Legal analysis of the Aarhus Convention in Spain

Santander, 10 July 2008

Author: Fe Sanchis-Moreno
Direct tel.: + (34) 661 168 203
E-mail address: sanchis.fe@sarenet.es
Postal address:
P° Maria Agustin, 3, dcha. E-50004 Zaragoza, Spain

I. General information on ratification and transposition of Aarhus Convention in respective country, in particular:

- When was the AC ratified

The **Aarhus Convention** was signed by Spain on 25 June 1998, ratified on 29 December 2004, published in the Spanish Official Journal on February 16, 2005 and came into force on March 29, 2005.

- What is the legal position of this type of international convention in your national legal system

The Convention became part of Spanish law and is therefore enforceable[1]. It imposes obligations, recognises and regulates rights of the people, and all administrative bodies, including judicial bodies, must comply with it. Since its entry into force, existing regulations for so-called 'Aarhus rights' were automatically amended.

Under the Spanish legal system a Convention has a preferential position. On one hand, it has to comply with the provisions of the Spanish Constitution, on the other, it cannot be abolished, amended, or suspended by Spanish acts, therefore, prevails over national, regional and local legislation. International Conventions are directly applicable whenever they are self executed, if this is not the case, it may be necessary the adoption of specific national legislation to achieve a correct application. .

- Whether the transposition, including amendments, was formally finished

These regulations were also amended thanks to the direct effect of community legislation: **Directive 2003/4/EC of 28 January 2003** on public access to environmental information, and **Directive 2003/35/EC of 26 May 2003** providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

In addition, on July 18 2006, **Act 27/2006** regulating the rights of access to environmental information, public participation, and access to justice in environmental matters was approved. It was passed to create a legal framework for the application of these rights, by meeting the obligations arising from the Aarhus Convention and implementing Directive 2003/4/EC and Directive 2003/35/EC. This Act has been in force since July 20 of 2006 but the access to justice provisions came into force only on October 19 2006.

The PRTR Protocol was signed by Spain in May 21 2003; however, it has not been ratified yet. The GMO amendment was signed by Spain in February 21 2008.

[1] Spanish Constitution, art. 96(1): "Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order. Their provisions may only be abolished, modified, or suspended in the manner provided for in the treaties themselves or in accordance with general norms of international law."

- Names of national act(s), by which the AC was transposed

Act 27/2006 was the starting point for the adoption or amendment of a number of subsequent acts and regulations governing the exercise of these rights at the national and regional levels. At national the Order in Council 1/2008, of 11 of January approving consolidation of environmental impact legislation can be mentioned. So far, amongst others, the following acts can be mentioned at regional level: Act 7/2007, of 9 of July, on Integrated Management of Environmental Quality in Andalucia; Act 11/2006, of 14 of September on Environmental Impact Assessment and Strategic Impact Assessment in Baleares Islands; Act 17/2006, of 11 of December, on Environmental Integrated Control in Cantabria; and Act 4/2007, of 8 of March, on Environmental Impact Assessment in Castilla La Mancha.

- Any other information on transposition you consider necessary

In the 10 years that passed since the Convention was signed, almost all efforts have been put into producing legislation that generally repeats the same thing over and rarely introduces "practical arrangements" to promote an effective exercise of Aarhus rights different from those provided by the Convention and the Community directives.

Moreover, this long legislative process was not accompanied with appropriate budgets, i.e.: personnel and means for complying with all these laws. Nor was it accompanied by activities to increase public awareness, or training and capacity building programs, or even "friendly" information about the existence and exercise of these rights[2]. As a result, very few people from the public, the administration, the judiciary, or even from environmental non-governmental organisations and other citizens' organisations know about Aarhus rights or how to exercise them efficiently.

II. Overall framework and context of AC related issues:

[2] To illustrate this, with regard to increasing awareness and information about activities related to Aarhus rights in Spain in these past 10 years, the author only knows about four relevant publications. Three of these publications were prepared by non-governmental organisations, and all of them had limited distribution, although they are available on-line. These publications are the following: Sanchis, F. 2007. "Aplicacion en España del Convenio de Aarhus desde la perspectiva de la aplicacion de las Directivas 2003/4/CE y 2003/35/CE" and "Reflexiones sobre los posibles beneficios de una directiva comunitaria relativa al acceso a la justicia en materia ambiental". In: La Aplicacion del Convenio de Aarhus en la UE y en España. EEB. Available at: http://www.eeb.org/activities/transparency/Aarhus_survey.html Sanchis, F. 2007. Guia sobre el Acceso a la Justicia Ambiental – Convenio de Aarhus. Available at: http://www.abogados.es/portalABOGADOS/archivos/ficheros/1193946142239.pdf Salazar, E. 2006. El acceso a la informacion ambiental en el Convenio de Aarhus. Guia para las autoridades publicas de Cantabria. CIMA. Available at: http://www.medioambientecantabria.com/colec_manuales/ampliar.php?Id_contenido=13806&Id_tipo= And: European ECOForum 2002 Que es el Convenio de Aarhus? Available at: http://www.participate.org/index.php?option=com_docman&task=cat_view&gid=18&dir=DESC&order=date&Itemid=50&limit=7&limitstart=7

Focus of our analysis is the A2J; however, each organization can include here information, which is important in a respective country. For example:

- General atmosphere relevant for the AC and issues it is addressing – how is it accepted/reflected in attitudes and decision-making of competent authorities as well as representatives of public; what is your assessment of the situation – "pre" and "post" Aarhus

The Spanish Constitution, adopted in 1978 after 40 years of dictatorship, recognizes in article 45 the "right to enjoy an environment suitable for the development of the person"[3]. However, this is not provided as a fundamental right but as a guiding principle for economic and social policy. Which affords a lesser degree of protection than, for example, is given to the right to life and physical and moral integrity (art. 15), which is a fundamental right. Therefore, article 45 of the Spanish Constitution needs to be developed by legislation that can then be invoked and applicable.

