



**STUDY ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS,  
IN COMPLIANCE WITH DECISION IV/9(F) OF THE MEETING OF THE  
PARTIES TO THE AARHUS CONVENTION**

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## 1.- BACKGROUND AND RATIONALE

This study is drafted in compliance with Decision IV/9(f) of the Meeting of the Parties to the Aarhus Convention<sup>1</sup>.

During the last intersessional period, the Aarhus Convention's Compliance Committee issued its findings and recommendations in relation to the two Communications against the Government of Spain -communications ACCC/C/2008/24 (Murcia)<sup>2</sup> and ACCC/C/2009/36 (Almendralejo)<sup>3</sup>- for alleged breaches of its obligations under the Convention.

In view of the information submitted by both the communicants and the Government of Spain through its National Focal Point, the Committee drafted a report that set the grounds for final Decision IV/9(f), adopted in July 2011 at the Fourth Meeting of the Parties to the Aarhus Convention, held in Chisinau (Moldova).

The Decision IV/9(f) on compliance by Spain with its obligations under the Aarhus Convention recognized the willingness of Spain to discuss in a constructive manner the compliance issues in question with the Committee, and to take measures implementing the Committee's recommendations during the intersessional period.

Similarly, the Decision welcomed the progress made by Spain in this area, particularly with regard to access to information and public participation, while recognized the need for further efforts in the area of access to justice, with a view to overcome the obstacles to fully implement Articles 9.4 and 9.5 of the Convention.

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<sup>1</sup> The full text of Decision IV/9(f) is available at:

[http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece\\_mp\\_pp\\_2011\\_CRP\\_8\\_Compliance\\_Spain\\_e.pdf](http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/ece_mp_pp_2011_CRP_8_Compliance_Spain_e.pdf)

<sup>2</sup> A complete information record on Communication ACCC/C/2008/24, including access to all documents submitted by the parties involved and the reports issued by the Committee, is available at:

<http://www.unece.org/env/pp/compliance/Compliancecommittee/24TableSpain.html>

<sup>3</sup> A complete information record on Communication ACCC/C/2009/36, including access to all documents submitted by the parties involved and the reports issued by the Committee, is available at:

<http://www.unece.org/env/pp/compliance/Compliancecommittee/36TableSpain.html>

In this regard, the Meeting of the Parties invited Spain, as Party concerned, to thoroughly examine, with appropriate involvement of the public, the relevant legislation and in particular the court practice with regard to:

- I. Injunctive relief in cases of environmental interest;
- II. Award of legal aid to environmental NGOs; and
- III. The rule of dual representation (*Abogado* and *Procurador*) in environmental judicial procedures.

Finally, Spain was invited to report to the Meeting of the Parties through the Compliance Committee, six months before the fifth session of the Meeting of the Parties, on the progress with the study required.

Spain accepted to prepare this in-depth study and to submit it to the Meeting of the Parties through the Compliance Committee, as agreed, six months before the fifth Meeting of the Parties, which will be held in Maastricht (The Netherlands) during 2014.

The result of this commitment is now presented through this study on access to justice in environmental matters.

## **2. - PROCESS BY WHICH THE STUDY HAS BEEN PREPARED**

As explained above, the submission of this study correctly implements Decision IV/9(f). The in-depth study examines the relevant legislation in relation to access to justice in environmental matters, and in particular the court practice in relation to the three aforementioned specific issues: Injunctive relief in cases of environmental interest; award of legal aid to environmental NGOs and the role of "dual representation" (as the Compliance Committee referred it) in environmental matters.

As required by the Meeting of the Parties, the preparation of the study was made with appropriate involvement of the public. Taking this requirement into account, the Ministry of Agriculture, Food and Environment (MAGRAMA) and the Ministry of Justice designed a questionnaire on the subject for its distribution among a variety of representative and qualified stakeholders<sup>4</sup>, including the Communicants themselves, Asociación para la Justicia Ambiental (AJÁ) and Asociación contra la contaminación de Almendralejo. Responses to the questionnaire were conveniently collected, studied and taken into account in the elaboration of the first draft of the study.

Once drafted, the first version of the study was submitted to public consultation for a sufficient time so that the stakeholders and the general public could submit the comments and contributions they deemed appropriate.

After this period of information and once further comments and contributions were integrated, the final version of the study on access to justice in environmental matters was drafted, translated into English and submitted to the Convention's Compliance Committee in due time, six months before the Fifth Meeting of the Parties.

The study also incorporates an appendix by the Ministry of Justice reflecting its position on the situation of environmental justice in Spain, with regard to the three issues raised by Decision IV/9(f).

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<sup>4</sup> Other units at the MAGRAMA and the Ministry of Justice, Regional Focal Points of the Aarhus Convention, associations in defense of environmental justice, environmental NGOs, General Council of Spanish Lawyers, General Council of Attorneys, associations of judges and magistrates, prosecutors, universities, law observatories, etc..

### **3. - ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS: GENERAL OVERVIEW**

The environment, as established in the Preamble of Law 27/2006 (18 July) regulating the right of access to information, public participation and access to justice in environmental matters, is a legal matter whose enjoyment is a right to all citizens and whose preservation is a duty shared by the public authorities and the society as a whole.

Environmental issues can directly affect individual interests and/or rights of certain specific persons, but in many cases this affectation occurs on collective or diffuse interests, which do not belong to an individual but to all and each of the members of the group, class or community, regardless of the existence of any particular legal relationship. Consider, for example, a project with adverse environmental effects on an entire region, a landscape, a river system, etc.

Given this sort of threats, access to judicial and administrative appeals on environmental matters requires the availability of adequate tools for real and effective intervention before courts and administrative bodies, with the aim to serve its fundamental purpose: the protection of the environment as a collective legal matter.

This environmental protection is enshrined in article 45 of the Spanish Constitution:

- 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.*

Other relevant constitutional provisions dealing with access to justice in environmental matters include: the fundamental principle of State of Law (article

1.1), the full submission of public authorities to the law, the legality and the judicial review (articles 9.3, 103.1 and 106.1) and, specially, the principle of effective judicial protection (article 24.1), which provides that everyone has the right to obtain an effective protection from the courts, in the exercise of their rights and legitimate interests.

Title IV of Law 27/2006 (18 July) regulates access to justice and administrative review in environmental matters. This Law, which transposes to domestic law both the Aarhus Convention and the EU Directives in the matter, focuses on three most relevant aspects of access to justice.

First, Article 20 of Law 27/2006 provides that a member of the public<sup>5</sup> who considers that an act or, where applicable, an omission by a public authority<sup>6</sup> has impaired his/her rights to information and public participation as recognised by this Law may seek the administrative remedy regulated in Law 30/1992 on the Legal System of Public Authorities and the Common Administrative Procedure and other applicable regulations. Following resolution of the administrative appeal, if the private party is not satisfied, a judicial review may be sought, as established in Law 29/1998 (13 July) regulating the jurisdiction of judicial reviews. The decisions on the administrative and judicial appeals are binding for the authorities and they must be motivated and notified in writing.

It is, as we can see, a remission to the general system of administrative and contentious-administrative (judicial) appeals which complies with the requirements of Article 9.1 of the Aarhus Convention, according to which the public can appeal to a judicial body and, prior to any judicial remedy, there must be a review procedure before a public authority or an independent and impartial body. It also complies with Article 9.2, providing remedies against decisions, acts or omissions within the scope of public participation in specific activities.

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<sup>5</sup> Under Article 2.1 of Law 27/2006, of 18 July, public means “*any natural or legal person, as well as their associations, organizations and groups in accordance with relevant legislation or practice*”

<sup>6</sup> Article 2.4 of Law 27/2006 (18 July) provides a broad definition of public authority, including the National Government and the Governments of the autonomous communities; to national, regional and local administrations, institutions connected with or under public law, the advisory bodies, corporations of public law and natural or legal persons in certain circumstances.

Secondly, Article 21 of Law 27/2006 (July 18) established an administrative appeal against the actions of third parties who are considered to be public authority, even if they are not public administrations *stricto sensu*. In this regard, the public who considers that an act or omission by any of the persons referred to in Article 2.4.2<sup>7</sup> has violated their rights under the law, may directly issue a complaint before the Public Administration under whose control the third party operates. The solution to this claim puts an end to the proceedings, it is enforceable and, in case of breach, the enforcement can be addressed by imposing periodic penalty payments.

Lastly, article 23.1 of Law 27/2006 (18 July) designed a *quasi actio popularis* in environmental matters with the following features:

The action may be brought against acts or omissions by public authorities violating any of the environmental provisions listed in article 18.1<sup>8</sup>.

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<sup>7</sup> "For the sole purpose of the provisions of Titles I and II of this Law, "Public authority" means the natural or legal persons when they have public responsibilities, perform public functions or provide public services relating to the environment under the authority of any of the institutions, bodies or entities referred to in the preceding paragraph."

<sup>8</sup> Article 18. *Environmental provisions*.

1. Public authorities must ensure that the rights of participation established in article 16 are respected, with regard to the elaboration, modification and revision of legally binding dispositions on the following matters:

- a) Water protection.
- b) Protection against noise.
- c) Soil protection.
- d) Atmosphere.
- e) Land use and rural and urban planning.
- f) Nature and biodiversity protection.
- g) Forestry.
- h) Waste Management.
- i) Chemicals, including biocides and pesticides.
- j) Biotechnology .
- k) Other emissions , discharges and releases to the environment.
- l) Environmental impact assessments.
- m) Access to Information, Public Participation in Decision -making and Access to Justice in environmental matters .
- n) Any other matters established by regional legislation .

Regarding legal standing, only non-profit legal persons meeting the following criteria have the right to bring this public action against acts or omissions of public administrations relating environmental issues.

1. Their bylaws must include as the association's goal the protection of the environment or of any of its elements
2. The association must be legally constituted at least 2 years before the date in which the action is initiated; it must remain active in achieving its goals.
3. A geographical connection (established in their bylaws) with the area affected by the act or omission.

Popular or public action operates at both judicial and administrative level, through the administrative remedies of Title VII of Law 30/1992 (26 November) or through the contentious-administrative remedies of Law 29/1998 (13 July).

In fact, as the preamble of Law 27/2006 states, this remedy is a "*kind of*" popular action or, as it has been described by some authors, a singular legal recognition of standing. Indeed, popular action is traditionally open to every person without any particular circumstance, right or interest whatsoever, while the popular action of Law 27/2006 is recognized only for non-profit legal person meeting the above-mentioned requirements.

Besides, there are a number of regional and national dispositions regulating legal standing in particular environmental matters.

At a national level, public action is recognized in matters such as urban planning, coast protection, cultural heritage or national parks. For instance, article 103 of Act 22/1988 on Coast Protection, establish a public action "*to demand the enforcement of the provisions of this Act and the provisions enacted for its development and implementation, before both administrative bodies and courts*"

At a regional level, in some autonomous regions, such as The Basque Country, a general environmental public action has been established (see article 3.4 of Act 3/1998 on environmental protection: "*The action to require the enforcement of what is provided in this law will be public, both before administrative organs*



*and the courts*”). In many other regions, public actions have been established to contest decisions relating different environmental matters: wastes, environmental assessment, atmosphere, wetlands, etc.

