Environmental democracy and access to Justice
The implementation of Aarhus Convention in Spain
“Environmental democracy and access to Justice. The implementation of Aarhus Convention in Spain”
Preface

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”. (Principle 10 of Rio Declaration on Environment and Development, 1992.)
From The Asociación para la Justicia Ambiental, AJÁ (Association for Environmental Justice), with the help of the Collaboration Agreement signed with The Fundación Biodiversidad (Biodiversity Foundation, we have carried out this current study about the access to justice and the implementation of Aarhus Convention in Spain from a practical and real point of view. Discussing with law operators how access to environmental justice is executed in our country.

It must be highlighted that this situation does not differ very much from Spanish lawyers’ opinion. The 88% of them consider that our present Justice Administration pattern is in a deep and serious crisis. The 83% of them add that this has not been ameliorated in recent years, or that it has been made worse, according to a recent survey from The Consejo General de la Abogacía Española (Spanish Advocacy General Council) (Metroscopia survey to 5,243 legal professionals in 2009).

This essay is focused on the analysis of the access to environmental justice in Spain and, maybe due to its specialty, the faults on the organization of Spanish justice increase owing to the fact that it is a question of a very particular area.

For those of us who believe that Justice Administration is a public service, lamentation and constant complaint on a lacking situation we all know, is not worth, but the intention, that is the reason of this essay, of analyzing and remedying a situation which is not appropriate these days. That is the reason why starting from analysis and declaring through the participants to whom we are grateful for their
collaboration in this study, Environmental Lawyers and Environmental Prosecutors, reveal with everyday examples the problems to achieve access to environmental justice in compliance with the Article 9 of Aarhus Convention.

Everybody knows the problems that Justice Administration has; slowness on lawsuits, its costs, which are augmented in environmental justice as environmental experts must be used because of the lack of a forensic corps that hosts them, the shortage of training in environmental subject matter among law operators.... These are matters that worry us and this study is intended to analyze and propose their solution.

Articles 45 and 24 in Spanish Constitution, which include our rights to environment and to an effective judicial guardianship respectively, must blend so that every citizen that realizes his right to environment has been affected seriously, can go to justice courts so that they mend this contravention.

We would not like the rights accepted in Aarhus Convention and the developing legislation on this to turn into what writer Luis García Montero shows so rightly: “Laws are necessary when they aim to order reality fairly, taking part in it, but they get poisoned when they are just useful to put our minds at rest, hiding unfair facts of real existence with their beautiful words” (“Inquietudes Bárbaras”, Anagrama 2008)
Acknowledgements

From The Asociación para la Justicia Ambiental, AJÁ (Association for Environmental Justice) we would like to thank in the first instance The Fundación Biodiversidad (Biodiversity Foundation) its contribution to the development of this current study about the access to environmental justice and our recognition of its defense of the values included in the Article 45 of the Spanish Constitution.

In the same way we would also like to thank ELAW its constant support to jurists worldwide who work for the defense of the environment collective interest and, especially, its resolute support to AJÁ activities in the context of the Collaboration Agreement signed with The Fundación Biodiversidad (Biodiversity Foundation) in order to promote a more effective access to environmental justice.

Of course, an special acknowledgement to every single Environmental Lawyer and Environmental Prosecutor that has been kind enough to give his time to the collaboration of this essay with his/her contributions which have enriched the content of it. Furthermore they have enlarged the possibilities of ameliorating the access to environmental justice.

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The current legal framework in the so-called environmental democracy is established in the European continent with the signature, ratification and entry into force of the United Nations Economic Commission for Europe Convention about access to information, public participation in decision making and access to justice in environmental matters, best known as Aarhus Convention, named after the Dane city where it was signed on 25 June 1998.

This Convention means the legal materialization in the European continent-Environment for Europe Process- of the Principle 10 of Rio Declaration of 1992. It reckons that each individual shall have the right to live in an environment that allows them to guarantee their health and welfare. Along with this right it also states the duty, both individually and in association with other individuals, to protect and improve it in the interest of the present and future generations; in the same way that Article 45 in our Constitution reckons that everyone has the right to enjoy a suitable environment as well as the duty to preserve it. This convention associates this right-duty with the recognition and regulation of three instrumental rights, the so called three pillars: the right to access to environmental information, the right to public participation in decision making about environment that has or can have an effect on it, and finally, the right to access to justice in order to protect these rights and environmental justice observance.

Chart 1. Article 1 of Aarhus Convention

**Article 1. Objective**

*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*
The advances in environmental democracy, favoured with the ratification and implementation of the provisions of Aarhus Convention in Europe in 41 states and in the institutions of the European Community, are a worldwide referent that provides initiatives and models for the development of proposals in the rest of continents.

The Convention has to be implemented in Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, European Community, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kazakhstan, Kirghizstan, Leetonia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, United Kingdom, Rumania, Slovakia, Slovenia, Spain, Sweden, Tadzhikistan, Turkmenistan and Ukraine.

The ratification of the Convention in Spain in December 2004, that came into force on 29 March 2005 and the passing of the Act 27/2006, on 18 July, that regulates the right of access to information, public participation and access to justice in environmental terms, by which directives 2003/4/EC and 2003/35/EC¹ were incorporated, altered Spanish legal framework for the exercise of these rights, improving in the interests of effectiveness the previous framework.

During the last Meeting of the Parties of the Aarhus Convention, held in Riga (Latvia) from 11 to 13 June 2008, Aarhus Convention celebrated ten years of existence. The Meeting of the Parties is the main governing body of the Convention and it is formed by all the states and supranational organizations that are bound to apply it. In Riga, as in every Meeting, the implementation situation was evaluated thanks to the analysis of the national implement reports submitted by the Parties of the Convention, and those of the Compliance Committee.

This is a means created to review compliance with the Convention. It makes recommendations on compliance issues to the Parties and, in a very new way in the field of public international law; members of the public may make communications concerning the non compliance with the Convention.

Unfortunately, compliance reviewing did not include the situation in our country. Spanish Government, breaking the duties that governments themselves enforced in the Convention, attended to the Meeting without having put into effect the compulsory national implement report. In this omission of duties it was only accompanied by Croatia, Lithuania, Luxembourg, Portugal and Rumania.
No more than some days before the Meeting of the Parties in Riga, the then Ministry of the Environment published on its website the initial studies to prepare the national implement report. There it was announced that its conclusion was planned for March 2009: too late to be included in June 2008 evaluation and too soon to be useful in the evaluation that will take place in the next Meeting in Moldova in 2011. Not submitting this report sends a clear message to Spanish citizenship as well as to the rest of inhabitants and governments of the countries involved in the implementation of Aarhus Convention, on the matter of our Government uninterest in regard to guarantee the effective implementation of the duties assumed when signing and ratification of the Convention therefore, the public confidence as to its interest in the achievement of the right to have an appropriate environment for the development of the individuals is questioned.