The constitutional framework of environmental responsibilities distributed between central and regional government set out in articles 148 and 149 entails a complex administrative situation for environmental matters. Since 1978, central government has been responsible for providing basic environmental legislation and establishing common levels of environmental protection. Spain's 17 autonomous regions are able to set high standards of legal protection and are also responsible within their own territories for matters such as hunting and fishing, public works, transport, non-commercial ports and airports, agriculture and livestock, forestry management, etc. Besides these regional responsibilities, local councils also have considerable responsibilities on some environmental issues, e.g. urban waste management, town planning, parks, or siting and authorization of activities that can have an impact on the environment[4].

The right of access to information and public participation is set out in articles 9(2), 23(1) and 105 of the Spanish Constitution. The right of access to information contained in public registers and files is recognized as a non-fundamental right. But the right to participate in public affairs is a fundamental right whose exercise has to be actively facilitated by the public authorities, which are obliged to remove any obstacles impeding it.

Article 24 of the Constitution recognizes as fundamental the right to obtain effective protection of the courts in the exercise of rights and legitimate interests. The Constitution does not establish a right or specific procedure for access to justice in

[3] Art. 45 of Spanish Constitution states that: (1) everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it. (2) The public authorities shall concern themselves with the rational use of all natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity. (3) For those who violate the provisions of the foregoing paragraph, penal or administrative sanctions, as applicable, shall be established and they shall be obliged to repair the damage caused.

[4] Act 7/1985 of April 2 regulating the basic legal framework for local government, which sets out the powers and responsibilities of local councils.

matters related to the environment; it is necessary to resort to ordinary legal procedures provided in general law on effective judicial protection. However, in article 125 it provides for so-called *actio popularis* (or "popular action"), which gives citizens and, implicitly, organizations the right to go before the courts and challenge an activity which affects a collective interest, such as the environment. The use and scope of this "popular action" has been developed by national and regional sectoral acts. Finally, article 119 of the Constitution guarantees that everyone is able to access to justice by establishing that Justice shall be free of charge when the law so provides and in any case for those who have insufficient means to litigate.

The Aarhus rights: access to environmental information, public participation and access to justice on environmental matters, have been developed through a range of specific legislation since 1978, e.g. Organic Act 3/1984 of March 26 regulating popular legislative initiative; Act 30/1992 of November 26 on the legal framework of public administration and common administrative procedure, which defines the participation of interested parties in administrative procedures and access to information contained in official registers and files; Order in Council 1302/1986 on the environmental impact assessment regulation, which establishes a mechanism for public participation in environmental impact assessment; Act 38/1995 of December 12, on the right to access to environmental information, public participation and access to justice in environmental matters, etc.

The Spanish ratification of the Aarhus Convention developed the content of these three rights under the environmental field and reinforced them by requesting a real and effective exercise.

Despite constitutional background and specific legislative developments, an overall dramatic improvement in practice of Aarhus rights cannot be observed. Administrative and judicial bodies remain unaware of Aarhus rights, the same can be said about the public, including most of Spanish environmental organisations. Lack of democratic culture and of interest in environmental issues can be seen as one of the main factors behind this situation. Currently, it is difficult to properly assess the situation because of difficulties in obtaining appropriate updated data at the different administrative levels involved: national, regional and local.

To illustrate the general atmosphere regarding the exercise of Aarhus rights it is worth mentioning that the Spanish government did not submit the National Implementation Report on the Aarhus Convention to the 3rd Meeting of the Parties to the Aarhus Convention that took place in Riga (Latvia) in June 2008. Its preparation has just started and it is expected to be ready on 9 March 2009!

- A brief summarization of other two pillars, concretely:

i. Administrative standing in environmental matters – for example its relation to A2J or how is Art. 6.1, letter b) applied in our countries

Although the Spanish ratification of the Aarhus Convention and the direct application of Directive 2003/35/EC tacitly modified existing public participation rights, the approval of Act 27/2006 of July 18, regulating the rights of access to environmental information, public participation and access to justice in environmental matters, expressly modified existing legislation regarding environmental impact assessment and integrated pollution and prevention control to meet the requirements both of the Aarhus Convention and of the Community directive[5]. More recently, Order in Council 1/2008, of 11 January approved a consolidation of existing national environmental impact legislation.

