing what it should protect. It is only a means, not a goal; the state has been repeatedly shown as an organization without the necessary resources to be able to play the role of the sole protector of natural resources (this is also evident on the international level), making it necessary to open the public interest to civil society organizations and individuals who have the resources, time, and sufficient interest to litigate. In places where the state shows weakness[39] or even abuses its power, it is unlikely that anyone else can step in but the people themselves.[40] Despite more modern forms of standing in environmental cases, we should keep evaluating the possibilities of a broader right of standing in other areas. Since human rights are our birthright, and since the human being is Aristotelian *homo politicos*, our public interest should be similar. Errors in the implementation of the public interest can be found in the nature of the state's practices which fall short of expectations. It should be only natural that there would be an effective way of pointing out errors, not only at the time of elections, but also in the time between them. Sometimes the consequences are difficult to repair or which is worse, an irreparable harm to the community as a whole can be caused.

Orthodox standing has been developed in accordance with the views of a bygone era. These became obsolete a century ago. The doctrine should be aligned with current guidelines. The theoretical debate on the nature of the public interest in the first part of the paper is similar to the outcome of British and French legislation and case law. The two countries have been far apart in creation of administrative law, but the similarities in standing (and other issues) bring them closer together. The British and French approach with judicial determination of the *sufficiency or quality of the interest* is a good compromise between law and facts. An alleged breach of duty or illegality of state's actions could be related to

[38] The so-called *actio popularis* – although it is used only for special cases that meet the stringent requirements: see R. W. Lee, *Elements of Roman Law*, 4th ed., Sweet and Maxwell 1956. Lee explains that these measures were 'in the public interest, which has been allowed to any member of the public to sue for the imposition of a sentence, which he kept to himself or to share with the country' and points out that the *actio popularis* was additional due to the lack of criminal law. Id, 708.

[39] Given the limited space I can only mention the so called Peltzman effect where the regulation itself creates the opposite effect.

[40] Even a politician who decides major community issues has no *locus standi*, but his mandate to intervene in the public interest is based on elections. Sometimes the citi zens should have the possibility to enforce the public interest through the courts if they consider that the state does not exercise it sufficiently.

the position of the claimant which must have a sufficient, qualitative individual (not merely legal) interest to pursue and protect the public interest. Administrative law has been developed primarily to protect the rights of the people against abuse of power. Let it also have the appropriate tools against abuse now and in the future.