The adoption of the Act 27/2006 and other norms concerning autonomies including some of the modifications introduced by the Convention and by the Communitarian Directives that followed it, although being important to guarantee the effectiveness of the exercise of these rights, it is insufficient if it is not accompanied by measures such as the approval and execution of appropriate budgets, the realization of training and qualification programmes for the professionals involved, the improvement of structures, personal and material resources assigned to the exercise of the process and also by information and guidance programmes directed to individuals that want to exercise these rights.

The Association for Environmental Justice, willing to promote advancement in the access to environmental justice, decided to contribute to the evaluation of Article 9 implementation situation, concerning the third pillar: access to environmental justice, with the accomplishment of this study. Due to the non-existence of specific information regarding to the situation of the access to justice in environmental matters in our country, chose to limit the investigation and analysis field to the point of view of the professional environmental lawyers devoted to the protection of the environment.

These people can be framed into what has internationally been known as public interest environmental lawyers since the sixties. They are professionals specialized in the defence of environmental cases. They work for the correct implementation
of environmental regulations and for the achievement of an environment friendly for everyone. There are not many of them in the world, according to John E. Bonine, professor in Law Faculty, Eugene University- USA and co-founder of the Environmental Law Alliance Worldwide, approximately 750 professionals suit this definition in the United States of America that has a population of 300 million inhabitants, about 25 in Latin America and Caribbean to assist a population of 460 million inhabitants. In Europe figures are not much better. Exactly, with a population of about 700 million inhabitants, professor Bonine has found only 50 professionals of law economically supported to devote to this kind of cases. In Spain we do not have any record or data related to this kind. Only a few environmental organizations have environmental lawyers staff, and most of them in the event of needing it, turn to professionals that defend these cases in the exercise of law from their offices or combining it with other jobs for government or with teaching. Most of the time the work they do gets inside the concept of volunteering because they do not receive any fee, these are “pro bono” cases, that means free of charge or at most they get paid quite bellow stipulated fees considering their dedication and specialization.

Since the beginning of the nineties some of these people, specially these linked in any way to environmental organizations, have established mechanisms to coordinate themselves exchanging information and sharing training by means of the constitution of networks that were easier when the Internet appeared. Working in a coordinating way they have favoured the adoption of legal improvement and to a lesser extent some strategies for environmental lawsuit. In this respect it is important to highlight the role played by the former Legal Commission of CODA reconverted to the Área de Defensa Jurídica de Ecologistas en Acción (Law Defence Area of Ecologists in Action)

Together with the point of view of these lawyers it was also decided to include the opinion of some environmental public prosecutors, whose function is the defence of environmental lawfulness in criminal matters. The post of environmental prosecutor is very recent in our system. It sets a new mark concerning specialization of environmental protection and it emerged in response to the decisiveness and will of some public prosecutor’s offices that being aware of the need for specialization that this kind of cases require, created special services de facto. This tendency was endorsed in 2006 through the creation and designation of a Public Prosecutor “de sala” Coordinator of Environment and Town Planning.
At this point it is pertinent to show our appreciation again for the unselfish collaboration of all the people that finally accepted to be interviewed and have shared their day to day view on the access to environmental justice in our country.

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**Chart 4. Article 9 in Aarhus Convention**

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

   In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

   Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

   a) Having a sufficient interest or, alternatively,
b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

What is the object of this study?

The aim of this study is to:

- Analyze the implementation of the Article 9 of Aarhus Convention in Spain.

- Be useful as a diagnosis of the situation of access to environmental justice in Spain.

- Identify existing good practices and obstacles for an effective access.

- Supply with data to make strategies for the implementation of Aarhus Convention in Spain.
• Evaluate judicial procedures ability to ensure an effective defence of environmental rights and existing needs to implement Article 9.5 of Aarhus Convention.

• Bring information about the implementation of Article 9 of Aarhus Convention in Spain to the United Nations Economic Commission for Europe Aarhus Convention Secretariat.

• Supply the most active in environmental democracy institutions and organizations in Latin America with useful information about the legal field of the recognition of the right to access to justice in Spain, and also with the good practices and possible obstacles for an effective implementation of the exercise of the right to access to environmental justice.

The variable we are going to deal with is **the grade of the implementation of the Article 9 of Aarhus Convention in Spain**.

The evaluation includes the following indicators:

• Evaluation of the effectiveness of the access to justice as access to environmental information regards.

• Evaluation of the effectiveness of the access to justice regarding public participation in decision-making processes in environmental matters.

• Evaluation of the effectiveness of the access to justice when an infringement of the right to environment has occurred by act or omission of a public administration.

• Evaluation of the effectiveness of the access to justice when an infringement of the right to environment has occurred by act or omission of a particular, natural or legal person.

• Time spent from the beginning of the respective administrative or legal procedures to the obtaining of a final court judgement.

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2 The effectiveness evaluation refers to three essential indicators: time taken, costs related and effective protection of the protected good.
• Imposition of security.

• Adoption of protective measures.

• Imposition of costs.

• Proceedings costs, including legal and expert professional fees.

• Orders of reparation for damaged environment.

• Administration of justice resources in the service of the access to environmental justice.

• Mechanisms of assistance to legal aid employed

• Public accessibility to court orders.

• Availability of information for citizens about existing possibilities to make and administrative or legal appeal.
2. Methodology used

In order to carry out this study a semicualitative sociological investigation method based on in-depth open script interviews has been used.

Two types of data have been used:

- **Primary data:** information collected from lawyers that are in charge of the most emblematic cases in defence of environmental collective interest, and also from environmental public prosecutors.

- **Secondary data:** collected from the following sources,

  - Publications of the administration of justice bodies referring to the object of study.
  - Jurisprudence databases.
  - Reports published by the various institutions of Ombudsman in Spain in everything relating to access to environmental justice.
  - Reports or studies about the access to environmental justice published by citizen organizations of environmental type.
  - Studies and publications of juridical and sociological type that provide interesting data of the object of study.

The list of people to interview was prepared following the results of the analysis of secondary information.

The selection of lawyers devoted to the defence of environmental collective interest was done applying an experience, geographical and gender balanced approach. We listed law professionals known for their continual collaboration with various environmental organizations and for their defence of emblematic environmental cases. Professionals that have a lot of experience in the subject matter. Not all the people selected and contacted participated in this study. Finally, we held seventeen interviews.
This study did not try to include the opinion of every environmental public prosecutor, although they are a perfectly quantifiable group, that is the reason why we also did a selection based on experience and geographical balance. Finally we just managed to hold three interviews.