The Act 27/2006 also provided for a specific regulation of public participation regarding the preparation, amendment and review of plans and programmes related to waste, batteries, nitrates, package and packaging waste, air quality and others as may be established by the different autonomous regions[6]. Besides, it provides for specific provisions regarding public participation in the preparation, amendment and review of general dispositions related to the following matters: protection of water, protection against noise pollution, protection of soil, air pollution, rural and urban planning and land use, nature conservation and biodiversity, woodlands and forest management, waste management, chemical products, including biocides and pesticides, biotechnology, other emissions, discharges and releases of substances into the environment, environmental impact assessment, access to information, public participation in decision-making and access to justice in environmental matters, and any other matters provided for by regional legislation[7].

Despite legislative developments the public participation in environmental decision-making is usually seen as formal procedure with very little capacity to influence the final decision of the authority. It can be said that authorities obliged to conduct public participation procedures generally lack appropriate information on the scope of this right, on how to deal with or manage an effective public participation procedure, and, generally, lack trained personnel and enough means to deal with a public participation procedure. On the other hand, the public in general and non-governmental organisations in particular, also lack information and capacity building to take part in an effective manner. Some progress can be mentioned in some levels and aspects; however, it is difficult to speak about a satisfactory level of compliance with the Aarhus provisions regarding public participation. Lack of participation in an early stage and what should be considered as a "reasonable" time-frame for taking part are two of the major issues in this regard.

In last years an increasing trend can be observed to use a wider concept of "general interest" as a way to exempt specific projects from the application of the environmental impact assessment procedure, limiting or even avoiding, in this way, the public involvement in the decision making process.

[5] Additional disposition no. 1 modified Order in Council 1302/1986, of 28 July, on the Environmental Impact Assessment. And additional disposition no. 2 modified Act 16/2002, of 1 July, on Integrated Pollution Prevention and Control.
[6] Arts. 16 and 17.
[7] Art. 18.

Act 27/2006 does not establish specific administrative appeal or judicial review procedures to address the situation where the exercise of the right of public participation is impeded by an act or omission of a public authority[8]. Existing general administrative and judicial appeals are applicable in these cases. To the author's knowledge, access to justice in these cases is rarely exercised. Often the access to justice is grounded on violations of other environmental legislation and the issue of the lack of public participation is addressed as an additional matter. This situation can be explained, firstly, because public participation is still seen by public authorities and judges as a formal procedure which does not have any influence at all over the final outcome -- the final decision. It is very rare to see a court decision nullifying an administrative decision that did not take into account public comments or that was made without required public participation[9]. Secondly, people are dissuaded from exercising this right before the courts because of the costs (i.e., lawyers, solicitors, technicians and experts' fees) and the excessive length of the administrative court procedures to obtain a court decision[10].

ii. Situation of A2I – what are the most significant limits of access to environmental information in your countries (e.g. vague provisions and lack of specific terms of performance for public authorities to make relevant information public)

Specific legislation on access to environmental information existed in Spain since the Directive 90/313/EEC was transposed trough Act 38/1995 of 12 December after an infringement procedure for non-compliance opened against Spain by the European Commission. Although the application of this act besides Act 30/1992 of 26 November amending general legislation on administrative procedure, which dated from 1958, brought some improvements regarding openness and more transparency on access to general administrative information and information on the environment; it cannot be said that access to environmental information was in compliance with existing legal provisions at the time the Aarhus Convention entered into force in Spain.

Traditionally, Spanish public authorities have not acted transparently and have not allowed citizens access to the information in their possession. Nor have they been accustomed to replying promptly to citizens' requests. In fact, during recent decades the custom has been not to answer at all, a situation which has made "administrative silence" a cornerstone of administrative procedure[11]. Active provision of environmental information did improve a bit; although it cannot be said it was fully developed nor was

[8] Art. 21(1) of Act 27/2006.

[9] Very recently, a landmark court decision, Decision no. 20 of the High Court of Castilla and Leon (appeals against administrative decisions) found null and void Decree 13/2006, of 9 March, amending Annex I of Decree 140/1998, of 16 July, that approves the Plan for Managing Natural Resources of Fuentes Carrionas and Fuente Cobre-Montana Palentina (Palencia) Natural Space, based on the scientific and technical information provided by the comments of the public using the public participation procedure that the public authorities disregarded.

[10] The length of judicial procedures depends on several factors, including the type of court you address in seeking your remedy. An overview of environmental court decisions of the Supreme Court of Justice on administrative law from 2003 until present shows that it takes from 5 to 9 years to obtain a final court decision from this Court, from the date of the first judicial appeal before a lower court.

[11] See Sanchis, F. 1996. Spain (Chapter 12) in: *Access to Environmental Information in Europe. The Implementation and Implications of Directive 90/313/EEC*. Kluwer Law International

covering all requested matters. Poor development of active provision of environmental information in combination with lack of responses – "administrative silence" – produced a poor level of access to environmental information.

Act 27/2006 does not specifically address the major issue of the so-called **"administrative silence"** (a lack of official response). Theoretically, legally, responses (including denials) to requests for environmental information must always be reasoned[12]. Under the general administrative law, a lack of response in due time to a request for environmental information becomes a positive response. Great problems arise when the people try to materialise this "positive answer". People are not aware of the procedure to follow and usually need to hire a lawyer to obtain the information under the administrative procedure. This substantially increases the costs and the time involved for the public to access the information "obtained" following the positive response of administrative silence.