## 4. - SPECIFIC ISSUES

### 4.1. - INJUNCTIVE RELIEF IN CASES OF ENVIRONMENTAL INTEREST

#### 4.1.1. - Introduction

Injunctive relief is a key element in the protection of the right to a sound environment. This protection, due to the very nature of the matter involved, demands fast and effective procedures. In opposition to a traditionally reactive Law, which seeks to reduce or compensate a harm that is already done, the new Environmental Law should make use of legal tools that allow facing the risks before they occur (prevention principle) or foreseeing and avoiding unknown or uncertain threats (precaution principle). The access to precautionary justice in environmental matters is strongly based on these principles.

In the Spanish legal system, this precautionary protection results in the adoption of the so-called precautionary measures (*medidas cautelares*), which consist, mainly but not solely, in the decision by the Judge or Court to temporarily suspend a contested act or disposition until a final decision is taken.

Since the rationale of the injunction is to ensure the effectiveness of an eventual favourable decision regarding environmental interests or rights, access to precautionary justice has been traditionally considered as substantive part of the constitutional right to effective judicial protection as enshrined in Article 24 of the Spanish Constitution (CE). In this regard, both the Constitutional Court (e.g. STC 218/1994, of July 18, 1994 <sup>9</sup>) and the Supreme Court (e.g. STS

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<sup>9</sup> "Many times we have had the opportunity to stress the constitutional significance of the interim measures and their close relation with the fundamental rights and freedoms enshrined in the constitutional text, specially the right to effective judicial protection of article 24. The consolidated jurisprudence is based on the premise that "judicial protection cannot exist without adequate precautionary measures that ensure the enforcement of the final decision" (STC 14/1992 , Legal Basis 7). "The power of the courts to suspend, like the rest of precautionary measures, responds to the need of ensuring, where appropriate, the effectiveness of future court decisions: that is, to prevent that an eventual favourable decision may become ineffective" (STC 238/1992, Legal Basis 3). Moreover, the same ruling states that lawmakers cannot eliminate the possibility of adopting precautionary measures to ensure the effectiveness of future judgments, "as this would deprive litigants of (...) the right to effective remedies "(Legal Basis 3)."

6990/2003 of 10 November 2003 <sup>10</sup>) have repeatedly declared that interim measures seek to correct the excessive length of the processes and its irreversible and harmful effects on the legitimate interests of the applicants, trying to avoid that the process itself become an instrument of injustice.

#### **4.1.2. - General framework of precautionary measures in Spanish Law**

Interim measures in contentious-administrative jurisdiction, the jurisdiction where the vast majority of environmental matters are sustained, are generally regulated by Law 29/1998 of 13 July, regulating the Contentious-Administrative Jurisdiction (hereinafter LJCA)

According to article 129 of LJCA, parties can request, at any stage of the proceedings, the adoption of any precautionary measure ensuring the effectiveness of the decision. In cases where a legally binding disposition is contested or the suspension of the effect of a provision is requested, the petition should be made when bringing the initial action or submitting the lawsuit.

Article 130 provides that, upon a detailed assessment of all the interests involved, the injunction may be granted only if the enforcement of the contested act or the application of the provision could prevent the remedy from attaining its legitimate objective, rendering the procedure ineffective. The injunction may be refused only when such measures might produce a serious disturbance of the general interest or of a third party, a circumstance that the court or judge will weight in a reasoned manner.

As we can see, the adoption of the interim measure is grounded on an absolutely essential requirement, the so-called *periculum in mora* (danger in delay), as defined in article 130 of LJCA: "the enforcement of the contested act or the application of the provision could prevent the remedy from attaining its legitimate objective". In general terms, the *periculum in mora* can be described as the threat of an irreparable damage or damage difficult to repair in the plaintiff's assets, rights, interests or legal position, during the time needed to

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<sup>10</sup> "As many other aspects of jurisdiction and administrative litigation that experienced the direct influence of the Constitution, the precautionary measures, through the requirements of the right to effective judicial protection recognized in Article 24.1 of the Constitution, the precautionary suspension of administrative acts or the suspension of the operation of regulations are no longer exceptional and becomes an ordinary instrument of judicial review. "

take a final decision. This danger in delay must be sufficiently credited, even through merely circumstantial evidences, in a way that the party must burden with the proof of the specific irreparable damage or damage difficult to repair in order to adopt the suspension.

As an additional standard, the LJCA requires that the Judge or Court conducts a "pre circumstantial assessment of all interests" or, in other words, a reasoned balancing of the competing interests in the case. The Constitutional Court has declared that the resolution of interim relief incidents requires to balance, on the one hand , the interests involved, both the general or public interest and the private interest of the persons concerned, and, on the other hand , the irreparable damage or damage difficult to repair that might result from the continuation or termination of the suspension. This assessment should be done through a detailed examination of the factual situations created and regardless of the viability of the petitions of the claim (ATC 428/2004, of 10 November). Although the Constitutional Court refers to the factual situations already created, the reality is that the assessment should focus on the situations which, with some degree of predictability, might arise in the event of the termination of the suspension.

As a jurisprudential contribution to this quite narrow system, the combination of the two above-mentioned legal criteria (*periculum in mora* and balance of interests) should be made without prejudging the merits of the case, given the lack of sufficient elements (contradiction, evidence, expert's reports ...) that are essential for a definitive judgement.

Another highly relevant jurisprudential contribution is the application of the doctrine known as *fumus boni iuris* or presumption of sufficient legal basis, according to which "for the mere purpose of legal protection, the legal basis of the claim can be provisionally assessed, taking into account the limited scope of a preliminary review and without prejudging what may be declared by the final ruling".<sup>11</sup>

It is also important to highlight that according to the current regulation, the traditional notion of precautionary measures as a mere suspension has been

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<sup>11</sup> STS, 18 May 1994, Legal Basis 5.

replaced with a *numerus apertus* system where all kind of measures are available, including those of an active nature, that is, an obligation of specific action against the passiveness of the public authorities in order to avoid that the damage to the environment will effectively occur, consolidate or perpetuate.<sup>12</sup>

With regard to procedural matters, Article 131 of the LJCA provides that the precautionary incident must be dealt in a separate piece, after hearing the other party. The Court Clerk will conduct the procedure for a period no longer than ten days and a decision called *Auto* (Order) will resolve the process within the next five days.

Article 132 provides that the precautionary measures will be in force until a final decision is taken in the main process or until the process itself terminates due to any of the reasons provided by the LJCA.

Regarding the adoption of cautions or cross-undertakings in damages, article 133 provides that if an injunction may harm another party, any appropriate measure to compensate for harm to the other party may be required, including the deposit of a sufficient bond.

Lastly, Article 135 provides for the adoption of the so-called *medidas provisionálísimas* (extremely provisional measures), which may be agreed only in two days without hearing the other party, in cases of extraordinary or exceptional emergency, that is, of greater intensity than what is normally required for the adoption of regular provisional measures.

#### **4.1.3. - Injunctive relief in Spanish Environmental Law**

As noted above, the right of access to interim justice in environmental matters is a key element in the effective protection of such a vulnerable and threatened matter as the environment.

Aware of this vulnerability, Parties to the Aarhus Convention agreed in article 9.4 that the environmental review procedures shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

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<sup>12</sup> Not surprisingly, article 129.1 of LJCA refers to “any measures that will ensure the effectiveness of the judgment”.

At this point, it should be noted that the English term “injunctive relief” was inaccurately translated as *orden de reparación* (repair order) in the official Spanish version of the Convention (Official Gazette of Spain, BOE nº 40, 16 February 2005), while the truth is that the English expression refers to any action undertaken to ensure the real and effective enforcement of the remedy and the attainment of its legitimate objective. Indeed, as we can read in the new Implementation Guide of the Aarhus Convention, “*when initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies must be able to issue an order to stop or to undertake certain action. This order is called an “injunction” and the remedy achieved by it is called “injunctive relief” (...). In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases may be inadequate.*”<sup>13</sup>

However, the expression used in Spanish language, *orden de reparación* (repair order), refers, under Spanish Procedural Law, to the measures adopted by the Judge or Court at the termination of the procedure, when the final ruling is issued, including measures such as the re-establishment of legal situations, the obligation of restore a situation to its previous state through environmental remediation or the economic compensation for damages.

Regardless this inexact translation (or possibly due to it) the truth is that Law 27/2006 (18 July) regulating the rights of access to information, public participation and access to justice in environmental matters, did not mention injunctive relief nor established any particular regime to adapt precautionary measures to the specific needs and characteristics of the environmental review procedures.

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<sup>13</sup> <http://www.unece.org/index.php?id=32764>

Given the absence of specific regulations, injunctive relief in environmental matters is ruled by general Law 29/1998, of 13 July, regulating the Administrative Jurisdiction (the previously analyzed LJCA).

#### **4.1.4. - Court practice regarding precautionary measures: problems denounced, case law and recent trends.**

In the light of the responses to the questionnaire distributed for the elaboration of this study and after the findings of the CC cases themselves, we can conclude that there are four main concerns regarding the adoption of precautionary measures in cases of environmental interest:

- Firstly, the question of the assessment of the various interests involved in each case: on the one side, the public environmental interest and, on the other side, the public or private interests that may be affected by the measure;
- Secondly, the cost of the bonds or cautions related to precautionary measures;
- Thirdly, the excessive length of the interim relief procedures; and
- Finally, according to findings in case ACCC/C/2008/24, the Spanish injunctive relief system lacks effective remedies to suspend land and urban Plans and urbanization projects.

In the following paragraphs, these four aspects will be thoroughly examined.

#### **A) Assessment of interests involved**

First, as mentioned above, there is a concern from the part of the stakeholders who completed our questionnaire, about the practical implementation by courts and judges of article 130 of LJCA with regard to the reasoned weigh up or balancing of all the different interests involved. According to the majority of opinions, the socio-economic dimension of many projects and activities with environmental impact along with their public notoriety and political significance, make it very difficult for judges and courts to suspend the enforcement of the administrative permit of the project or activity. In their view, when balancing the interests involved, developmentalist and economic interests are often placed

above conservationist or environmental ones. To oppose this trend, the stakeholders demand more objective legal criteria for injunctions.

Similarly, the stakeholders are of the view that when assessing the interests involved, judges and courts often tend to confer on public administrations the protection of a public interest, while environmental NGOs usually do not receive the same recognition. In addition, taking into account the undetermined nature of the environment as a legal matter, in many cases the environmental impact affects only collective or undefined, diffuse interests, which do not belong to an individual but to all and each of the members of the community, regardless of the existence of any particular legal connection.

On this particular issue, it is important to note that the environment, in the Spanish legal system, is categorized as a public interest, a category which goes beyond a mere collective interest, and is expressly recognized by article 45 of the Constitution as one of the Guiding Principles of the social and economic public policy. In this context, Professor Jordano Fraga<sup>14</sup> notes that the Supreme Court (TS) has consolidated over the past years a significant case law trend recognizing the prevalence of the public interest to protect the environment, considering that the legal determination of this protection implies the precautionary suspension of any act that may have an impact on the environment. If the impact exists, article 45 CE, as a Guiding Principle informing the Court practice, obliges to suspend the administrative act that may cause any damage to the environment as a constitutionally protected matter.

Among the recent rulings consolidating the aforementioned trend, we can cite the following:

STS 1028/2009, 11 February 2009, Legal Basis 7: *“Therefore, from this perspective, in relation to the prevalence of the general interests (materialized in the aforementioned environmental protection) compared to the particular interests or interests of third parties, the assessment made by the instance Court appears to be firmly and impeccably grounded”*

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<sup>14</sup> JORDANO FRAGA, JESÚS, «El proceso de afirmación del medio ambiente como interés público prevalente o la tutela cautelar ambiental efectiva: La suspensión de los actos administrativos por razón de la protección del medio ambiente en la jurisprudencia del TS», Revista de Administración Pública, núm. 145, enero-abril 1998, pgs. 169-198.