In the study the opinions of both groups are differentiated and we made a specific epigraph for the opinions of environmental public prosecutors.

The methodology used to hold the interviews consisted of:

1.- Telephonic communication with the person to be interviewed, explaining to her/him the object of the study, asking for her/his collaboration and announcing the sending of the interview script.

2.- Sending of the interview script to selected professionals.

3.- Making an appointment to get an answer of the script.

4.- Holding of the interview according to the sent script in the established date and time.

5.- Further clarifications or additional information requests.

The model for holding the in-depth open script interviews was previously validated with a “pre-test” in two preliminary interviews. It is important to take into account that in this kind of interviews the interviewed person always has the possibility of extending her/his answers.

The method of data collection was that of recording and transcription of the interviews. Followed by the analysis of their contents and data extraction.

The information supplied by the interviewed people has been used prior authorization and only for the study, always safeguarding the protection of every personal data as regulated in the Organic Law 15/1999 on 13 December, on Personal Data Protection.
The general diagnosis about the access to environmental justice in Spain that interviewed people made corresponds to two clearly defined and opposite discourses, the majority of them being negative. Eleven people have a negative opinion against six people of positive opinion.

According to the minority positive opinion, in general, access to environmental justice in our country is good in comparison with other countries. A positive evolution is detected, especially in certain judicial bodies. Nevertheless, inside this appreciation they also mention the difficulty of judgement attachments; especially they allude to an excessive time in delivery of judgement.

The majority perception however is clearly negative and it refers to the following aspects:

- More permeability in judicial bodies to protect private interests opposite to the protection of collective interests such as environment.

- Large ignorance of the right to access to environmental justice by individuals, by public administrations and also by justice.

- Judicial system is neither fast nor little onerous.

- Too few environmental issues go to the various judicial fields. As an example, in criminal justice, in spite of the existence of public action and environmental crime their real implementation is very marginal. Courts and juridical operators lack enough training, there are not enough experts, the collaboration of environmental administration fails, it is difficult to obtain data of the facts and all that makes a reality that limits the use of public action. The civil justice hardly has space for issues related to the protection of environmental collective interest. And in administrative appeal justice access in theory exists but in practice there are not enough means, the principle of implementation of
administrative resolutions fails, and that joined to the slowness of justice, is the reason why although we obtain judgments in favor, they end up not enforced, as: "Why appealing if, even if I win, the dam, the road is built and a backward step is impossible?".

- Lack of the habit of going to law among collectives that defend environment due to the economic aspect.

In the same way, we find two opposite discourses about how the implementation of the Convention is being carried out. The opinion that the Convention is being correctly implemented is totally minority, only three interviewees pronounce this way. On the contrary, thirteen interviewees think that this implementation is not done correctly. Finally one interviewee thinks that it is too soon to pronounce on this subject matter.

Inside the positive opinion we distinguish the assessment of the adoption of the Act 27/2006, that is considered to be correct, and its implementation is considered to be too soon to value or inadequate. Inside this discourse we find a very positive opinion: "the transposition to internal law has been exemplary, very participative and reached by consensus, resulting in a full and detailed text, with the Act 27/2006, of 18 July, that regulates the rights of access to information, public participation and access to justice in environmental matters. It has been attempted to clarify this matter and facilitate legitimation, especially for environmental NGOs."

Those who consider the implementation of the Convention to be incorrect think that:

- There has been an incorrect adaptation with Act 27/2006. This is an act that does not meet Aarhus, it causes a corrupt application.

- The Convention is not applied at all. It is unknown.

- It establishes provisions contrary to what is usual in our justice.
- Lack of interest in relation to its application and it is not as important as it should be.

- It has not been internalized. Administrations do not apply the measures it establishes. The rights already existed but their exercise is not facilitated.

- As the **right to access** to information is concerned the following aspects are highlighted:
  
  o There is not any improvement felt with the come into force of Aarhus Convention.
  
  o Since 1992 the right to access to environmental information had already existed, it was improved with Act.27/2006. In practice, the majority of administrations ignore the existence of this right, mainly local administrations. As regards the degree of compliance they say “they answer in a bad way, too late or they do not answer.”
  
  o The answer of administrations is irregular, but none of them answers in time. Moreover, doing that they do not make clear the existence of the Convention or of the Act 27/2006. They should implement that, but they do not do it.
  
  o The administrations touch briefly on it. They even evade enforcing a judgement that bounds them to give the requested information.
  
  o It is tremendously costly to ask for information in courts, not only economically but also time taking, as you may need three years to obtain a judgement. There are being hearings of abbreviated procedures for more than a year, almost two. It does not make any sense. The Courts of Law and Tribunals of the Contentious-Administrative are blocked
- As the **right to public participation** in environmental decision-making is concerned the following can be stated:

  o Its exercise is not correct either in theory or in practice. It is very limited.

  o Concerning concrete projects, the periods of public exposition are not done in the decision-making period but in the implementation or the administrative attachment of the judgement.

  o One interviewee, having more than fifteen year experience, tells us “I do not know any participative process that has meant a withdrawal in a decision that has already been made.”

  o There are not any participation mechanisms in the decision-making period.

  o The regulation and application have been done in a very little imaginative way.

- Concerning **the right to environmental justice** it is said that:

  o The regulation of the exercise of right is correct. The available juridical instruments are reasonably right.

  o The legitimation is moderately well guaranteed, however the practical exercise is very limited.

  o In access to justice what has been changed has got worse.

  o There are still problems to access to justice.

  o The Legal Aid Bar Commission does not seem to accept the possibility that an NGO receives the right to legal aid. Act 27/2006 is not being applied.
You still have to comply with the general requisites of access to legal aid.

- Aarhus Convention is not being implemented. After the entry into force of Aarhus Convention and Act 27/2006, there are the same problems as before. The realities that have limited the access to justice so far have not been unblocked.

3.1. Data, studies and informs

The majority of the interviewees do not know the existence of studies, informs, articles, statistics or publications relating to the situation of the access to environmental justice in our country.

Among those who have knowledge of some publication related to the subject, only five of them, allude to the following sources: the prosecutor’s office environmental reports and the Crown Prosecution Service report, the reports of courts, the Guide about the Access to Environmental Justice- Aarhus Convention published by AJÁ with the help of the Governing Body of the Advocacy, some articles in the media, articles published in “El Ecologista” and some of the thematic workbooks of Ecologists in Action.