A specific procedure is created under Act 27/2006 to regulate situations when the right of access to environmental information is **impeded by an act or omission attributed to a person, whether natural or legal, acting as a public authority**, that is to say, a person who has public responsibilities or functions, or is providing services in relation to the environment under the control of an administrative body[13]. In these cases, the requester is allowed to lodge a complaint directly with the administrative body with control over the administrative functions of that natural or legal person. The decision made by the administrative body about the complaint is directly enforceable and financial penalties could be imposed if the order to comply is ignored by the natural or legal person. There are **no further specifications on the new complaint procedure**, such as the content of the complaint. Nor is it explained how **administrative silence** would operate when there is no decision about the complaint within the established period. There are no data available on environmental information requests addressed directly to persons, natural or legal, or the use of this appeal procedure. Presumably, most of these persons acting as a public authority are not aware of their obligations under this act to directly provide environmental information to requesters.

Act 27/2006 does not specifically requests that charges for supplying environmental information should be reasonable[14]. There are already reported situations of non-compliance with this requirement[15].

Finally, it is worth mentioning that Act 27/2006 does not establish a specific administrative appeal or judicial review procedure for a remedy when the exercise of the right of access to environmental information is **impeded by an act or an omission of a public authority**. In these cases, the general existing administrative appeals and administrative court appeal procedures are applicable. Therefore, anyone requesting

[12] Arts. 4(7) of the Aarhus Convention, 4(5) of Directive 2003/4/EC and 10(2) in fine, 11(3) and 13(6) of Act 27/2006.
[13] Article 21 and 2(4.2) of Act 27/2006.
[14] Art. 4(8) of the Aarhus Convention and 5(2) of Directive 2003/4/EC.
[15] Charge of unreasonable costs for accessing to environmental information is one of the issues brought to the attention of the Aarhus Convention Compliance Committee by the first communication of the public regarding non-compliance of Spain. The communication was found initially admissible at the 20th Committee meeting held in Riga 8-10 June 2008.

environmental information can use general existing appeal procedures[16]. However, almost no one brings cases related to access to environmental information before the courts. People are dissuaded from exercising this right because of a combination of two factors: costs (i.e., lawyers and solicitors fees), and the excessive length of the administrative court procedures (i.e., between 1 year and 6-8 years to obtain a final court decision).

III. Particular issues:

This sections describes how are the following provisions of the Aarhus Convention incorporated in our national legal systems – mostly by relevant provisions of national legislation or – where applicable – by national jurisprudence of our respective countries:

Article 2.5, Definitions:

- How is the definition "Public concerned – as the public affected or likely to be affected by, or having an interest in, the environmental decision-making" incorporated into our national legislation

Act 27/2006 does not include a definition of "public concerned" but of "interested public", following the common administrative definition of interested party as follows[17]:

- anyone who is deemed to have an interest under article 31 of Act 30/1992 on the legal framework of public administration and common administrative procedure; and

- any non-profit organization meeting the following requirements:

    - the aims provided in its bylaws expressly include the protection of the environment in general or of any particular element thereof

    - it was legally established at least two years before the action is brought and has been actively pursuing the aims provided in its bylaws

    - it performs its activity pursuant to its bylaws in a territory that is affected by the administrative act or, if applicable, omission

[16] Art. 20. *Appeals.* "Any citizen who believes that an act or, if applicable, omission attributable to a public authority infringes the rights enshrined in this act as regards information and public participation may file an administrative appeal as provided in Title VII of Act 30/1992 of 26 November on the legal framework of public administration and common administrative procedure, and other applicable legislation, as well as, if applicable, an appeal for judicial review as provided in Act 29/1998 of 13 July on Administrative Jurisdiction."

[17] Art. 2 of Act 27/2006, which refers to art. 23.

Art. 31 of Act 30/1992 states the definition of interested parties in administrative procedures as follows:

- Those who promote the administrative action as holders of legitimate individual or collective interests and rights.

- Those who have not initiated a procedure but whose rights may be affected by the decision taken in the procedure.

- Those who have not initiated a procedure but whose legitimate individual or collective interests may be affected by the decision and become a party to the procedure before the final decision on the procedure is made.

Besides, NGOs representing economic and social interests would deem to have a collective interest as laid down in legislation.

- What criteria - "requirements under national law" – if any, are set for non-governmental organizations promoting environmental protection?

As mentioned above, Act 27/2006 introduced the following three requirements after the Aarhus Convention was ratified:

- the aims provided in its bylaws expressly include the protection of the environment in general or of any particular element thereof

- it was legally established at least two years before the action is brought and has been actively pursuing the aims provided in its bylaws

- it performs its activity pursuant to its bylaws in a territory that is affected by the administrative act or, if applicable, omission

It should be stressed that these requirements applicable to non-profit organizations, that is to say NGOs, did not previously exist in Spanish law. Under the common administrative law environmental NGOs used to be able to participate promoting an administrative procedure as holders of a collective interests, being the environment considered as a collective interest.