STS 5066/2009, 23 July 2009, Legal Basis 7: *“Similarly, when weighting all interests involved, the public interest representing the protection of the environment and the defense of a sustainable development must prevail over the economic interest represented by the private residential urbanization project, as it’s been similarly pronounced in precedent rulings of 30 March 2009 -RC 790/2008- and 18 December 2008 -RC 3743/2007 -, among others.”*

STS 5350/2010, 20 October 2010, Legal Basis 2: *“Thus, we believe that the weighting of the interests involved made by the first instance Court is in line with the criteria of article 130 of the Jurisdictional Law. The Court believes that the collision of interests must be solved, on the grounds exposed, by giving preference to the general interests over the particular ones. We believe that this conclusion is in line with the legal provisions and the relevant case law, since there is a strong underlying general interest of efficient environmental protection, which constitutes a preponderating value as it’s been previously declared by the Court (Decision of 21 May 1989)”*

STS 5432/2012, 16 July 2012, legal Basis 8: *“In the field of environmental protection, reactive law facing damages already done (polluter pays principle) has been overtaken by a new law that confront environmental risks before they effectively occur (prevention principle) or foresee and avoid unknown or uncertain threats (precaution principle). In this case, the prevention of an environmental risk justifies the adoption of the precautionary measure.”*

Another remarkable case law trend regarding the weighting of the interests involved was initiated by the Ruling of the Supreme Court of 21 October 2010 (rec. 3110/2009), which pointed out as a key element for the adoption of the interim suspension of a project the fact that it has been approved in absence of a previous environmental impact assessment: *“(The absence of an assessment) is not a trivial or irrelevant circumstance when it comes to decide about the merits of the requested precautionary measure . It is, precisely, the absence of such assessment –regardless of its legal obligation-which allows us to be even more scrupulous about the protection of the environment. In other words, the absence of any assessment –which could have specified and eventually minimized any potential damage derived from the works- and the doubt created by the absence of such an environmental control technique*

*should allow us, when confronting the interests involved, to highlight the importance of the environmental interests. Regardless of its legal obligation, the truth is that some kind of assessment of the environmental values in the area would have allowed a better understanding of them...”*

To sum up, as pointed out by Razquin Lizarraga<sup>15</sup>, we can conclude that despite the variety of precedents governing the access to precautionary justice, some clear key criteria for the adoption of the interim measures can be drawn from the jurisprudence of the Supreme Court. These criteria have also been observed in the decisions of the High Courts of Justice of the Autonomous Communities.

1) The preeminence of the environmental public interests, particularly over urbanization interests, taking into account the need to put in perspective the public interest derived from the legal nature and the execution of the urban plans, which breaks in front of a prevalent environmental interest.

2) The preeminence of the environmental public interests over private ones, taking into account the difficult or impossible reversibility of the damages to the environment, and

3) The position of the public administrations involved, so that there is a jurisprudential trend to give prevalence to the interests represented by the “higher” administration over those represented by the “lower” administration (State vs. Autonomous Community or Municipality and Autonomous Community vs. Municipality)

The Constitutional Court has also pronounced in many occasions about the interim relief system regarding the protection of the constitutional right to an environment adequate to the development of every person, as enshrined by article 45 of the Constitution. Some of the most relevant considerations contained in the constitutional case law regarding injunctive relief in environmental matters include the following:

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<sup>15</sup> RAZQUIN LIZARRAGA, JOSÉ ANTONIO, «Precautionary measures in environmental matters in the contentious-administrative jurisdiction according to the recent case law of the Supreme Court», Revista Aranzadi Doctrinal num. 3/2010

Firstly, the Constitutional Court maintains that (ATC 353/1995, 20 December), since in the context of the challenging of a regional (Autonomous Community) disposition opposed to a national disposition, the implementation and effect of one of the dispositions implies the suspension, *de facto*, of the other, the criteria to be followed when it comes to environmental standards is to ensure the maximum protection of ecological interests, since environmental damages are usually impossible to repair.

Secondly, the Constitutional Court's jurisprudence on the continuation or removal of an interim suspension in cases of environmental interest is virtually unanimous on the prevalence of the protection of biological and natural resources, given their fragility and irreparability. (ATC 674/1984 [ RTC 1984, 674 AUTO] , 1270/1988 [ RTC 1988, 1270 AUTO] , 101/1993 [ RTC 1993, 101 AUTO] , 243/1993 [ RTC 1993,243 AUTO] , 46/1994 [ RTC 1994,46 AUTO] , 222/1995 [ RTC 1995,222 AUTO] , 287/1999 [ RTC 1999, 287 AUTO] , among others).

Thirdly, according to the constitutional case law on interim suspension of legal dispositions (Legal Basis 4 of ATC 355/2007, 24 July [RTC 2007, 3507]) the defence of ecological interest deserves a preferential status:

*"In this regard, it should be recalled what was already argued in the Legal Basis 3 of ATC 252/2001, of 18 September (RTC 2001,252 AUTO), which also reflects precedent jurisprudence: In our ATC 287/1999 (RTC 1999, 287 AUTO) we declared that there is a widespread and repeated constitutional jurisprudence on the decision to be adopted regarding incidents of continuation/ lifting of previous suspensions in cases where the environment is among the public and private interests involved. According to this jurisprudence, "it should not be understood from the Constitution the idea that all measures regulating natural resources must first and foremost respect the criteria of avoiding any unessential sacrifice to patrimonial rights or interests of individual nature (ATC 101/1993 [RTC 1993, 101 AUTO], F. 2), concluding that, given the fragility of the biological natural resources and the irreparability of the potential damages, decisions must be generally oriented in favour of the primacy of the protection of such resources (ATC 674/1984 [RTC 1984, 674 AUTO], 1270/1988, 101/1993 [RTC 1993,101 AUTO], 243/1993 [RTC 1993,243 AUTO], 46/1994*

*[RTC 1994,46 AUTO] y 225/1995, among others) (ATC 287/1999 [RTC 1999,287 AUTO]”*

Lastly, as a sole exception to this jurisprudential trend, conservationist interests may be subordinated to other public or private patrimonial interests only when the detriment of these interests entails the direct and immediate damage to a fundamental sector for the economy of the Nation, with potential economic damages difficult to repair (ATC 890/1986 [RTC 1986, 890 AUTO], F. 2) or when the implementation of the contested measures could have extremely serious consequences. (ATC 29/1990 [RTC 1990, 29 AUTO], F. 3, reiterating the previous one) (ATC 287/1999 [RTC 1999,287 AUTO], F. 4)

For their part, the stakeholders participating in the elaboration of this study have acknowledged the relevance of this jurisprudential trend, gradually more in favour of giving prevalence to the environment over other interests, while regretting that not all Judges and Courts have assimilated this trend.

In any event, considering the eminently case-by-case nature of the injunctive relief system, the stakeholders demand new tools that allow deciding in more objective terms whether the environmental interests should prevail or not when adopting an interim measure or, at least, the introduction of a general prohibition principle. In other words, they call for a legal and explicit recognition (and not merely jurisprudential) of the primacy of the environment over other interests when deciding on the adoption of precautionary measures.

Notwithstanding the feasibility of these proposals, it is important to recall that the Aarhus Convention does not oblige to put the preference of environmental interests in objective terms, but to ensure that the injunctive remedies are, just like the other procedures, “*fair, equitable, timely and not prohibitively expensive*” (article 9.4). In this regard, the requirement of a fair procedure (“*objetivo*” in the official Spanish version of the Convention) means that both the process and the final ruling of the decision-making body must be impartial and free from prejudice, favouritism or self-interest.<sup>16</sup>

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<sup>16</sup> United Nations Economic Commission for Europe (UNECE), *Aarhus Convention Implementation Guide* (second edition, text only version) (April 2013)

Therefore, the judicial discretionary powers (and its related degree of subjectivity) to assess the impact to the environment and to contrast the various interests involved are fully in compliance with the Aarhus provisions and do not deserve, in our view, any reproach.

To sum up, the Ministry of Agriculture, Food and Environment believes that, with regard to the reasoned assessment of the interests involved, the implementation of the current legislation through a wide interpretation of the right to enjoy a suitable environment as enshrined in article 45 of the Constitution, ensures a full access to interim justice in environmental matters.

Nevertheless, the possibility of introducing a general principle in favour of giving prevalence to environmental interests could be considered. That could be made through its inclusion in Law 27/2006, 18 July, with a view to reinforce a sound interpretation of the right to access to environmental justice according to the constitutional mandate of article 45 and the principles of the Aarhus Convention.

## **B) The costs of injunctive relief**

One of the major concerns for plaintiffs pressing environmental interim justice is that of the costs, more specifically the amounts requested as bonds or cross-undertakings to face compensations if it eventuates that the interim relief obtained was not justified.

Most of the stakeholders participating in the study, mainly environmental NGOs, shared the view that the sometimes prohibitive costs of these bonds are insuperable obstacles and act, *de facto*, as a deterrent when demanding environmental interim justice. There is no point in granting injunctive relief, they argue, if the relief is conditioned to the deposit of sums of money far beyond the means of non-profit organizations such as environmental NGOs.

Against this kind of reasoning, it is important to clarify that according to the current legal system governing injunctive relief, the adoption of the interim measure does not entail *per se* the imposition of any bond or cross-undertaking in damages. On the contrary, it is the judicial body who has to weigh up, on a case-by-case basis, the opportunity of these cautions in relation with their purpose and, when appropriate, the amount. In this regard, we must recall that article 133 of LJCA provides that “*if an injunction may result in any kind of*

*damage, appropriate measures may be adopted to prevent or mitigate such damage. The deposit of a sufficient bond or security **may** also be required to give an undertaking in such damages”*

Consequently, the judicial body must decide in each case whether the bond is required or not, taking into account the protection of a prevalent environmental interest and considering all the circumstances involved, such as the irreversibility of the damage to the environment, the presumption of sufficient legal basis (*fumus boni iuris*), the lack of economic resources of the plaintiff, etc.

Making use of this faculty, a jurisprudential trend granting interim relief with no bond requirement at all, or requiring mere symbolic amounts has consolidated over the past years. This court practice is grounded on the conviction that the imposition of bonds to associations working for the protection of the environment would burden the plaintiff with the obligations derived from a procedure where both the action and the petition seek to defend collective interests. To put this kind of burden on an action that seeks to protect environmental collective interests would lead to obviate the right to access to justice, especially when the threat of irreparable damages to the environment can not be easily quantified in terms of calculating the sum of a bond.

This case law trend includes some decisions that have obtained great notoriety in the local media due to its impact on projects and infrastructures of great magnitude in social and economic terms

#### **Selected case summary**

The environmental NGO Federación Ecologista Ben Magec, Ecologistas en Acción obtained at first instance an interim measure suspending the entry into force of a Department Order removing the *Cymodea Nodosa* (a species of seagrass) from the Catalogue of Threatened Species of the Canary Islands. This decision, which implied the halt of the works at the port, was contested to the High Court by both the Government (at national and regional level) and the private company Gas de Canarias. The appellants argued that the suspension would cause irreparable damage to the public interest represented by the project in terms of socioeconomic benefits. In their view, this public interest was superior to the interest represented by the protection of the seagrass.