The lack of specific information relating to the situation of the access, is on the one hand very illustrative and, on the other hand it makes exceedingly difficult the in-depth analysis of this reality and of the impact of Aarhus Convention and the derived legislation for the improvement of such an access.

On the Community basis there are several studies and informs that refer to the situation of the access to environmental justice, some of them even refers to the access situation in Spain\(^3\). Unfortunately, the lack of a Spanish version and their scarce distribution in our

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\(^3\) Consult bibliography appendix.
country make their knowledge difficult.

It was to be expected that the lack of information about the matter would be remedied, at least in part, thanks to the writing of the National Implementation Report of Aarhus Convention in Spain. This is not the case. As previously stated, this report was not prepared in time. You can prove how the last draft on 5 December 2008, open to public inspection in the website of the Ministry of the Environment and Marine and Rural Affairs\(^4\), does not bring any data or reference that allows you to have a superficial idea of the way the implementation of Article 9 is functioning in practice. In respect of the obstacles found in the implementation of the Convention it can be read in its paragraph 126: “No important obstacles have been detected to implement this article, because excluding slight qualifications, it is in accordance with our legal system.” Concerning the additional information on the practical application of the provided for under Article 9 the paragraph 127 literally indicates: “Most of the time, environmental associations, not individuals, have sometimes asserted a claim in the appropriate juridical body, probably and in spite of the efforts of the Administration in this respect, because there is a lack of information of the public in general, about this matter.”

Unfortunately, we have to point out that regarding “the efforts” of the Administration to inform the public in general, we do not know which these are. In the ten years that have passed since Spain signed the Convention in June 1998, we only know about an autonomous administration, that of Cantrabia, that has done something similar to this. In 2006, a guide for its public administrations was published in order to make possible a better application of the provisions of the Convention regarding the access to environmental information\(^5\). We do not know of any other central, autonomous or local administration that has made any campaign of public information about the rights of the convention in general, or particularly, on the access to environmental justice. However we know of some initiatives carried out by different environmental organizations, including the one developed by AJÁ with the support of the Governing Council of Spanish Advocacy. In any case, these are insufficient initiatives given that they were done with limited resources.


3.2. Effective judicial protection for the rights of a participative democracy: the right implementation of Aarhus Convention

Aarhus Convention tries to guarantee an effective judicial tutelage establishing a series of common conditions that will be requested relating the right to access to justice to protect the exercise of the right to environmental information (Article 9.1) the right to participate in environmental decisions (Article 9.2) and the right to demand the correct observance of environmental legislation (Article 9.3). In this way the Convention requires that all the established procedures shall be adequate and effective, as well as fair, equitable, timely and not prohibitively expensive.

As regards to guarantee the effectiveness, the English original version of the Convention, uses the term “injunctive relief” that in the Spanish translation has been incorrectly replaced by “reparation of damages order”. The English term refers to guarantee the effectiveness of the judgement by taking what in our legal system is known as protective measures such as that of interrupting the effects of the administrative act or the activity in question. The translation used: “reparation of damages order” is completely wrong, because it alludes to a later moment, that is, the final moment in the sentence when the compensation of the damage caused by means of environmental restoration is ordered, or it can even refer to the compensation for damages, and it does not refer to the initial moment when the judicial body guarantees the effectiveness of the procedure by taking the necessary measures for the object of it to make sense, interrupting temporarily the judgement or appealed activity until a decree about the brought appeal is issued. In the carrying out of this study this divergence has been taken into account.

The Convention also requires that the decisions taken inside these procedures by courts and other bodies shall be recorded in writing. “Other bodies”, in our law, refers to administration. And it forces the decisions of the courts to be publicly accessible and as far as possible, also these of administration concerning the established procedures.
“In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible”.

Finally, the Convention indicates that the awarding of costs, having a reasonable quantity, by a court when the proceeding has finished will not be taken as a penalization, persecution or harassment of the people that exercise the rights of it.

“Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings”.

In the opening discourses of the last Meeting of the Parties, that took place in Riga (Latvia) in June 2008, both Mr. Marek Belka, United Nations Economic Commission for Europe Executive Secretary, and Mr. John Hontelez, European Environmental Bureau General Secretary and representative of the non governmental organizations in the Bureau of the Meeting of the Parties, agreed on showing their worry on the lack of application of the provisions relating the access to justice. Such a worry was shared with the people and institutions represented in the Meeting, and seconded in the text of Riga Declaration.
RIGA DECLARATION adopted at the third meeting of the Parties held in Riga on 11-13 June 2008

We, the Ministers and Heads of delegation from Parties and Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), together with representatives of other States, international, regional and non-governmental organizations, parliamentarians and other representatives of civil society from throughout the UNECE region and beyond, gathered here in Riga at the third session of the Meeting of the Parties, Have resolved as follows:

4. We note, however, that in a significant number of countries, major challenges remain with regard to the task of fully implementing the Convention. The national implementation reports, the findings of the Compliance Committee and the outcomes of various workshops, seminars and surveys indicate that these challenges include but are not limited to the following

(g) The need to remove or reduce practical barriers to access to justice, such as financial barriers, access to legal services and lack of awareness among the judiciary.

5. We therefore commit ourselves, within our own jurisdictions or spheres of activity, to facing those challenges. In doing so, we recognize that the Convention, as an international treaty, establishes a set of standards that are designed to be achievable across a large and politically diverse region, and that achieving basic compliance with those standards, while essential, should not set a limit on our efforts. In this regard, we encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than the minimum required under the Convention.

6. We also urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision making
and access to justice in environmental matters even where such measures would not necessarily involve any breach of the Convention.

(…)

15. We acknowledge the important role that the public, and in particular environmental organizations and public interest lawyers, can play in supporting the enforcement of laws related to the environment when adequate opportunities to challenge decisions, acts and omissions through administrative or judicial review processes are provided. We encourage all Parties to create the conditions which can enhance that role, including through the establishment of sufficiently broad standing criteria, the implementation of measures aimed at overcoming financial or other obstacles, and support for public interest environmental law non-governmental organizations’.

For its part, Act 27/2006, dealing with the pillar of the access to justice in its article 3.3 and in its Title IV, makes a specific reference to the general regulation of administrative and contentious-administrative existent appeals, and a more general reference to the appeal proceedings that are established by our Constitution and laws. Probably, considering it sufficient in respect to guarantee the compliance of the requirements in the Article 9 of the Convention. The Act establishes an assistance mechanism to eliminate or reduce the financial obstacles that obstruct the access to justice. And it recognises the right to access to legal aid, in the stipulated terms by Law 1/1996 on 10 January, of Legal Aid, amended by Law 16/2005 on 18 July, to those non-profit-making legal persons that comply with the established requirements in its article 23.1. This extend the right to access to legal aid previously granted exclusively to the public usefulness declared associations under the protection of the Organic Law 1/2002, on 22 March, regulating the right of association and of the Royal Decree 1740/2003, on 19 December, about the procedures relating public usefulness associations.