The definition adopted by Act 27/2006 can be seen as a way to make clear that environmental NGOs are always public concerned when meeting these criteria, or as aiming at setting limits to avoid that every legally established environmental NGO is included under the concept of public concerned. Taking into account that some of these requirements are easily and objectively checkable, while others need further criteria for interpretation, and that some of these criteria can go against some of the principles laid down by the Aarhus Convention[18] and were established after its entry into force, the

[18] Arts. 3(5), 3(6) and 3(9) of the Convention.

author is of the opinion that they were laid down to limit the scope of public concerned. For instance, these criteria were recently used to denied the right to obtain legal free aid to NGOs that were granted with it before on the basis of existing legislation.

Article 9.2., specifically:

- What is the interpretation of a word "alternatively" in this provision? Does our legislation guarantee access to review procedure for "public concerned having a sufficient interest" OR "public concerned maintaining impairment of a right according to this provision? Or does our legislation provide access to review to BOTH groups?

The requirement of exhaustion of administrative review procedures prior to access to a judicial review is applicable. Act 29/1998 establishes procedural capacity and legal standing criteria for those seeking access to administrative courts[19]. Amongst others, standing is granted to natural and legal persons holding a right or a legitimate interest; to corporations, associations, trade unions and entities affected or legally allowed to defend rights and collective legitimate interests; and to any citizen exercising *actio popularis* when expressly provided by an act. Thus, the general rule is that legal standing is granted under the administrative judicial review legislation to the plaintiff that shows a legitimate interest.

- What is the interpretation of "maintaining impairment of a right" by our national legislation or jurisprudence? How are identified such member/s of public who maintain impairment of a right – what is a content of such right?

Being an indeterminate juridical concept, the jurisprudence has made a broad interpretation of legitimate interest based on the Constitution[20]. A legitimate interest does not have to be direct or individual and does not necessarily imply holding a subjective right.[21] Rights and interests alleged should not be only respect of privacy or property; it can involve more vague ones, such as right to health, to life or to a healthy environment. Although when a person addresses an administrative court defending an environmental interest, this interest should be linked to the effects that the act, decision or omission challenged has in the individual sphere.

Article 9.3, specifically:

- How does our national legislation or jurisprudence interpret and apply the phrase "provisions of national law relating to the environment"?

Act 27/2006, includes under article 18(1) a list of what is regarded as environmental legislation as dealing with the following matters:

[19] Art. 18 and 19 of Act 19/1998.
[20] Art. 24(1).
[21] Milieu Ltd. 2007 Country Report for Spain in: *Report on the inventory of EU Member States' measures on access to justice in environmental matters.*

-"protection of water,
- protection against noise pollution,
- protection of soil,
- air pollution,
- rural and urban planning and land use,
- nature conservation and biodiversity,
- woodlands and forest management,
- waste management,
- chemical products, including biocides and pesticides,
- biotechnology,
- other emissions, discharges and releases of substances into the environment,
- environmental impact assessment,
- access to information, public participation in decision-making and access to justice in environmental matters,
- any other matters provided for by regional legislation".

This list is considered to be a non-exhaustive list as it is expressly mentioned by the stated purpose of Act 27/2006.

- How does our national legislation interpret "access to administrative or judicial procedures" – what quality such procedures have according to our legislation (e.g. two instance decision making including right to appeal)?

Act 27/2006 states that procedures available for challenging breaches of environmental legislation by an act or omission of a public authority are the existing ones established in Title VII - "Administrative review of administrative acts" - of Act 30/1992 of November 26 on the legal framework of public administration and common administrative procedure; and judicial review according to Act 29/1998 of July 13 regulating Administrative Jurisdiction.

The common administrative procedure requires that administrative procedures must be exhausted in order to bring a case before an administrative court. It allows interested parties to lodge an administrative appeal challenging an administrative act or decision. There are two possible options:

- If the authority that produced the act or decision has a hierarchical superior authority; the administrative appeal must be lodged within one month[22]. This appeal must be resolved and the decision notified within three months. When the decision notified on the appeal is not satisfactory or there is no decision at all, i.e.: administrative silence, an appeal may be lodged before an administrative court within two or six months, depending on whether there was a negative response or no response at all on the appeal[23].

- If there is no body superior to the authority responsible for the act or decision subject to review, it can be appealed against in the administrative courts within two or six months, depending on whether there was administrative silence involved[24].

[22] Arts. 114 and 115 of Act 30/1992, of November 26, on the legal framework of public administration and common administrative procedure.
[23] Art. 46 of Act 29/1998, of July 13, regulating Administrative Jurisdiction.
[24] Art. 46 of Act 29/1998, of July 13, regulating Administrative Jurisdiction.

Alternatively, the interested party may prefer to lodge another administrative appeal to seek a review by the same authority that made the decision or produced the act[25]. This appeal must be resolved and notified within one month; only then would be the interested party allowed to lodge an appeal with the administrative court within two or six months, depending on whether there was an express or a tacit decision on the appeal, i.e. administrative silence.

The general rule of the administrative jurisdiction is that first instance court orders and decisions are subjected to review[26]. Lodging an administrative judicial appeal does not prevent from the provisional enforcement of the court decision[27], although the judge, at the request of interested party, may adopt appropriate precautionary measures[28].