The High Court of Justice of the Canary Islands took into account the irreversibility of the environmental damages as well as the danger to the enforceability of the proceedings, and on these grounds the suspension was reconfirmed by the Order (Auto) 14/2009 of 15 June 2009

In this particular case, given the nature of the dispute, the Court considered that the requirement of a bond would impede the right to effective access to justice. The judicial body must weigh, on a case-by-case basis, the appropriateness of the suspension in relation to its purpose. In this particular case, the risk of irreversibility of the damage potentially caused by the discontinuation of the protection was the main reason for adopting the injunction, and it is precisely this irreversibility that excludes the requirement of such a bond, the imposition of which would defeat the purpose of the interim measure.

While being entirely aware of the economic consequences deriving from stopping the project, the Court was not less aware of the fact that making the injunction dependent on the deposit of a bond means that the injunction would be, de facto, denied.

The stop of the construction works of a hotel in the coast of Almeria constitutes another relevant case. In this particular one, the sponsors of the project asked for the deposit of a 12 million € bond. In contrast, the Ruling 131/2008, of 17 March 2008, from the High Court of Justice of Andalusia, argued that "...from the wording of article 133.1 of LJCA, the requirement of a bond can not always be inferred, as it provides in a facultative mood that *"if an injunction may result in any kind of damage, appropriate measures may be adopted to prevent or mitigate such damage. The deposit of a sufficient bond or security may also be required to give an undertaking in such damages"*. Besides, it is evident that the requirement of such a high amount as the bond requested by the appellant (...) may result in the impairment of the right to an effective judicial protection given the obvious difficulty for a non-commercial non-profit organization to meet such obligation."

Similarly, the Ruling 62/2011 (11 October) of the Supreme Court suspended the administrative permit for a wind farm with no bond requirement, on the following grounds: *"In this case, the requirement of a bond is not necessary for the*

*effectiveness of the suspension adopted, given the circumstances of the case. In this regard, it should be highlighted the presumption of sufficient legal basis of the claim and the fact that the environment is a matter where collective interests are particularly protected by the legislation, as shown by the popular action in environmental matters established by article 22 of the national Law 27/2006 (18 July) or the public action of article 88 of Law 11/2003 (8 April) on Environmental Prevention of Castilla y León. It should be noted, additionally, that the bond is not legally required in all cases, as provided by article 133.1 of LJCA"*

A further example, this time regarding a macro-urbanization project of 7.500 houses and three golf courses in the province of Ávila: "... Given the nature of the appellant entity, any requirement of bond would determine the impossibility of adopting the injunction which, considering the circumstances involved, it is considered a priority since the documents provided by the City Council itself reveal the existence of environmental values that must be preserved "(Ruling 60/2010 of the High Court of Justice of Castilla y Leon, January 29, 2010)

As we can see, according to the current legislation and under certain circumstances, nothing prevents from adopting interim measures with no bond requirement, particularly when environmental interests are involved. However, it has to be admitted that this line of reasoning is not totally extended among Judges and Courts.<sup>17</sup>

For this reason, the Ministry of Agriculture, Food and Environment will consider the option of suggesting legal modifications that clearly set out the possibility of exemptions to the deposit of bonds under given circumstances, as it is already the case under Civil Jurisdiction<sup>18</sup>

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<sup>17</sup> One of the stakeholders participating in the study shared the case of an initial interim suspension of an urban plan regarding a tourism-residential mega-project. This suspension was contested before the same Court and the claim was partially accepted, five months later, by Decision (*Auto*) of 29.05.2013, which imposed a bond of more than 40 million € to ADENEX, a non-profit environmental association. The same amount was requested to the NGO Ecologistas en Acción

<sup>18</sup> Under Civil Jurisdiction, the possibility of an exemption is explicitly provided in cases of actions protecting the collective interests of users and consumers. In such cases, article 728.3 of the Law regulating Civil Jurisdiction provides that the Court will exempt the plaintiff from paying any bond for



### **C) The length of the injunction processes**

Another matter of concern for some stakeholders is the excessive length of the separated file where the interim measure is to be settled.

We must recall that article 131 of LJCA provides that, in general terms, the injunction incident will be settled on separate proceedings, hearing the other party, and the incident will be conducted by the Court Clerk for a period of no more than ten days and resolved within the next five days. Exceptionally, in accordance with Article 135, if the plaintiffs allege the concurrence of extraordinary urgent circumstances, the judge or court, without hearing the other party, may decide whether to grant the injunction or not within two days.

There are no official statistics on the average length of environmental precautionary incidents, but generally speaking, considering the slowness of judicial process in Spain, we can consider that precautionary measures are adopted within a reasonable time.<sup>19</sup> However, it is fair to say that in some cases, especially when a first negative decision is appealed, the process may lose its purpose and meaning if the injunction is not rapidly agreed, ie within days or few weeks.

Aware of this situation, the Ministry of Agriculture, Food and Environment is in favour of considering any possible enhancement of the current legislation, more specifically, in the sense of allowing to formally request the adoption of the interim measures before the action is brought, in cases of environmental risk. This possibility is already available in cases of remedies against the inactivity or merely factual activity of the public bodies, according to article 136 of the LJCA.

At this point, it is worth mentioning the works carried out by the Special Section of the Law Coding Commission of the Ministry of Justice, inspired on a general purpose of continuous improvement, which is currently revising the LJCA in order to increase efficiency in all the matters governed by it.

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obtaining injunction, taking into account the circumstances involved, as well as the economic and social impact on all the interests involved.

<sup>19</sup> This is also the opinion of some of the environmental NGOs participating in the elaboration of this study.

#### **D) Interim suspension of urban plans and urbanization projects**

In its findings of the communication ACCC/C/2008/24, the Compliance Committee found that the Spanish injunctive relief system presented some deficiencies regarding the possibility of suspending urban planning instruments, due to fact that these are not directly executable but require additional instruments or permits to commence the construction works. More specifically, the Committee found that, in the present case, the Spanish court held that *“the request for suspension of Modification No. 50 and of the Land Allotment Plan were too early; it also held that there would be no irreversible impact on the environment because the construction could not start without additional decisions. Yet, when the Urbanization Project was approved and the communicant requested suspension of the decision until the court hearing was completed, the Court in case 539/2006 held that it was too late...”*<sup>20</sup>

The Committee found that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late and indicated that while injunctive relief is theoretically available, it is not available in practice. As a result, the Committee found that Spain was in non-compliance with article 9.4 of the Aarhus Convention.

In opposition to this considerations, we must recall that the most determining criteria, the fundamental requirement, for the adoption of the precautionary measures in the Spanish legal system is the presence of the *periculum in mora* (danger in delay), in other words, that the execution of the act or the implementation of the disposition may turn the remedy irrelevant, as clearly provided by article 130 of LJCA.

In order to correctly observe this circumstance, it is essential to prove an impact to the environment irreversible or difficult to repair or, in other words, to prove what damages and losses, impossible or difficult to repair, may occur in each case in order to adopt the suspension.

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<sup>20</sup> See [findings](#) by the Compliance Committee in case ACCC/C/2008/24, paragraphs 103 y 104.

But what happened in this particular case was, plain and simple, that the judicial body found that the impact to the environment was not sufficiently proved by the plaintiff.

Indeed, the High Court of Justice of Murcia, in its appeal Ruling of 21 December 2007 (Resolution No. 953/2007) found that:

*“In the present case, it should be highlighted that **the alleged environmental damages were not proved**”* (Legal Basis 3)

*“Regarding the alleged damages and losses, the Order (Auto) reveals that these are of an environmental, agricultural, social and cultural nature, and that the damages are alleged both in relation to the contested project and the preceding instruments, which has not been suspended, although they were also judicially challenged. On the other hand, the first instance Judge himself already noted that **there was not any evidence of the concrete damages, difficult or impossible to repair, that the execution of the contested resolution might cause**, because these damages were based on a party’s report that was not submitted to any contrast.”* (Legal Basis 4)

It is not, as we can see, a question of timeliness when requesting the suspension (“early or late”) but a question of actual impact to specific environmental interests that, in this particular case, was simply not proved.

Besides, the possibility of obtaining the precautionary suspension of urban planning instruments is perfectly feasible in the Spanish legal system, as long as it is credited that the contentious-administrative remedy would lose its legitimate purpose in case the interim suspension was not granted. And so it is regardless of the fact that the urban planning may need additional decisions for its effective and final execution.

A significant jurisprudential trend has consolidated over the last years in the case law of the Spanish High Court, giving preference to the adoption of precautionary measures when there is a risk that the remedy may lose its legitimate interest (*periculum in mora*), being also fully applicable to the contesting of urban planning instruments as a key element of its interim suspension. Even if *“there is no doubt about the existence of a jurisprudence trend quite reluctant to the suspension of general planning instruments requiring*

*additional instruments (...) but there is also a parallel trend that, with a view to avoid multiple remedies and challenges both at administrative and judicial level, has been accepting the suspension of the execution of urban planning instruments when there is a risk, as in the present case, that the continuation of the implementation or execution of the approved plan make the remedy lose its legitimate purpose” (STS 7202/2008, 29 December 2008, Legal Basis 4).<sup>21</sup>*

Considering the above, we find the interpretation made by the Communicant and assumed by the Compliance Committee to be completely inaccurate and therefore we cannot accept the conclusion that this specific denial of the injunction (or this kind of reasoning, in the CC’s words) creates a system where citizens cannot actually obtain interim relief.

For these reasons, regarding the system of injunctive relief in matters related to urban planning, the Ministry of Agriculture, Food and Environment considers that no specific initiatives are needed.

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<sup>21</sup> In the same line, see rulings STS 5066/2009, 23 July 2009; 601/2010, 12 February 2010; 351/2011, 11 February 2011; 1112/2011, 8 March 2011; 5432/2012, 16 July 2012 and 8126/2012, 7 December 2012.

## 4.2. - LEGAL AID FOR ENVIRONMENTAL NGOS

### 4.2.1. - Introduction

The right to free litigation in the Spanish legal system is enshrined in article 119 of the Spanish Constitution, according to which “*The justice will be free of charge when the law so provides and, in any case, for those who have insufficient means to litigate*”. It is a beneficial right and a right of legal configuration, which means that it is to the legislator to define its extension and specific conditions of exercise, taking into account the public and private interests involved and the specific budgetary allocations.

This faculty of legal configuration is clearly observed in the first point of article 119 when providing that “*justice will be free of charge when the law so provides*”. In such case, the legislator may award the benefit of free justice to persons or groups meeting some relevant specifications or requirements (i.e. acting in defence of general public interests, having a disability or being a victim of certain type of crimes), also may modulate the level of gratuity depending of the jurisdiction involved (criminal, labour, civil, etc.) or even depending on the kind of procedure and, of course, on the economic resources available.

In addition, there is also a constitutionally inalienable right to free litigation, as enshrined in the second point of article 119 indicating that the benefit will be granted “*in any case, for those who have insufficient means to litigate*”. The immediate objective of this provision, as declared by the Constitutional Court, is to allow access to justice to those lacking of sufficient economic means to face the expenses derived from the process “*without leaving their basic needs and those of their family unattended, with a view that nobody may be deprived of access to justice due to the lack of economic resources. In other words, the expenses must be paid to those who (...) will find themselves in the dilemma of giving up litigation or risking a minimum level of personal or familiar subsistence*”<sup>22</sup>. In this case, the gratuity of the justice is considered a subjective right aiming to ensure, on the one hand, equal means of defence and legal representation to those lacking of means and, on the other hand, a guarantee for the interests of justice.

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<sup>22</sup> Ruling by the Constitutional Court STC 16/1994, 20 January.