The Act 27/2006 does not establish any other regulation relating to avoid economic barriers in the access to environmental justice such as the principle of costs imposition for the unsuccessful part, the establishment of bails to represent officially in a criminal procedure people’s action, of securities for the adoption of protective measures, etc.
It does not endorse any specific provision designed to avoid the slowness of the procedures either, this is a subject that constitutes a big obstacle in the access to environmental justice, nor about the adoption of protective measures to guarantee the effectiveness of the right to access to environmental justice.

As previously mentioned, for its part, the draft of the National Implementation Report, was opened to a public inspection process of which we do not know the results. In respect of the obstacles found in the implementation of the Convention it can be read in its paragraph 126: “No important obstacles have been detected to implement this article, because excluding slight qualifications, it is in accordance with our legal system.” Let us see bellow if this point of view is shared by the professionals of the defence of the public environmental interest.

3.2.1. **Right to access to environmental information**

The right to access to environmental information was introduced in our legal system by the community directive 90/313/EEC on 7 June, about the freedom to access to information in environmental matters. All the state and autonomous regulations passed for the transposition of this directive were automatically repealed by the ratification of Aarhus Convention that profusely governs the field and conditions of the exercise of the right to access to environmental information. They were also modified by the provisions of Directive 2003/04/EC on 28 January, relating to the public access to environmental information and by which Directive 90/313/EEC was repealed.

In a summarised way, we can define the right to access to environmental information as the right that everyone has to access to environmental information that is under power of public authorities, with no need to invoke any particular interest, in the form requested, as soon as possible, and at the latest one month within the request has been submitted. Article 9.1 of the Convention guarantees judicial protection to exercise the right to access to environmental information under power of public authorities and

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natural or legal persons that perform public responsibilities or functions, or provide public services under the control of an administration.

**Chart 8. Article 9.1 of Aarhus Convention**

“Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.”

Considering that legal recognition of the right to access to environmental information dates 1990 and the improvement introduced in the regulated conditions to guarantee the access both in Aarhus Convention and in Directive 2003/4/EC, how do interviewees value the effectiveness of the access to justice in our country, taking into account some of the minimal conditions required in the Convention, specifically: time to obtain an enforceable judgement, costs and effective protection of the exercise of this right?

The assessment in this respect is almost unanimous. With the exception of two people that do not pronounce on this matter, the rest give us a negative point of view of
the protection of the exercise to access environmental information. Fifteen of the interviewees value the tutelage as ineffective. It seems that Aarhus has not had a positive impact on the improvement of the exercise and protection of the right to access to environmental information; it has not implied a material improvement of the situation. In the obtained assessments, the following questions are emphasized:

**In relation to the exercise of the right to access:**

- The access to information is always very difficult. The administration has not internalized the right that citizens have, that it is in the service of them, and that citizens are not its enemy.

- It is perceived that in numerous cases the requirement that the requests are written down is made with delaying intention. A lot of times requirements are not answered, and if so, it is never in time. Few times it is considered to turn to the contentious-administrative in order to get the information requested because this implies to delay even more the access to information and it also implies more costs.

- It is considered that the maximum period established to obtain the requested information is too long, taking into account the immediacy with which you are generally required the information you are requested. However, it would be a great success that such a period would be applied. Normally you have to wait much more time.

- The civil service remains outside the transparency principle and it is still anchored in the distrusting to give information, especially when an environmental organization makes the request.

- Documentation is not in electronic form that is why the costs keep on being very high. The effectiveness of the access would improve if the availability of information in electronic form would increase.

- The administration goes on resisting providing with environmental information, it continues refusing to provide it, especially when it is concerned to important
economic interests, for example this is the case of the information relating the land use. In such cases, experiences in which information is only obtained when you go to court are related. In these situations administrative procedures are seen as “a terrible waste of time”.

- The period of one month is not applied. Lack of participative culture. Administration is ignorant of its duty.

- Several interviewees explain that they do not use contentious procedures and that they obtain the information after pursuing it by several means for months, that this requires quite a lot of skills that are not within the reach of anyone. For them, one of the alternative procedures to the contentious is the Ombudsman and analogous figures in the autonomous scale, although they have diverse results depending on the case.

- The difficulties in the exercise of the right to access to information are attributed, together with other things, to the lack of training of administrations and to the scarce resources. It is pointed out that responsible authorities should be qualified and also that the assignment of resources is a political issue.

- It is also related how the access is tried to be very obstructed, and how people that want to access information is tried to be frightened by the costs that administrative and contentious-administrative procedures are going to have.

**In relation to contentious-administrative procedures:**

- The reference that Act 27/2006 makes to contentious-administrative system does not guarantee an effective protection, because our system does not fulfil the requirements established by Aarhus Convention.

- There is not a full implementation of Article 9. Administrations do not facilitate but impede the access to informative records. There is not enough speed and this impedes an effective judicial protection and that a contravention of rights does not occur. If Aarhus provisions regarding time and costs were applied, the access would be much more attainable.
- The time that it takes to obtain a judgement by contentious-administrative procedures, 3, 4, 5, 8 years, makes contentious appeal be completely useless.

- Almost null effectiveness of appealing to contentious-administrative courts. The own delay of court decisions makes go to them to be pointless. Even when you get a judgement in favour the interest for requested information has already disappeared.

- Rather than resorting to the contentious, people try to find alternative ways to obtain requested information. People do not go to court. Unless, for example, it is about information needed periodically or you want to achieve that a certain administration changes its habits to promote the culture of access to information.

- Although in subjects related to access to information, abbreviated procedure is generally used, this does not guarantee the speed of it. Cases that have not been judged for more than 3 years are mentioned. This is normal, in view of the saturation of the courts presided over by a single judge and all the areas of competence they are conferred.

- Concerning court decisions, it is indicated that judges usually apply the access in a very extensive way, ignoring the reasons maintained by administration to deny it. Of course owing to the time that it takes them to issue judgement, court decisions are completely ineffective.

- The implementation of other non judicial mechanisms would be necessary. It should be created under Article 9.1 of the Convention, an organism that would pronounce on citizens requests before they resort to judicial means, in a similar way to Data Protection Agency.

- In relation to the costs to access to justice it is highlighted that they are never imposed to administration although it has acted negligently or recklessly. Such costs must be always assumed by the person that appeals. Specifically, expert reports can raise them a lot.
- It is indicated that the administrative procedure to access to environmental information should be included in legal aid.