It is important to underline that Act 27/2006 does not address **access to criminal courts**. This access is granted whenever a public authority, or a natural or legal person, commits a breach of criminal provisions regulated by the Criminal Code or any specific criminal law. *Actio popularis* is granted for environmental crimes[29]. Every citizen has the right to exercise *actio popularis* in respect of criminal offences. Criminal offences are regulated by Title XVI of the Criminal Code: "Offences related to town and country planning and protection of historical heritage and of the environment"[30]. By accessing criminal courts, individuals and NGOs can become a party to criminal proceedings and therefore help protect the environment -- by becoming a party to a criminal suit, acting as a private prosecutor, assisting the public prosecutor in the investigation of offences, and even acting in the role of public prosecutor. We should add that any declared criminal liability implies a civil liability. **Access to civil courts** has not been modified however. This access is possible when damage is caused by any natural or legal person. This access is limited to directly affected parties. The application of this jurisdiction, in relation to the environment, would correspond to matters concerning civil liability not arising from an offence, or arising from an offence about which the criminal process has expressly made reservations.

- What criteria, if any, does our national legislation set for members of the public to challenge acts and omissions contravening provisions of national law relating to the environment?

Act 27/2006 does not establish specific administrative appeal or administrative judicial review procedures, although it recognises the right to "*actio popularis"*, whenever a public authority acts or fails to act in breach of environmental legislation[31]. Despite the recognition of "*actio popularis*", the wording of article 22 that addresses it and the wording of article 23 addressing legal standing, create a lot of confusion. The

25 Arts. 116 and 117 of Act 30/1992, of November 26, on the legal framework of public administration and common administrative procedure.
26 Chapter III of Act 29/1998.
27 Art. 84 of Act 29/1998.
28 Art. 83 of Act 29/1998.
29 Art. 19 of Organic Act 6/1985 of July 1 regulating the Judiciary and art. 101 of the Act on Criminal Prosecution.
30 Arts. 319-340 of Organic Act 10/1995 of November 23 on the Criminal Code.
31 Art. 22 of Act 27/2006.

conclusion is that this regulation is **far from establishing *actio popularis***. Instead, we find out/have the opinion that legal standing is granted only to qualified entities, that is to say, non-profit organisations that fulfil the following requirements, which are regulated for the first time regarding access to administrative judicial review procedures:

- The aims provided in the organizations bylaws expressly include the protection of the environment in general or of any particular element thereof;
- It was legally established at least two years before the action is brought and has been actively pursuing the aims provided in its bylaws; and
- It performs its activity pursuant to its bylaws in a territory that is affected by the administrative act or, if applicable, omission.

Some commentators and professionals see this provision as a step forward in improving recognition of legal standing for NGOs, while others (including the author) see this as a step backward because of the existing constitutional, jurisprudential, and environmental administrative sectoral legislation tendencies to recognise the right of every citizen to bring before a court breaches of environmental legislation made by public authorities. We can find examples supporting both views. Some administrative court decisions grant legal standing on the grounds of this disposition, while others use this disposition as a means to avoid granting environmental organisations legal standing.

Regarding criteria to **access to criminal jurisdiction**, as explained above, *actio popularis* is granted, that is to say: every citizen has access. **Access to civil courts** has not been modified by Act 27/2006. Access is possible when damage is caused by any natural or legal person. This access is limited to directly affected parties. The application of this jurisdiction, in relation to the environment, would correspond to matters concerning civil liability not arising from an offence, or arising from an offence about which the criminal process has expressly made reservations.

Article 9.4, specifically:

- What qualities and forms of "injunctive relief" does our national legislation establish? What conditions are set for issuing injunctive relief and how does our national legal system provide for its enforceability?

The Spanish version of the Aarhus Convention published in the official journal does not provide for a clear translation of "injunctive relief", known under our legal system as "precautionary measures". The term used by the Spanish version is: "reparation of damages order". Furthermore, Act 27/2006 does not introduce specific provisions on this matter. Therefore common civil, administrative and criminal judicial law is

applicable here. In all of the three jurisdictions it is possible to request the adoption of precautionary measures[32].

Precautionary measures are aimed at impeding the continuation of a situation liable to have harmful effects or to ensure the effectiveness of a future resolution, anticipating its effects or adopting measures allowing a future judicial decision to be put into practice. In the administrative jurisdiction these precautionary measures can be ordered at the request of a party whenever the court considers them to be applicable. In these cases the judicial authority may set a surety bond which must be deposited in order for the measures to be implemented. These surety bonds tend to be prohibitively expensive and non-profit entities – NGOs – usually cannot afford to pay them. Thus, though it is legally possible, such measures are not often taken. Mainly because these legal measures were originally designed to protect private interests and not a "collective interest" such as the protection of the environment. And therefore there are no well-developed tools, for instance, to calculate the costs involved for the various interests at stake. There are easy, well-established methods for calculating the money that a developer would lose if the construction of a dam is stopped while it is decided if it is being built in compliance with applicable environmental legislation. But there are no criteria, customs, internal directives or resources, and often not even the will, to calculate the damage to the environment if the dam is built and afterwards it is decided that it was built in breach of environmental legislation. Regrettably we often find that final court decisions are unenforceable because the environment that they sought to protect is not there anymore – is gone, and there is no way to return to the previous situation.