The constitutional provision of article 119 has been developed by articles 20.2 and 545.2 of Organic Law 6/1985 (1 July) on Judicial Power, which take the constitutional mandate and leave the regulation of the legal aid system to ordinary law <sup>23</sup>. By virtue of this legal reservation, it is the ordinary legislator's task to fulfil the constitutional mandate of articulating a system of legal aid for those lacking of financial means.

#### **4.2.2. - Law 1/1996 (10 January) on Free Legal Aid**

Article 119 of the Constitution was finally developed by Law 1/1996 (10 January) on Free Legal Aid. In opposition to the so far dispersed procedural legislation, the Law 1/1996 came to consolidate a one and single free legal aid system, overcoming the need to go to each different law governing legal aid at each different jurisdictional order.

The objective of the Law according to its preamble is to regulate a free legal aid system that allows citizens who prove the lack of sufficient economic means to make use of the professional services needed in order to have access to effective judicial protection and to adequately defend their legitimate rights and interests. It is, therefore, a law whose direct beneficiaries are the citizens seeking effective access to justice but seeing such access may be hampered because of their economic situation. The goal is, therefore, to ensure equal access to justice for all citizens.

Under the broad faculties of legal configuration derived from article 119 of the Constitution, the Law 1/1996 establishes a two-way system for the granting of the right to legal aid. On the one hand, there is an objective criterion based on the economic situation of the applicant, in conjunction with a more flexible mechanism that allows to exceptionally granting the right to legal aid to those exceeding the legal standards but, however, facing some particular circumstances that make it advisable. On the other hand, there is a general

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<sup>23</sup> According to the Spanish Constitution, " Organic laws are those relative to the exercise of fundamental rights and public liberties, those approved by the Statutes of Autonomy and the general electoral system, and the others provided for in the Constitution"

Hierarchically, Organic laws are at the same level as ordinary laws. The difference between them lies in the drafting process (more restrictive in the Organic laws, as the favorable vote of the absolute majority of the members of the House of Representatives is required) and in the matters that can be regulated.

award of legal aid to specific persons or groups, regardless of their economic situation, due to reasons of general interest, though generally based on quite restrictive criteria.

The general system based on the objective award of legal aid in reference to the economic means of the applicant is regulated in articles 2 et seq. of Law 1/1996. According to these provisions, the legal aid can be requested by any legal or natural person involved in any kind of judicial procedure or trying to trigger one, and lacking of sufficient means to litigate.

More specifically, free letigation will be granted to those natural persons lacking of sufficient assets and having annual gross incomes or resources, calculated per family unit, not exceeding the following amounts:

- Annual incomes per person (not integrated in a family unit) do not exceed the double of the Public Multi-asset Income Index. (12.780 € for year 2013)
- Annual incomes per person, integrated in a family unit of less than 4 members, do not exceed the double and a half of the Public Multi-asset Income Index (15.975€ for year 2013)
- Annual incomes per person, integrated in a family unit of 4 or more members, do not exceed the triple of the Public Multi-asset Income Index (19.170€ for year 2013)

Regarding legal persons, according to article 2.c, legal aid will be granted to the associations of public utility and the foundations legally registered in the appropriate public registry when they prove a lack of resources to litigate. In this case, the right will be granted if their annual turnover does not exceed the triple of the Public Multi-asset Income Index (19.170€ for year 2013)

In parallel to this objective awarding system, based in economic reasons, there is also a subjective system based on the will of the legislator, taking into account that the right to free legal aid is a beneficial right and a right of legal configuration. In this line, Law 1/1996 awards free legal aid, regardless of their economic capacity, to the following:

- Victims of gender-based violence, terrorism or human trade in those process where there is a connection, derive from or are a consequence of their condition as victims, and
- Minors and intellectually disabled when they are victims of abuse or mistreatment (article 2.g)
- People who have suffered an accident and are suffering permanent sequels that prevent them from doing the usual tasks of their jobs and occupations and need assistance to perform the most essential activities of daily life, when the subject of the dispute is the claim for the compensation of the personal and moral damages caused but the accident (Article 2.h)
- The Red Cross (Additional Disposition 2)
- Associations of Consumers and Users, according to article 37.d of Royal Legislative Decree 1/2007, (16 November), approving the consolidated text of the General Law for the Protection of Consumers and Users and other complementary laws. (Additional Disposition 2)
- Associations seeking the promotion and protection of the rights of the disabled persons, as listed in section 2, article 1 of Law 51/2003 (2 December), on Equal opportunities, no discrimination and universal accessibility of disabled people. (Additional Disposition 2)

Sometimes the award is recognized by other legal dispositions, as it is the case of trade unions and unified representatives of workers, which, according to Law 36/2011 (10 October) regulating Social Jurisdiction, will benefit from free legal aid when acting in the protection of the collective interests of the workers.

With regard to the material scope of the Law, the right to free legal aid covers, in general terms, the following benefits:

- Free assistance and guidance prior to the commencement of the judicial process.
- Assistance by Lawyer to the arrested or prisoner.
- Legal defence and representation by Lawyer and Procurator during the judicial procedure.



- Free publication of edicts or announcements that must be compulsory published in official journals during the process.
- Exemption of any judicial fee or payment of any deposit to trigger the appeal.
- Free expert evidence according to the relevant legislation.
- Free access to copies, testimonies, instruments and public notary certificates.
- 80% reduction of public notary fees.
- 80% reduction of public property or commercial registry fees.

Finally, it is important to note that, once the legal aid is granted, the right is also extended to second instance or appeal instance (article 7 of Law 1/1996).

#### **4.2.3. - Free legal aid in environmental matters: Law 27/2006 and its controversial interpretation.**

Once the general legal aid framework has been presented, we are now focusing on the specifications of the right to legal aid in matters related to the environment.

The elimination of economic barriers for access to environmental justice is one of the objectives of article 9 of the Aarhus Convention, according to which “*each Party... shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*”. In addition to the above referenced general framework, one of the mechanisms provided by the Spanish environmental legal system to comply with the Convention’s provisions is the award of free legal aid to non-profit legal persons (environmental NGOs, mainly) meeting certain requirements to exercise the new environmental popular action, as provided by article 22 et seq. of Law 27/2006 (18 July) regulating the rights of access to information, public participation and access to justice in environmental matters.

Thus, article 22 of Law 27/2006 establishes a popular action for environmental matters that allows non-profit legal persons meeting certain criteria to challenge the actions or omissions of the public authorities contravening the environmental law.

For its part, article 23, section 1, sets up the requirements that non-profit legal persons have to fulfil in order to bring this environmental popular action:

1. Their bylaws must include as the association's goal the protection of the environment or of any of its elements
2. The association must be legally constituted at least 2 years before the date in which the action is initiated; it must remain active in achieving its goals.
3. A geographical connection (established in their bylaws) with the area affected by the act or omission.

Finally, section 2 of article 23 specifically awards the benefit of free legal aid to environmental NGOs in the following terms: "Non-profit legal persons referred in the precedent section will have the right to free legal aid in the terms provided by Law 1/1996 (10 January) on Free Legal Aid"

It is, as we can see, a legally established award based on the will of the legislator (as it is the case of other groups such as trade unions or associations of consumers), who considers that environmental NGOs are worthy of this special protection in the context of the popular action of article 22.

However, the main question that arises here is how to correctly interpret the reference of article 23.2 of Law 27/2006 to the Law on Free Legal Aid, when it provides that the award of the legal aid will be made "***in the terms provided by Law 1/1996 (10 January) on Free Legal Aid***". In this regard, there are two clearly defined trends of interpretation that we are briefly presenting now:

The first one, widely assumed by Lawyers Guilds and the Provincial Commissions of Free Legal Aid<sup>24</sup>, understands that the legal persons entitled to exercise the environmental popular action by meeting the three requirements (protection of the environment as one of their main goals, two years of uninterrupted activity and geographical scope of the impact) must additionally fulfil the general standards under Law 1/1996 to benefit from access to legal

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<sup>24</sup> The Provincial Commissions of Free Legal Aid legal are the bodies responsible for granting, denying, or revoking, at first instance, the right to free legal aid, though confirmation or modification, if any, of the decisions previously adopted by the Lawyers Guilds, as provided by Article 7 of Royal Decree 996/2003 (25 July) approving the Regulation on Free Legal Aid.

aid. Accordingly, requests of free legal aid from entities that, either do not prove the lack of financial resources or do not attach the declaration of public utility, are being commonly rejected.

In opposition to this, there is another trend of interpretation that considers that Law 27/2006 makes an express and unconditional award of the right to free litigation for environmental NGOs, meaning that these non-profit organizations would be entitled to benefit from legal aid only by meeting the three criteria of article 23.1, regardless of the requirements established by Law on Free Legal Aid which would be considered unessential. In other words, the reference to the Law on Free Legal Aid would only have the purpose of completing the right in its aspects of material scope and procedure, but not in its origin, which would be directly established by Law 27/2006.

Communication ACCC/C/2009/36, in relation to the access to justice pillar, deals precisely with the denial of the benefit of free legal aid to the Communicant, the Association against the Contamination of Almendralejo, based on the main reason that the communicant was not a public utility entity, despite meeting the three requirements of Law 27/2006. In relation to the case, the Compliance Committee found that the Spanish legal aid system appears to be very restrictive for small NGOs and that by setting high financial requirements for an entity to qualify as a public utility entity and thus enabling it to receive free legal aid, the system is contradictory with the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker.

Similarly, almost every contribution of the stakeholders participating in this study agrees when stressing the fact that the current drafting of article 23 of Law 27/2006 was not sufficiently clear when setting the requirements to benefit from free legal aid.

In general terms, the stakeholders consider that the system established in article 23.2 of Law 27/2006 must be "*preferably applied*" because it is a specialized piece of legislation transposing to national law a pro-access provision, in opposition to the general framework established in Law 1/1996 on Free Legal Aid. The reference to this Law is made "*for the sole purpose of*

*determining the material scope of the right and the procedural aspects of the request, but not in relation to the requirements needed to benefit from the aid.”* In addition, they believe that *“if the legislator would had intended that the requirements for access to free legal aid, when it comes to the protection of the environment, would had been the same as for general matters, he would have omitted article 23.2 of Law 27/2006 for being totally unnecessary”*

In other words, if the requirements of article 23.1 of Law 27/2006 should be added to the general requirements of being a public utility entity -or a foundation- and proving the lack of resources, then *“we would suffer a kind of removal of the content of article 23.1 and a discrimination to environmental associations”*

The stakeholders believe that the legislators, when transposing the Aarhus Convention to national law, established a particular and specialized legal aid regime with a view to strengthen the protection of the environment, taking into account its significance as a general public interest. This would not constitute any original approach, as it is precisely the protection of general public interests what has justified the suppression of the “poverty” requirement for other collectives receiving free legal aid, such as associations of consumers or associations working for the rights of the disabled (see Additional Disposition 2, Law 1/1996).

The correct interpretation, thus, as it has already been accepted by some courts, is that *“free justice is granted by legal disposition to any association meeting the requirements of article 23.1 of Law 27/2006. It is not necessary to meet any other requirements that only would hamper effective access to justice.”*

For this reason, despite the guarantees of the current legislation -basically Law 27/2006- the majority of the stakeholders are of the opinion that the incorrect interpretation and implementation of article 23.2 is rendering this provision ineffective, and consequently some clarification or legislative modification is needed.