This should also comprise the initial phase, that of request, and it should cover not only the service of legal practitioners but also that of professionals of other subjects whose knowledge was necessary for the type of required information, the costs of access to registries, especially in town-planning cases. The creation of a spell of court duty specialised in these matters is suggested.

The assessments done were illustrated with specific cases, most of them negative natured.

😊 On the positive side, we will mention, as an example, how it was achieved by conviction that a city council would provide town-planning information, when its standard practice was refusing it continually. The case was taken to court precisely in order to modify such habit. Also how it was achieved to modify the accessibility to nuclear power station inspection reports, usually denied by the Nuclear Security Council.

😊 In the numerous negative examples set out, questions relating time spent in obtaining judgements are specially mentioned: more than 6 years without a judgement relating requested information about a dam, two years after requesting information a judgement in favour is obtained, but as the information was given with the file the right was considered to be satisfied without the court reprimanding the administration at fault.

Unfortunately, the collected assessments are not new, it has been made public how studying the judgements, for example of the Supreme Court, in the last years relating access to information it is gathered that the majority of them originate in requests made by environmental organizations and the time spent to obtain a final judgement is from 5 to 9 years. All the collected suggest that the protection of the exercise of the right to access to environmental information is very far from complying the requests established by the Article 9 of Aarhus Convention. That is why it is perfectly understandable that numerous environmental organizations in our country make it a rule not to resort to the contentious to access to requested information.

3.2.2. Right to take part in environmental decisions

The public right to take part in decision-making that affect or could affect environment also existed in our legislation previous to the entry into force of Aarhus Convention. That is why the Convention, Directive 2003/35/EC and Act 27/2006 modify the conditions in which this right whose fundamental countersignature is the Constitution is exercised.

The Convention regulates the conditions in which public participation must be guaranteed depending of the type of decision it is about:

- Specific activities (Article 6);
- Plans, programmes and policies (Article 7); and
- Regulations and normative instruments (Article 8).

Concerning who can participate, it establishes, on the one hand, the right to take part of the “interested public”, that when all is said and done, will be determined in case it is affected or not by the type of decision it is going to be made. On the other hand, it recognises that non governmental organisations promoting environmental protection will always have the condition of public that can participate. This recognition had already existed in our justice. Act 30/1992, on 26 November, of Legal System applicable to Public Administrations and of Common Administrative Procedure, in its Article 31, recognised so. In this respect Act 27/2006 introduced in its Article 23 a series of requirements that governmental organisations that want to take part must fulfil and that limit the general recognition established by Act 30/1992, in our opinion, infringing the principles and duties established in the Convention. (Articles 3.5 and 3.6).

In our legislation the ratification of the Convention and the transposition of Directive 2003/35/EC have implied the modification of state and autonomous regulations, relating:

- elaboration, modification and revision of plans, programmes and general provisions relating to the environment;
- environmental impact assessment;
- pollution prevention and integrated control;
- genetically modified organisms;
- drawing up of the plans contained in water legislation and
- strategic environmental assessment.

The Article 9.2 of the Convention regulates the requirement that the exercise of the public right to take part is protected.

Chart 9- Article 9.2 of Aarhus Convention

“Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
In the Third Meeting of the Parts to the Aarhus Convention, held in Riga (Latvia) in June 2008, the great concern about the inadequate implementation of the provisions relating the public right to take part, and therefore the lack of obtaining an effective participation, was clear. Such a concern was collected in the text of Riga Declaration with the expression of the faults detected and the pending challenges, and also the type of actions and measures provided to solve them.

Chart 10- Extract of Riga Declaration

Extract of Riga Declaration adopted at the third meeting of the Parties held in Riga on 11-13 June 2008.

(…)

4. We note, however, that in a significant number of countries, major challenges remain with regard to the task of fully implementing the Convention. The national implementation reports, the findings of the Compliance Committee and the outcomes of various workshops, seminars and surveys indicate that these challenges include but are not limited to the following:

(a) The need to establish adequate legislative, regulatory or administrative frameworks and develop detailed procedures;

(b) The need to reduce gaps between the legal, regulatory and administrative requirements and the actual practice;

(…)

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
(d) The need for public authorities to take responsibility for the quality and level of public participation, including where developers are mandated to organize the public participation process;

(e) The need to provide for appropriate levels of discussion and feedback in the course of public participation, including where consultation is organized through electronic means;

(f) The need to ensure that members of the public, including non-governmental organizations, are afforded appropriate opportunities to participate effectively in decision making processes, inter alia by providing for a sufficiently broad interpretation of the public concerned and establishing sufficiently broad standing criteria in the context of appeals procedures;

(...)  

5. We therefore commit ourselves, within our own jurisdictions or spheres of activity, to facing those challenges. In doing so, we recognize that the Convention, as an international treaty, establishes a set of standards that are designed to be achievable across a large and politically diverse region, and that achieving basic compliance with those standards, while essential, should not set a limit on our efforts. In this regard, we encourage each Party to consider going further in providing access to information, public participation in decision-making and access to justice than the minimum required under the Convention.

6. We also urge Parties to refrain from taking any measures which would reduce existing rights of access to information, public participation in decision making and access to justice in environmental matters even where such measures would not necessarily involve any breach of the Convention.

(...)  

13. We recognize that procedures enabling the public to participate effectively in decision making, whether on specific activities or on more strategic levels, lie at the heart of the Convention. Despite this, significant challenges in creating the conditions for effective participation remain, such as failure to adequately notify
the public concerned, lack of early opportunities for participation, unwillingness among public authorities to take due account of comments received, insufficient expertise among the public or public authorities, and difficulties in applying public participation procedures in transboundary contexts. We recognize that there is a need to increase our activities in this area in such a way as to address these challenges. We also consider it important to engage more fully with the experts responsible for designing and facilitating public participation procedures.

14. With respect to public participation in strategic decision-making, we note the mutually reinforcing character of parts of the Aarhus Convention and the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), and call upon Parties and other interested States to ratify and implement the Protocol on Strategic Environmental Assessment at the earliest opportunity.