- How is the requirement for "fair and equitable" procedures provided for in our national legal system?

To be fair, the process must be impartial and free from prejudice, favouritism or self-interest. Fair procedures must also apply equally to all persons, regardless of position, race, nationality or other discriminatory criteria[33]. To be equitable, procedures need to avoid the application of the law in an unnecessarily harsh and technical manner[34]. The Spanish Constitution recognises as a fundamental right that we are all equal before the law and that we cannot be discriminated against on any grounds[35]. This fundamental right gets the highest degree of protection in our legal system.

Besides, the Constitution sets all principles ruling the judicial power[36] and an organic act developed by various regulations set out strict provisions guaranteeing fair and

[32] For instance, arts 129 to 136 of Act 29/1998.
[33] Cited from p. 133 of The Aarhus Convention – An Implementation Guide. UNECE. New York and Geneva, 2000.
[34] Explanation taken from p. 134 of The Aarhus Convention – An Implementation Guide. UNECE. New York and Geneva, 2000.
[35] Art. 14 of the Spanish Constitution says: "Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance."
[36] Articles 117 to 127 of the Spanish Constitution.

impartial process and trials[37]. There are procedures to guarantee fairness, for instance to remove judges from their posts when they act partially or protect the interests of just one of the parties.

- How is the requirement for "timely" procedures provided for in our national legal system?

Timeliness is crucial to the administration of justice. There is a Spanish saying: "justicia tarde no es justicia" (late justice is no justice at all). This is always true, but especially in environmental issues. The excessive length of Spanish judicial procedures is one of the weakest points of access to justice in Spain. For instance, a court case on the right of access to environmental information can take from 1 year to 6-8 years. Getting environmental information requested 1 year, or 6-8 years after the request was submitted is useless.

However, so far no effective measures have been taken in this regard. It should be added that the excessive slowness of judicial procedures has for many years appeared in reports on the malfunctioning of judicial administration in Spain and in proposals to improve it with very little positive results so far. To allocate appropriate budgets and trained personnel seems to be the main solution to ongoing situation.

- How is the requirement for "not prohibitively expensive" procedures provided for in our national legal system?

Since 2003 access to justice may involve the payment of "judicial fees". However, regarding access to environmental justice, the costs of a suit may usually include only the fees of lawyers, solicitors, technicians and experts; bonds for becoming a party to a criminal suit; surety bonds for applying for injunctive relief or precautionary measures, and finally to cover the costs of the other party if you lose the case – the loser-pays principle[38].

Access to justice in Spain is also constitutionally guaranteed for those who lack the means to bear the costs involved. Act 1/1996, on free legal assistance, regulates the way in which anyone who can prove that his or her income is low may request and obtain access to free-of-charge judicial proceedings[39]. NGOs regarded by the Interior Ministry as "of public utility"[40] are also entitled to access to free-of-charge justice under that act. These provisions are improved by article 23(2) of Act 27/2006, which states that all non-profit entities meeting the requirements set in article 23(1) and exercising the incorrectly named *actio popularis* are entitled to free access to administrative judicial procedures as regulated in Act 1/1996.

[37] Organic Act on the Judicial Power 6/1985, of 1 July.
[38] This is a governing principle under civil jurisdiction.
[39] It can be requested online at: http://www.justiciagratuita.es
[40] Organic Act 1/2002 of March 22 on the right of association, developed by Royal Decree 1740/2003 of December 19 on procedures related to associations of public utility.

Article 9.5:

- What are inspiring assisting mechanisms used by our national legal system to further effectiveness of provisions of article 9?

Act 27/2006 provides that non-profit organizations exercising the incorrectly named *actio popularis* are entitled to obtain **free legal aid** pursuant to Act 1/1996 of January 10 on legal aid[41]. This provision is intended to establish an assistance mechanism to help reduce financial barriers to access to environmental justice. Unfortunately, this free legal aid mechanism is only restricted to the administrative judicial cases. For criminal or civil judicial cases, Act 1/1996 grants that anyone who can prove that he or she has low-income may request access to free-of-charge judicial proceedings[42]. NGOs regarded by the Interior Ministry as "of public utility"[43] are also entitled to access to free-of-charge justice under that Act.

In practice, it seems that Provincial Legal Aid Commissions, responsible for granting the petitions for obtaining free legal aid, were not informed or aware of this disposition. A number of cases were reported about these Commissions ignoring Act 27/2006 and denying requests for free legal aid submitted by environmental organisations.

Several cases were also reported about court decisions related to criminal cases that granted in an appeal procedure a diminished bond to exercise *actio popularis* from 3,000 €to 300 €on the grounds of the Aarhus Convention and Act 27/2006.

It is worth mentioning that environmental NGOs are sometimes reluctant to use this free legal aid, in the first place, because in some cases the decision whether to grant it can delay the judicial procedure a lot while the damage to the environment continues. Additionally, the lawyers appointed to provide free legal assistance are not necessarily experienced in, or even trained in, environmental law.