In parallel, the views on the interpretation of Law 27/2006 amongst legal commentators or academics are also quite dissimilar. Taking a common pro-

legal aid position as a starting point, two main trends have been identified: on the one hand, some consider that Law 27/2006 automatically recognizes the right to free legal aid for non-profit environmental NGOs; on the other hand, some are of the view that the national Law does not provide any relevant legal advance and consequently is not in line with the provisions of article 9.5 of the Aarhus Convention regarding the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice.

In the opinion of Fe Sanchís Moreno, Eduardo Salazar Ortuño and Ginés Ruiz Maciá, *“article 3.3 and Title IV of Law 27/2006, with regard to the access to justice pillar, specifically refers to the existing general regulation of administrative and contentious-administrative (judicial) remedies and more generally refers to the remedies established by our Constitution and relevant Laws, in the conviction that these references are sufficient to ensure the compliance with article 9 of the Convention. It does establish a mechanism to remove or reduce financial obstacles to access to justice and recognizes the right to free legal aid, in the terms provided by Law 1/1996 (10 January) on Free Legal Aid, modified by Law 16/2005 (18 July), for non-profit legal persons meeting the criteria of article 23.1, **which means that the right to free legal aid is extended.**”*<sup>25</sup>

This view is shared by José Antonio Razquin Lizarraga and Ángel Ruiz de Apodaca Espinosa: *“in line with the provisions of the Aarhus Convention, **the solution adopted by Law 27/2006 was to make environmental NGOs beneficiary of free legal aid**, a solution already suggested by some authors who took into consideration the provisions of the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations, the Directive 2003/35/EC and the law 27/2006 itself on the requirement of being a non-profit organization.*

*To overcome some of these economic obstacles for NGOs, the Law 27/2006 gives them free legal aid in the terms provided by Law 1/1996 (10 January) on*

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<sup>25</sup> SALAZAR ORTUÑO, EDUARDO; SANCHÍS MORENO, FE and RUIZ MACÍA, GINÉS, «*Democracia ambiental y acceso a la justicia: La aplicación del Convenio de Aarhus en España*», Fundación Biodiversidad. Pages. 29 to 30.

*Free Legal Aid, a measure that aims to avoid discouragement or impediment of access to justice for this kind of NGOs”.*<sup>26</sup>

On the other hand, there are authors like Alexandre Peñalver i Cabré who regret the lack of concretion of Law 27/2006: “*From this pragmatic point of view, the judicial protection of the environmental collective interests is in need of new mechanisms that allow correcting the economic inequality among the parties of the environmental process, based on the social recognition of the environmental protection activities undertaken by citizens and NGOs. More specifically, it is essential to reimburse expenses to citizens and groups when bringing actions against the passiveness of the public authorities. That would require, among other initiatives: a) the extension of the benefit of free legal aid beyond public utility entities, since there are other entities with difficulties to litigate and, therefore, if they were not subject to receive legal aid that will constitute a violation of article 119 of Spanish Constitution in conjunction with articles 9.2, 14, 24.1 and 45 (...)*

***Law 27/2006 does not provide a satisfactory response to overcome these financial burdens nor complies with the provisions of articles 9.4 and 9.5 of the Aarhus Convention, as it only recognizes the right to free legal aid for some environmental NGOs, while leaving aside the rest of NGOs and the general public, who should also have the right to an effective access to justice to protect the environment.***<sup>27</sup>

Once the current legislation has been analyzed, together with the view of the stakeholders and the opinions of the legal commentators and academics, it is time to examine the practical implementation by the Provincial Commissions of Free Legal Aid and its eventual review by courts and judges.

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<sup>26</sup> RAZQUIN LIZARRAGA, JOSÉ ANTONIO and RUIZ DE APODACA ESPINOSA, ÁNGEL; «*Información, participación y Justicia en materia de medio ambiente: Comentario sistemático a la Ley 27/2006, de 18 de julio*». Thomson Aranzadi. Pages. 408 to 409

<sup>27</sup> PEÑALVER I CABRÉ, ALEXANDRE; «*Novedades en el acceso a la justicia y a la tutela administrativa en asuntos medioambientales*», from *Acceso a la Información, Participación Pública y Acceso a la Justicia en Materia de Medio Ambiente: Diez años del Convenio de Aarhus*, Atelier, Pages. 385 to 386

We must commence by recognizing that the Provincial Commissions of Free Legal Aid, as the public bodies responsible, in their own territorial competences, for granting, denying, or revoking, at first instance, the right to free legal aid, are almost unanimous at this point: the non-profit legal persons referred to in article 23 of Law 27/2006 (basically environmental NGOs) must compulsorily fulfil the general requirements of Law 1/1996 if they intend to benefit from free legal aid. Thus, the requests for free legal aid made by environmental NGOs are almost systematically denied on the grounds of not being a public utility entity or/and not proving the lack of sufficient financial means to litigate

The subsequent challenges presented before the Contentious-administrative Courts usually obtain a respond in the same vein, arguing that article 2, section c) of the mentioned Law 1/1996 states that the only legal persons entitled to benefit from free legal aid, whenever they prove the lack of financial means, are public utility associations or Foundations legally inscribed in the appropriate Public Registry.

However, we have recently learned some relevant resolutions which, based on a *pro-actione* interpretation, recognized the right to free legal aid for environmental associations exclusively meeting the criteria of the environmental popular action established by Law 27/2006.

#### **Selected case summary**

In the context of an ordinary contentious-administrative process against the Regional Interest Project “Marina de Valdecañas” (a touristic-residential project with impact on a specially protected area) the environmental NGO Ecologistas en Acción requested, under article 23.2 of Law 27/2006, the recognition of its right to free legal aid; however, the Lawyers Guild of Cáceres at first instance and the Provincial Commission of Free Legal Aid at second instance, denied the petition on the grounds that the association did not prove the lack of sufficient means to litigate.

Ecologistas en Acción challenged this decision before the High Court of Justice of Extremadura arguing, in short, that the self-declared purposes of the Law 27/2006 include the incorporation to the national law of the provisions and objectives of the Aarhus Convention. In particular, with regard to the

controversial issue, with the aim of improving the access to courts of justice for environmental organizations, article 23.2 recognized their right to free legal aid. Given this new legal scenario, the recognition of the right to free legal aid can not be denied to non-profit organizations meeting the criteria (protection of the environment as one of their main goals, two years of uninterrupted activity and geographical scope of the impact) established by the Law 27/2006 to exercise the environmental popular action.

Taking on board the arguments presented by the NGO, the Contentious-Administrative section of the High Court of Justice, in its Order (Auto) of 22 April 2013, *“accepts the approach of the ecologist organization maintaining that it is a beneficiary of the right to free legal aid by express legal mandate, according to article 23.2 of Law 27/2006, regulating the rights of access to information, public participation and access to justice in environmental matters”*

The Court finds that *“it is out of question that the requirements established in No. 1 of the aforementioned article are fulfilled by the plaintiff. We therefore share the reasons of their approach, particularly the one defending that we must discard any legal interpretation that leads to render a provision ineffective or unnecessary. This last argument constitutes unquestionable jurisprudential doctrine, being a good example of this doctrine the ruling of the Supreme Court STS of 5 November 2008, rec. 4755/200)”*

In this particular case, as we can see, the approach shared by the stakeholders participating in this study is accepted by the Court: *“if the legislator would had intended that the requirements for access to free legal aid, when it comes to the protection of the environment, would had been the same as for general matters, he would have omitted article 23.2 of Law 27/2006 for being totally unnecessary”*

Besides, Ecologistas en Acción alleged, and the Court fully accepted, that the interpretation made by the Provincial Commission of Free Legal Aid of Cáceres:

a) is objectively contrary to the authentic interpretation of the legislator, who in no way intended to burden the plaintiff with further and extraordinary obligations;

b) is contrary to the principle of interdiction of restrictive interpretation of rights;



c) ignores the tacit derogation of the requirements established by Law 1/1996, according to the "*lex posterior*" and "*lex specialis*" principles.

d) ignores the spirit of the norm (Law 27/2006) which aims to precisely not only facilitate, but also encourage access to justice to the public acting in defence of the environment. This aim would be unlikely achieved if further requirements are needed.

The Order (Auto) 174/2013 of 15 May by the Contentious-administrative Court No. 6 of Murcia constitutes another relevant decision for the purposes of this study. In this case, the Judge recognized the right to legal aid of the Association for the protection of the horticultural heritage of Murcia, in the understanding that the benefit was automatically granted by meeting the requirements of the environmental popular action of Law 27/2006.

Legal Basis 4 of the Order reads as follows: "*From the previous information we must conclude that, even if there is no evidence of the legal declaration of the plaintiff as a public utility entity, it is granted legal standing to bring the popular action of article 22 of Law 27/2006 in connection with article 23. As a consequence, the plaintiff will benefit from the right to legal aid recognized by section 2 of the aforementioned article.*

*In addition, it must be stressed that neither the administrative file nor the judicial records contain any evidence (...) showing that the plaintiff do not meet the requirements needed to hold legal standing for the aforementioned popular action.*

*In conclusion, we must estimate the challenge, declare the unlawfulness of the contested decision, suspend its effect and declare the right of the plaintiff to benefit from free legal aid with all its consequences."*

Another relevant decision in the same line, this time by the Provincial Commission of Free Legal Aid of Burgos, granted legal aid to Ecologistas en Acción Segovia despite the fact that they were not legally declared as a public utility association.

At first instance, the association was requested by the Commission to attach the relevant documentation supporting its declaration as public utility entity, according to article 4 of Law 191/1964 (24 December) regulating Associations, with the aim to resolve the request of free legal aid prior to the contentious-administrative appeal against a number of Ministry's Orders regarding the removal of the hill Monte Quitapesares no. 271 from the Catalogue of Public Utility Hills.

In their response to such request, the association clearly stated that *"Ecologistas en Acción is not a public utility entity and it is not perceptive to be declared as such in order to obtain the recognition of the right to free legal aid"*. Right after, the environmentalist association presented the main reasons supporting its position:

a) *"If the restrictive interpretation of the Legal Aid Commission would be accepted, the Law 27/2006 would not be extending, but narrowing, the right to effective access to justice, since the declaration of public utility should be added to the requirements of article 23.1 of Law 27/2006"*

b) *"The Law 1/1996 on Free Legal Aid could not foresee the new path to free legal aid opened by Law 27/2006. In this sense, it is outdated. However, this fact should not prevent interpreters from analyzing the right to free legal aid from a triple point of view: integrating the legal system, analyzing all the precedent recognitions of the right (consumers, non-legalized foreigners, NGOs protecting the disable's rights, etc) and, lastly, from the perspective of the "pro actione" principle and the interdiction of a restrictive interpretation of the rights.*

*For these reasons, we must now refer to article 3.1 of the Civil Code, which provides that "Rules will be interpreted according to the proper meaning of their words, in relation to the context, the historical antecedents and the social reality of the time when they must be applied, and according to their spirit and purpose"*

c) *"It is quite relevant that the associations of consumers and users are enjoying their right to be declared as public utility entities (section a) separately and independently of their right to free legal aid under Law 1/1996 (section d), according to article 37 of Legislative Royal Decree 1/2007 TRLGDCU.*

*In our view, that is exactly the system operating by virtue of Laws 27/2006 and 1/1996. The latter plays a subsidiary and instrumental role and, therefore, it should be updated in order to include the extension of the personal scope of the right operated by Law 27/2006”*

d) *“Indeed, the effect of Law 27/2006, as a transposition of the Aarhus Convention and its precedents, is an extension of the personal scope of the right to free legal aid regulated in article 2 and Additional Disposition 2 of Law 1/1996. This extension is, as we have seen, one of the many extensions since the Law 1/1996 was passed.*

*The reference to “the terms provided by Law 1/1996” made by Law 27/2006 cannot and must not be understood as a demand of further requirements, other than those listed in Law 27/2006, which, in a nutshell, creates a new right for environmental NGOs meeting exclusively those criteria.*

*The reference to Law 1/1996 is inevitable, but it is a general reference for the mere purpose of procedural aspects. This is the view of all the aforementioned legal doctrine and it is so inferred from all the international law provisions regulating the matter.”*

In the end, as we anticipated, the Provincial Commission of Free Legal Aid of Burgos, in its resolution of 22 May 2009, accepted all the arguments presented by Ecologistas en Acción Segovia and granted the legal aid, considering that *“the Association fulfils the requirements of article 2.c and 3.6 of Law 1/1996 (10 January) on Free Legal Aid, in conjunction with article 23 of Law 27/2006 (18 July) regulating the right of access to information, public participation and access to justice in environmental matters”*

More recently, we have learned from one of the stakeholders participating in this study, a number of resolutions supporting this interpretation of article 23.2 of Law 27/2006, among others, Order (*Auto*) of 13 May 2013 by the High Court of Justice of Extremadura and the Orders of 15, 23 and 24 de July 2013 by the High Court of Justice of Castilla y León.