(…)

16. The emergence of genetic engineering is one of the major technological developments of the modern era, with significant implications for the environment. Given the high level of public interest in the topic and the need for rational and informed debate, establishing balanced procedures to facilitate effective public participation in decision-making in this field is of paramount importance. In this regard, we note the progress towards entry into force of the amendment on genetically modified organisms (GMOs) that was adopted by consensus at our second session in Almaty and encourage all Parties that have not done so to ratify, approve or accept the amendment with a view to bringing about its entry into force by early 2009. We also encourage Parties to apply the provisions of the amendment to the maximum extent possible pending its entry into force. We recognize the value of further collaboration with the bodies of the Cartagena Protocol on Biosafety in activities aimed at supporting the application of the Lucca Guidelines on Access to Information, Public Participation and Access to Justice with respect to GMOs and the implementation of the Almaty amendment on GMOs.
Let us review how interviewees value the effectiveness of the access to justice in our country in those cases in which the exercise of the right to take part in decisions that affect or can affect environment is impeded or obstructed, taking into account some of the minimal conditions required in the Convention, specifically: time to obtain an enforceable judgement, costs and effective protection of the exercise of this right.

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The negative assessment is, in this respect, almost monolithic, except for a unique positive assessment and two people that do not pronounce on this respect.

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The positive assessment observes that the regulation is good, as disobeying the stage of public information means the nullity of legal proceedings. However it misses enough regulation about public participation, which many times is restricted to public information procedures to lodge pleadings. It misses that it is paid more attention to citizens and means of debate that later on would have an impact on the decisions that are finally taken.

From the unanimous negative assessment made by 14 of the 17 interviewees the following questions must be highlighted:

- **With regard to the exercise of the right to participate:**

  - Public participation is not taken into account. The exercise of this right is even more difficult than the right to access to environmental information. Real participation is not allowed, it is masked. There is an important problem of participation.

  - Participation is a fiction. The public information procedure turns into a useless formality. The functioning of the regularly institutionalized instruments of participation, such as advisory boards, is described as “fume”. They do not even have a moral ability to have influence. Actually they are not really consultative but they are simply used for administration to inform. They facilitate information to be received and make it possible that administration tests the opinions of the organizations called up to participate. However, they are neither effective as for receiving such opinions, nor taking them into account and these opinions do not have a real influence on their decision-making processes.
- Concerning environmental impact assessment, the administration does not make preliminary consultations every time it is forced to do so. It makes a strictly formalist compliance of the requirements imposed, not aiming to cause a real and effective participation.

- The majority of the lodged pleadings are systematically rejected. Citizens are tried to be discouraged. Environmental organizations are not paid attention.

- The **exercise of the right to participate in town-planning subjects** is repeatedly mentioned:

  - In town-planning subjects there has been a significant improvement on the formal plane. The established procedure is followed but *“in the end it comes out, this that has to come out”*. It is perceived that when there are not important interests there is some effectiveness, there are certain positive results at a local level, but just in “low environmental profile” or little controversial cases. However, in big projects, big infrastructures, beyond local level those turn into mere participative procedures that are made up.

  - In town-planning legislation, the participation procedure is designed in such a way that citizens are not the subject of the processes, but the object of it. Citizens participate in questions that have already been decided. Those are actually citizens *“procedures for accession”* not participative ones.

**Concerning the judicial protection of the exercise of the right to participate:**

- The effectiveness of the protection is null.

- Excessive slowness of contentious-administrative procedures, even when an abbreviated procedure is used. Too many years of wait for a judgement, there are numerous examples of it, in a number of cases relating to environmental impact assessment. Such slowness is illustrated with the fact that there has not been a judgement after 10 years waiting. This slowness is one of the chronic
illnesses of our legal system and it does not limit to environmental cases. The necessary reform of the contentious-administrative has not been dealt with. Competences are transferred from one court to another, and they are blocked due to the volume of cases.

- Administrative justice undervalues the non-completion of administrative procedures. When there is a contravention of administrative procedures, such a contravention is many times considered to be a cause to be annulable and not of nullity. It is appreciated that the contravention does not involve defencelessness and applying the principle of procedural economy, the court appreciates that it exists a high probability that the administration decision was the same although the stages of the participative procedure had been respected, that is why the decision is not annulled. So, the big barrier to guarantee participative procedures is that they do not only have a formal substance, but also a material one.

- The protection is ineffective. If some deficiency is confirmed, for example, in the procedure of environmental assessment there is not the legally required information, although the court recognises it, the decision is not annulable but repairable.

- The costs rise in view of the need to rely on professionals specializing on quite different matters. Non-governmental organizations do not have enough resources; this limits quite a lot their defence.

The assessments done were illustrated with specific cases, the majority of them having a negative nature. It is mentioned, for example, a judgement declaring the nullity of a park because in the public information procedure the requirement to inform the people that had lodged pleadings was not fulfilled. That is why the park was unprotected for a year. Various examples illustrate how applied criteria differ in similar cases. That is why the casuistry becomes erratic. So, we find diametrically opposite judgements in similar cases or situations.

In view of the interviewees assessments and the examples given, the real situation is very far from fulfilling the Convention requirements, is very similar to the situation des-
3.2.3. Cases of environmental law contravention by act or commission of a public administration

Together with the protection of the right to access to environmental information and the public right to take part in decisions concerning environment the Convention establishes in its Article 9.3, the right to access to justice when the right to environment is contravened.

The Convention, in its preamble, considers the right to environment as a human right in need of guarantees. It insists on the need for a bigger compliance of environmental duties imposed by regulations. Moreover, it recognizes the important part that members of the public can play in this task. So, the aim of the Convention in its Article 9.3 is to favour the access to administrative or judicial procedures to those who want to collaborate with the effective implementation of environmental regulations.

The environmental law that the contravention refers is national. That is, all the environmental regulation in force in the territory of each Party of the Convention. The contravention in question can be due to a commission or an omission, of a public authority or of a particular natural or legal person. This provision implies to put administrative or judicial procedures adequate to challenge these commissions or omissions that contravene environmental law at members of the public disposal. Finally, the decision of what members of the public in question can access to justice to contribute to the compliance and implementation of environmental regulations is up to each Party of the Convention that in this respect can follow its own criterion in its internal legislation.
In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Act 27/2006 was not especially exhaustive developing Article 9.3. It did not establish specific procedures to access justice in environmental matters when there is an infringement, by act or omission, of the applicable environmental regulation. In its Article 22 it regulated what it named as “actio popularis in environmental matters”, that, in fact, resulted in conferring legitimisation to certain legal persons that fulfil the requirements it established in its article 23.1. That means legally recognising their interest to appeal against acts or omissions of an administrative nature. So, it established that, in these cases, non lucrative legal persons that have among the aims guaranteed in their statutes the protection of the environment in general or of any of its elements in particular, that have been legally constituted at least two years before the exercise of the action and that are exercising in an active way the activities that are necessary to achieve the aims planned in their statutes, and that, according to their statutes, develop their activity in a territorial scope that is affected by the administrative act or omission, will be able to appeal such administrative activities or omissions. For which they must follow the procedures regulated in the Title VII of the Act 30/1992, on 26 November, of Legal System applicable to Public Administrations and of Common Administrative Procedure and that of the contentious administrative, once administrative procedures are exhausted, regulated in Act 29/1998, on 13 July, regulating the Administrative Appeals Courts.