IV. Conclusions:

From time to time, the public debates the malfunctioning of the Spanish justice system, although nobody dares to develop a sound policy or strategy to invest appropriate resources to definitively improve it. As we know, effective access to environmental justice is vital in achieving the fundamental right of enjoying a healthy environment and also in ensuring that everyone contributes to protecting the environment for future generations.

However, despite enjoying a legal system that can be seen as progressive (i.e., recognition of *actio popularis* for environmental crimes and under certain sectoral legislation related to specific areas of the environment, such as coasts and land use

[41] This Act as amended by Act 16/2005 of July 18 develops art. 119 of the Spanish Constitution: "Justice shall be free of charge when the law so provides and in any case for those who have insufficient means to litigate".
[42] It can be requested online at: http://www.justiciagratuita.es
[43] Organic Act 1/2002 of March 22 on the right of association, developed by Royal Decree 1740/2003 of December 19 on procedures related to associations of public utility.

planning; opportunities for obtaining free legal aid; and the adoption of precautionary measures) barriers to access to justice on environmental matters in Spain persist and impede an effective legal protection of Aarhus rights. These barriers include the following:

- Excessive length of judicial processes.

- Prohibitive costs involved, i.e. experts' fees, surety bonds, bonds to exercise *actio popularis* in criminal cases, loser-pays principle, etc.

- Granting of legal standing.

- Difficulties in obtaining precautionary measures to suspend/stop an activity while the final court decision is made.

- Burden of proof and difficulties in obtaining independent experts to provide evidence.

- Judges, prosecutors, lawyers and solicitors lack appropriate training or skills for dealing with environmental cases.

- Poor enforcement of judgments and court decisions.

- Public lacks information on access to administrative and judicial review procedures.

In the 10 years that passed since the Convention was signed, almost all efforts have been put into producing legislation that generally repeats the same thing over and rarely introduces "practical arrangements" to promote an effective exercise of Aarhus rights different from those provided by the Convention and the Community directives. Adopting new legal provisions, or improving existing ones, may be necessary, but it is not enough to meet all the requirements imposed by the ratification of the Aarhus Convention. Although there is room for improvement (especially regarding procedural provisions related to access to justice), it is necessary to clearly stress that such improvements will have no positive impact on **access to environmental justice** if they are not accompanied by other implementation measures such as the following:

Regarding the public:

- Provision of "friendly" information to the public how to exercise Aarhus rights in the available administrative and judicial procedures .

- Financial support for capacity building and training programmes for promoting the exercise of Aarhus rights among environmental NGOs and other citizens' organisations.

- Financial support for citizens and NGOs that bring environmental cases before the courts to protect the environment (i.e., direct funding, reimbursement of

costs when the court finds out that the authority/ies fail(s) to comply with their legal obligations, etc.).

- Access to environmental court decisions and administrative decisions on environmental related issues (i.e., free of charge access to on-line databases).

Regarding the judiciary and the administration of justice:

- Appropriate budgets to provide sufficient means and personnel for the courts to manage environmental suits without excessive delays and for enforcing court decisions, whenever this is needed.

- Reinforcement of existing controls on the courts' performance, and of responsibilities of judges and public authorities involved in an environmental case that provoke, on purpose, excessive delays.

- Capacity building for the judiciary, including raising awareness and training programmes on Aarhus and environmental law.

- Appointment of independent experts to help judges correctly assess or properly balance technical evidence submitted by the parties and to provide support, specifically on decisions related to the adoption of precautionary measures.

- Raising awareness campaigns and training programmes for judicial administrative staff.

- Capacity building and training programmes for environmental prosecutors.

- Training programmes on the environment for those lawyers provided under Act 1/1996 on free legal assistance.

Annex I – Bibliography

- Milieu Ltd. 2007. Country Report for Spain in: *Report on the inventory of EU Member States' measures on access to justice in environmental matters.*

- Razquin, J. and Ruiz de Apodaca, A. 2007. *Informacion, Participacion y Justicia en Materia de Medio Ambiente. Comentario sistematico a la Ley 27/2006, de 18 de julio.* Thomsom/Aranzadi.

- Sanchis, F. 2007. "*Aplicacion en España del Convenio de Aarhus desde la perspectiva de la aplicacion de las Directivas 2003/4/CE y 2003/35/CE" y "Reflexiones sobre los posibles beneficios de una directiva comunitaria relativa al acceso a la justicia en materia ambiental"*. In: La Aplicacion del Convenio de Aarhus en la UE y en España. Pp: 80-112. EEB-Fundacion Biodiversidad. Madrid.

- Salazar Ortuño, E. and Sanchis Moreno, F. 2007. *El acceso a la justicia ambiental a partir del "Convenio de Aarhus"*. Revista Aranzadi de Derecho Ambiental, no. 12. Year 2007-2: 75-94.

- Sanchis, F. 2007. *Guia sobre el Acceso a la Justicia Ambiental – Convenio de Aarhus*. Consejo General de la Abogacia Española - Asociacion para la Justicia Ambiental.

- Sanchis, F. 2007. *Access to justice in Spain under the Aarhus Convention*. Asociacion para la Justicia Ambiental.

- Stec, S. & Casey-Lefkowitz, S. 2000. *The Aarhus Convention – An Implementation Guide*. United Nations. New York and Geneva.