#### 4.2.4. - Conclusions

As we can see, the issue of access to free litigation for NGOs, far from being undisputed, creates no little controversy both among the legal commentators and the administrative and judicial bodies.

In principle, it can be understood that the award of free legal aid made by Law 27/2006 had the purpose of enhancing the system of access to justice for the environmental NGOs entitled to exercise the environmental popular action, with a view to better protect, as declared in the law's Preamble, the diffuse and collective interest represented by the environment.

Regarding the intention of the legislator, it may be useful at this point to analyze the *iter legis* (or the path a law takes from its conception to its implementation) of Law 27/2006, particularly the contributions to the preliminary draft made by the Economic and Social Council. In relation to article 22 of the preliminary draft, which established the new environmental popular action but with no reference at all to any kind of legal aid, the Council made the following proposal:

*“At this point, the Economic and Social Council believes that the Law should include the benefit of free legal aid for the entities mentioned in article 23 of the preliminary draft, whenever they prove the lack of sufficient means according to Law 1/1996 (10 January) on Free Legal Aid.”*

Well then, as we know, the legislators accepted this proposal to recognize the right to free legal aid, but refused to include the reference to the “poverty” requirement. It can be easily inferred that such requirement was not finally included because it was the intention of the legislators to grant the benefit of legal aid with no further requirements than those listed in article 23.1 of the current Law 27/2006.

This is the pattern that has been followed for other collectives, for which a number of sectorial laws have recognized the right to free litigation, regardless of the lack of resources or the eventual declaration as public utility entity. For example, trade union organizations through article 20.4 of Law 36/2011 (10 October) regulating Social Jurisdiction<sup>28</sup>; associations of consumers and users,

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<sup>28</sup> “Trade unions will be exempt from making deposits or other consignations in all their proceedings before

according to article 27.d of Legislative Royal Decree 1/2007 (16 November), approving the consolidated text of the General Law for the Protection of Consumers and Users and other complementary laws<sup>29</sup>.

Nevertheless, it seems evident that the current drafting of article 23.2 of Law 27/2006 is not as clear and unambiguous as it would be desirable in order to undoubtedly determine the personal scope of the right to free legal aid for environmental NGOs. For this reason, with a view to redress to the extent possible the current disparity of jurisprudential trends, the Ministry of Agriculture, Food and Environment is in favour of the possibility of reviewing the current regulation or, if appropriate, the introduction of formative and awareness raising activities addressed to the institutions and public bodies responsible for the processing and resolution of the requests of free legal aid.

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Social jurisdiction and will be granted free legal aid when acting in the protection of the collective interests of the workers”

<sup>29</sup> “To benefit from the right to free legal aid in the terms provided by Law 1/1996 (10 January) of Free Legal Aid”

### **4.3. - REPRESENTATION AND LEGAL ASSISTANCE IN CASES OF ENVIRONMENTAL INTEREST**

#### **4.3.1. - Legal regime of both professions**

The legal framework of representation and legal assistance in all kind of procedures is broadly governed by Law 1/2000 (7 January) on Civil Jurisdiction and Organic Law 6/1985 (1 July) on Judicial Power, as well as by their own statutes: the General Statute of the Lawyers of Spain and the General Statute of the Procurators of the Courts of Spain.

Firstly, it is important to stress that, according to the Law on Civil Jurisdiction, the simultaneous practice of the professions of Lawyer and Procurator is not permitted. As we will see next, the two professionals carry out clearly dissimilar duties within the judicial procedure and consequently the references to a "dual representation" system must be considered as totally inaccurate. The tasks performed by Lawyers and Procurators are not interchangeable, nor their respective professional roles can serve as a substitute to each other, even though both figures serve the same purposes: the proper administration of justice and the guarantee of effective representation and defence of the parties.

The Procurator of the Courts must hold a first degree in Law and an official collegiate membership. He or she performs the main task of representing the justiciable during the proceedings, that is, the Procurator acts on behalf of the party through the exercising of the procedural rights, the release of the corresponding burdens and the assumption of duties and obligations of this nature. He or she facilitates the work of both the Lawyer responsible for the legal defence and the Courts or Judges, trying to speed up the course of justice and acting as a link between the party and the judicial bodies.

It is also a mission of the Procurators, according to their statutes, to perform whatever duties and competences are assigned by the procedural laws in order to enhance the administration of justice, the adequate procedure of the hearing and the efficient execution of the rulings and other decisions adopted by Courts and Judges.

Besides their duties of collaboration with the judicial bodies, and acting professionally, fast and efficiently in the defence of the interests of their clients,

the Procurators have the obligation to keep professional secrecy, avoid disloyalty and illegal competition, follow the course of the hearing, sign all the petitions on behalf of the client, listen and sign citations and notifications of any kind and attend all the proceedings and actions provided by the relevant regulations.

Regarding the remuneration of their services, article 34 of the Royal Decree 1281/2002 (5 September) approving the General Statute of the Procurators of the Courts of Spain provides that the Procurators will receive the remunerations established in the current schedule of fees. These fees are specific retribution patterns seeking to avoid overcharging practices and serving as a guarantee of the payment, as the amount to be paid is previously fixed. In any case, the Procurator is entitled to agree with the client a rise or a reduction of no more than 12% of the established amounts.

Presently, the current fees are set forth in Royal Decree 1373/2003 (7 November) approving the schedule of fees of the Procurators. For appeals and processes of indeterminate value before the contentious-administrative jurisdiction, the fees range between 260,08 € and 334,38 €, depending on the judicial body before the action is brought. For processes of determinate value, the remunerations are set in proportion to the value of the case, according to a pre-established chart included in article 1 of the Royal Decree (i.e. process valued in 3.005,06 € generates a remuneration of 99,16 €). For the interposition of an injunction, in any process, before Contentious-administrative Jurisdiction, the Procurator will charge a fee of 37,15 €.

With regard to the system of legal assistance, according to the Organic Law on Judicial Power, the Lawyer is the Law first degree holder professionally performing the direction, guidance, legal advice and defence of the parties in any kind of process, which makes his or her participation strongly linked to the fundamental rights of articles 17.3 and 24.2 of the Spanish Constitution<sup>30</sup>. The

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<sup>30</sup> Article 24.2 of the Spanish Constitution provides that *“all have the right to the ordinary judge predetermined by law, to defence and assistance of an attorney, to be informed of the accusation made against them, to a public trial without delays and with all the guarantees, to utilize the means of proof pertinent to their defence, to refrain from self-incrimination, to refrain from pleading guilty, and to the presumption of innocence”*.

intervention of a Lawyer ensures the legal assistance to the citizens during the process, in a compulsory manner when so provided by the Law or, in any case, as a constitutional right to the legal defence and professional assistance expressly recognized by our *Magna Carta*. Correlatively, public authorities must ensure the defence and assistance by Lawyer in the terms provided by the Constitution and the laws.

For its part, the General Statute of the Lawyers of Spain, approved by Royal Decree 658/2001 (22 June), describes the figure of the Lawyer as a free and independent professional who provides his or her services to society in its public interest and acts in a context of free and loyal competition, through the advice and defence of public or private rights and interests, making use of the legal science and technique inspired by the principles of concord, effectiveness of the fundamental rights and freedoms and the justice. Like Procurators, Lawyers must be collegiate member of one of the official Lawyers Guilds in order to legally perform their duties.

Regarding the regime of remunerations, the Statute of Lawyers provides that the Lawyer has the right to obtain an adequate economic compensation for the services rendered, as well as the reimbursement of all the expenditures made. Unlike the Procurator's regime, the amount of the Lawyer's remuneration is freely agreed by the Lawyer and his or her client, with no limits of any kind. Merely as an orientation, indicator scales elaborated by the Lawyers Guilds can be taken as reference. The scales will be used according to the rules and traditions of the geographical scope of the Guild and, in all cases, they will be subject to the agreement of Lawyer and client.

#### **4.3.2. - Intervention in environmental processes**

With relation to the perceptive intervention of Lawyers and Procurators, the system is different depending on the jurisdictional order where the action is sustained.

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For its part, article 17.3 provides that *“Every person arrested must be informed immediately, and in a way that is understandable to him, about his rights and the reasons for his arrest, and he may not be forced to make a statement. The assistance of an attorney to the arrested is guaranteed during police and judicial proceedings under the terms established by law.”*



In the Contentious-administrative order, where the vast majority of the environmental cases are decided, Law 29/1998 (13 July) regulating the Contentious-administrative Jurisdiction establishes different regimes of representation and legal assistance depending on whether the action is brought before individual judicial bodies (Contentious-administrative Courts and Central Contentious-administrative Courts, where the case is heard by one single judge) or before collegiate bodies (Contentious-administrative halls of High Courts of Justice, National Audience and Supreme Court, where cases are heard by a number of magistrates).

More concretely, article 23 of LJCA provides that in the proceedings before individual judicial bodies, the parties may be represented by Procurator and will be assisted, in all cases, by Lawyer. If the party decides to be represented by Lawyer, all the procedural actions will be notified to him or her. That is, in this case the representation by Procurator is merely facultative and the Lawyer can perform certain representation duties as well as his or her regular duties as legal adviser. On the other hand, if the case is heard by a collegiate body (two or more magistrates), the Law provides that parties will be represented by Procurator and assisted by Lawyer.

Normally, when the case is initially brought to a first instance court, it is heard by one judge and when the case is brought to a second instance or instance of appeal, it is heard by a number of magistrates.

### **4.3.3. - The question of the costs and its alleged violation of the Aarhus Convention**

The Compliance Committee of the Aarhus Convention, in communication ACCC/C/2009/36, found that the system of representation and legal assistance (erroneously qualified by the Committee as "dual representation"), compulsory only in second instance, "may potentially entail" prohibitive expenses to the public. However, the Committee itself recognized that it did not have detailed information on how high the costs of the dual representation may be and in which way such costs may vary in the different regions of the country.

The response to these two questions has somehow been anticipated in section 4.3.1. above. Firstly, the remunerations of the Procurators are those expressly provided by Royal Decree 1373/2003 (7 November) approving the schedule of fees of the Procurators, which, as it has been explained, can only be incremented (or reduced) up to 12% of the fees through agreement of the Procurator and his or her client. Secondly, the aforementioned Royal Decree is in force within all the national territory, meaning that the fees are the same in all regions or Autonomous Communities of the country, to all Procurators, regardless of their respective Procurators Guild.

Having clarified this, we will now focus on the alleged prohibitive condition of the costs of the representation and legal assistance system, which is limited, as we know, to appeals heard by collegiate bodies. For this purpose we will take on board the contributions made by the stakeholders participating in the elaboration of this study.

Firstly, it is generally believed that the tasks performed by the Procurators are essential for the adequate progress of a judicial procedure with full guarantees. Despite being a distinct professional legal figure which is not very common in countries within our social-cultural orbit, the truth is that in the Spanish legal system the Procurators perform a number of important duties (representation, reception and transmission of notifications, fund management, submission of documents...) that make their intervention in judicial process highly desirable, particularly in those more complex. The replacement of such legal figure would entail more difficulties for both judicial bodies and specialized lawyers, who

would have to assume additional bureaucratic duties now performed by Procurators, and that will prevent lawyers from fully dedicating to the study of the substantial issues.

Indeed, in the context of the previous drafting works of the White Book of Justice<sup>31</sup>, published by the General Council of the Judicial Power, the various legal stakeholders consulted, particularly Judges and Magistrates, were supportive of the compulsory intervention of Procurators in all kinds of processes or, at least, in those presenting a higher level of complexity. They argued, in support of their view, that in cases where the intervention of the procurator is not legally required, important malfunctions and delays in the proceedings were noticed. In this line, the Constitutional Court itself highlighted the significance of the participation of the Procurator in the adequate progress of the judicial procedure: *“without their collaboration, not only the normal functioning of the justice will be seriously deteriorate, but also the constitutional guarantees of effectiveness and defence linked to the judicial protection will be impossible to achieve”* (STC 110/1993).

In opposition to this, a minority of stakeholders considers that the position of Procurator has become obsolete and dispensable. They are of the view that the use of the new technologies should be prioritized, creating new communication channels between Judges/Magistrates and the parties through electronic means. Nevertheless, they recognize that the position of Procurator is firmly rooted in our legal system and its replacement could only be feasible in a context of an in-depth reformation of the judicial procedures.

Secondly, regarding the actual costs derived from the compulsory intervention of the Procurator, in the light of the amounts of the fees provided by Royal Decree 1371/2003, we believe that they cannot be considered prohibitive, in the sense of preventing the public, whether individuals or NGOs, from bringing an environmental action. This also seems to be the opinion of the majority of the environmental NGOs consulted for the elaboration of this study, expressed in literal terms such as the following:

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<sup>31</sup> [http://www.icam.es/docs/ficheros/201202170003\\_6\\_0.pdf](http://www.icam.es/docs/ficheros/201202170003_6_0.pdf)

*“Far from leading to prohibitive costs, the intervention of the Procurator ensures the observance of the aforementioned principles”*

*“We have already mentioned that the costs do not seem particularly prohibitive to us. A Procurator does not usually require more than 400 € per a Contentious-administrative challenge. If we take into consideration that expert evidences are usually over 3.000 €, it is clear that the problem with excessive costs is not in the part of the Procurators.”*

*“In cases where the value of the case is not determined, the costs of the Procurator are not prohibitive (300 €), being inferior to those of judicial fees. That will be the case of challenges against generally applicable legally binding normative instruments”*

Sometimes this general opinion is qualified a bit, when considering that the costs are not prohibitively expensive *“because legal professionals usually have a pro-bono vocation”*. In the same line, some stakeholders believe that the costs are not prohibitive *per se* because it is not unusual that *“these professionals accept lower remunerations or carry out pro-bono work”*

In any event, with regard to the proposal consisting in allowing Lawyers to carry out all the duties of the Procurator, we understand that this would entail some negative consequences for the adequate progress of the process: firstly, as previously indicated, Lawyers will have less time and dedication to study the substance of the case and, secondly, further duties would entail further remunerations, as it can be easily understood, with the “aggravating factor” that in such case the remunerations would not be subject to the limits of Royal Decree 1373/2003, but they would be freely agreed by Lawyer and client. This thought was also shared by some environmental NGOs:

*“...the problem with excessive costs is not in the part of the Procurators, who lighten the burden of Lawyers duties, whose remuneration should be increased in case they should undertake them. The position might be dual, but, in reality, remunerations are not.”*

*“The position of Procurator allows the Lawyer to fully dedicate to the substance of the case and not to the procedural aspects. The reduction of costs would be*

*null considering the sacrifice in terms of the time that the lawyer should dedicate to procedural aspects”*

#### **4.3.4. - Conclusions**

To sum up, as it has been explained in the above paragraphs, we believe that the requirement of being represented by Procurator and legally assisted by Lawyer in the more complex environmental processes does not entail *per se* non compliance with the provisions of the Aarhus Convention, for the following reasons:

- a) The duties performed by Procurators and Lawyers are not interchangeable, so it is totally inaccurate to refer to a “dual representation” system;
- b) The position of Procurator in the current procedural system is essential for the adequate progress of a judicial procedure with full guarantees;
- c) The costs of the representation performed by the Procurator are reasonable and cannot be considered as prohibitive;
- d) The eventual exclusive performance by the Lawyer of the Procurator’s duties could work to the detriment of the efficiency, guarantee and celerity principles. Besides, it won’t entail a significant reduction of costs.

For these reasons, the Ministry of Agriculture, Food and Environment does not consider, to date, the proposal of any specific initiative regarding the system of representation and legal assistance in environmental matters.

## **5. - APPENDIX: MINISTRY OF JUSTICE POSITION ON THE SITUATION OF ENVIRONMENTAL JUSTICE IN SPAIN**

The Ministry of Justice is aware of the importance of a proper implementation of the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention), given its binding nature and its relevance as an instrument recognizing rights directly to individuals.

Consequently, the work carried out by the Ministry of Agriculture, Food and Environment in preparing the study on access to justice in environmental matters deserves our special recognition. It should be stressed, in particular, the preparation of the questionnaire sent to the Ministry of Justice, as well as to the main group of Stakeholders involved in the development of the three pillars of the Convention, such as associations for the defence of environmental justice, NGOs, consumer associations, users of justice, lawyers, procurators, judges, prosecutors, etc.

At this point, we should recall the positive assessment made by the Compliance Committee of the Convention regarding the willingness of Spain to discuss in a constructive manner the compliance issues in question, in order to implement the recommendations made by the Committee in the different communications received regarding the compliance by Spain and the progress made on the first two pillars.

From the part of the Ministry, our scope of action is focused on the third pillar of the Convention, as set out in Article 9, since it includes access to justice for the public who consider that there has been a violation of the provisions of the first or second pillar of the Convention, that is, the right to information and the public participation in environmental matters.

Therefore, the Ministry of Justice is receptive to the recommendations made by the Compliance Committee. Nevertheless, according to the responses to the questionnaire sent to the Ministry of Agriculture, Food and Environment, we consider the following:

### **5.1. - In relation to judicial practice with regard to injunctive relief:**

The precautionary measures provided in Articles 129 *et seq.* of the Law 29/1998, of 13 July, regulating the Contentious-Administrative Jurisdiction (LJCA), are considered adequate, since these precepts are sufficiently precise to allow the judicial body to react sufficiently in advance and avoid irreparable damage to the environment.

These measures achieve, therefore, the purpose assigned to them by law. The effectiveness of such measures is reinforced by the court practice, which is determined, in accordance with the provisions of the LJCA, by a balanced review of all the circumstances and protected objects involved in each case, and is endorsed, by a growing awareness-raising from the part of legal practitioners when applying them, regarding both the preponderance of environmental public interests over other interests, and in relation with the exemption of bonds and cautions when effective access to justice could be at risk. The key to a fully successful implementation of the precautionary measures system lies in this awareness-raising, training and professional performance.

Finally, one can not ignore the currently on-going works of the Special Sections of the General Law Commission of the Ministry of Justice, responsible for reviewing the aforementioned Law 29/1998, of 13 July, in order to correct those areas for any possible improvement.

### **5.2. - Regarding the award of free legal aid to environmental NGOs**

Environmental NGOs are granted their right to free legal aid if they meet the conditions laid down in Article 23.2 of Law 27/2006 of 18 July, regulating the rights of access to information, public participation and access to justice in environmental matters and in Law 1/1996, of 10 January, on Free Legal Aid.

At this point, it is worth mention the efforts done by the Ministry of Justice to update the legal aid system and give it greater feasibility and effectiveness, mainly through the drafting of a new Law on Free Legal Aid to replace Law 1/1996, January 10. The preliminary draft seeks to achieve better management of available public resources and greater control of public and private stakeholders involved in the system, to ensure the quality of services provided.

We have already moved towards a new pattern for legal aid, through the approval of Royal Decree-Law 3/2013, of 22 February, amending the regime of taxes in the field of administration of justice and the system of legal aid. With regard to legal persons, the Royal Decree-Law fosters access to free legal aid, by modifying the basic requirements for its granting. The new thresholds -lack of sufficient patrimony plus an annual turnover not exceeding the triple of the Public Multi-asset Income Index, that is € 19,170.39 per year), are more consistent with the actual economic situation of environmental NGOs than those initially required by Law 1/1996.

With regard to the rest of requirements established by Laws 27/2006, of 18 July, and 1/1996, of January 10 – which are observed by the judicial decisions regarding free legal aid- we believe that they are adequate given the purposes of the two laws. These requirements assure that the limited resources will be used in order to get legal free aid to those legal persons whose nature and purposes are oriented to general interest, avoiding any abusive or incorrect use.

### **5.3. - Regarding the rule of the dual representation**

The intervention of the Lawyer and the Procurator is necessary for the proper administration of Justice because, as evidenced by the applicable legislation, the roles assigned to the two positions are different. Thus, according to Royal Decree 658/2001 of 22 June, approving the General Statute of the Lawyers of Spain, the role of the lawyers is the defence of the interests of the parties to a proceeding. Royal Decree 1281/2002 of 5 December, approving the General Statute of the Procurators of the Courts, indicates that Procurators are responsible for the technical representation of the parties, in the proper proceedings of the challenges and the efficient execution of the decisions made by administrative and judicial bodies.

The costs of lawyers and procurators are in compliance with the right of access to justice: firstly, Law 27/2006, of 18 July, regulating the rights of access to information, public participation and access to justice in environmental matters, provides the opportunity to seek administrative review, according with the Title VII of the Law 30/1992, of 26 November, on the Legal Regime of Public



Administrations and the General Administrative Procedures, which do not entail any cost to the appellant.

Regarding judicial review, Article 23 of Law 29/1998 of 13 July regulating the Contentious-administrative Jurisdiction provides that the representation is compulsory only in cases before collegiate bodies, presumably the most complex ones.

Furthermore, Article 139 of the said Law provides for the payment of the costs of the proceedings by the party who have seen all his or her claims rejected in the first instance, or the appeal fully dismissed in the rest, except in cases where the Judge appreciates circumstances justifying a different decision. In cases of partial estimation, each party shall pay their own costs and a half of the common expenses. Lawyer's fees and, where appropriate, Procurator's, are included in these costs. Therefore, if the claims based on any action or omission, done by the government in relation to the rights articulated by Law 27/2006, of 18 July, are estimated by the court, the Administration must pay the costs and, therefore, the fees of Lawyers and Procurators.

#### **5.4. - Conclusion**

The Ministry of Justice considers that access to justice in Spain is in line with the provisions of the Aarhus Convention. However, the recommendations of the Compliance Committee and the eventual legislative progress in this area at European level will be considered.

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