In its article 22 in fine, the Act expressly exempts from this regulation those acts and omissions attributable to natural or legal persons that have assumed public responsibilities, functions or providing services of public nature, in relation to the environment under any of the authorities, institutions or organizations collected in the section 1 of the article 2.4.
As regards the decision of what is considered to be the right to environment, the article 18.1 of the Act collected a list that the preamble of the Act itself considers to be open and that mentions those regulations relating the protection of water, protection against noise pollution, protection of soil, air pollution, rural and urban planning and land use, nature conservation and biodiversity, woodlands and forest management, waste management, chemical products, including biocides and pesticides, biotechnology, other emissions, discharges and releases of substances into the environment, environmental impact assessment, access to information, public participation in decision-making and access to justice in environmental matters, and any other matters provided for by regional legislation.

The fact is that the movement that Act 27/2006 makes of the article 9.3 does not include those acts or omissions that contravene environmental legislation that do not have an administrative nature. For these cases the article 3.3 in its section 4 makes a generic reference to the rights to access to justice recognized in the Constitution and laws.

The suitability of the criteria required by Act 27/2006 to non lucrative legal persons to be able to exercise the right to access to justice in the event of contravention of environmental law by act or omission of a public authority is debatable. First of all, because the Article 3.6 of the Convention shows that it does not require any derogation from existing rights of access. Secondly, because if criteria that restrict the access existed these should be consistent with the principles of equality or non-discrimination included in the Convention, that is why in the event of establishing requirements, these must be based on objective criteria that are not unnecessarily excluding. And thirdly, because the article 3.9 of the Convention establishes that legal persons will not be discriminated as to where it has its registered seat or an effective centre of its activities.

How do interviewees value the effectiveness of the access to justice when there has been an environmental law contravention by act or omission of a public administration, taking into account the time to obtain an enforceable judgement, costs and effective protection of the protected juridical good?

יפלשו מראיינים את התוכן של יעילות אכזבה של אכזבה של אכזבה של אכזבה. בפרט, המ嵴יבים הבאים שאלונות:

- The majority, thirteen interviewees, give us a completely negative assessment, of absolute ineffectiveness of such an access. Especially, the following questions are mentioned:
- The excessive length of judicial procedures and the excessive cost of them make access and judicial protection ineffective.

- The administration inactivity is a main subject concerning the environmental legislation infringement. In many cases courts order to follow administrative proceedings without further ado. It would be necessary that courts were aware of the sphere of the exercise of their power. There is a deficit in the penalizing sphere of their acting. Dissuasive sanctions for administration, effective in environmental matters are not issued. Courts should issue concrete sanctions, state convictions in the judgements and not limit to requiring administration to perform the administrative penalty hat has given rise to the case in question.

- These kinds of procedures are very costly in time and money. The possibility to access to free legal aid extended in Act 27/2006 so that not only non-governmental organizations regarded as of public utility, access to free of charge justice access, is not enough. The fact that lawyers appointed to provide free legal assistance are ignorant of environmental law reduces the possibilities of using this formula and anticipates the failure of the action taken against an administration that has resources and well-formed teams.

- In the sphere of administrative law, the effectiveness of the access, in cases relating to actions of the administration, is scarce. When it is about cases of omission in the control of activities that are provoking offence, the effectiveness is null or almost null.

- In the criminal sphere, a certain control of the courts in relation to criminal acts of administration especially in town-planning matters, starts to be noticeable.

😊 In the two interviews that make an assessment that is not completely negative the following questions are emphasized:
- Concerning the costs of procedures, one of the interviewees highlights that hired lawyers are usually “moderate in their fees”, that makes the costs much more reasonable. Among the reasons mentioned to this moderation in fees the defence of collective interest, the non lucrative condition of the organization they represent and the organization support in the preparation of the case are mentioned.

- The ability of justice to be adapting to the action or non-action of administration. However the problem of slowness is underlined. That court resolution sometimes comes very late. Also that only sometimes the problems that this produces are palliated by protective measures but not always. And that, such protective measures mean a cost that does not permit the access to justice for everyone. Finally the problem of the enforcement of judgements is stressed.

The examples that cement the ineffective access assessment are very numerous:

- In numerous cases in which a company pollutes with the tolerance of administration that omits its duty to control and does not exercise its penalizing powers. When this kind of cases enter criminal procedures, courts can, where appropriate, end up finding the company guilty but what they do not do is to convict administration for omitting its duty to control.

- An administration approves a project that affects seriously a protected area, for example, a bird special protection area. The cases in which the protection conditions of an area are modified are also abundant, for example a Natural Resources Ordering Plan of a Natural Park, to permit a previously banned activity or installation.

- Various examples have to do with close season annual orders by which a certain trapping method is repeatedly authorised.

- There are quite a lot of examples relating protected wetlands that disappear due to the action of administration itself. For example: a Partial Plan is approved, with
the intention of permitting a construction in a wetland without the obligatory environmental report. When a judgement is obtained the construction was, of course finished and operative and obviously, the wetland had disappeared. The enforcement of the judgement consisted of the evacuation of the obligatory report by the ministry of environment in the regional government. Such a report established the lack of environmental values of the already extinct wetland.

- Concerning the enforcement of judgements, interviewees mention numerous cases of urbanizations improperly authorized by administration that judgements declare illegal and ten years later are still in the same place.

### 3.2.4. Cases of environmental law contravention by act or omission of a private person

As it was explained in the previous epigraph, together with the protection of the right to access to environmental information and the public right to take part in decisions concerning environment, the Convention establishes in its Article 9.3, the right to access to justice when the right to environment is contravened. This right is based on the consideration that the right to environment is a human right in need of guarantees. Moreover, the Convention, in its preamble insists on the need for a bigger compliance of environmental duties imposed by regulations. And, immediately after, it recognizes the important part that members of the public can play in this task. The aim of the Convention is clearly to favour the access to administrative or judicial procedures to those who want to collaborate with the effective implementation of environmental regulations.

The contravention of environmental law is the national one of each state that has ratified the Convention. And such a contravention can be attributable to an act or omission of either a public authority or a particular natural or legal person. The members of the public that can access will be fixed by each Party of the Convention that can have adopted criteria, in this respect, in their internal legislation.
In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

As it was indicated, Act 27/2006 was not especially exhaustive developing Article 9.3. It did not establish specific procedures to access justice in environmental matters when there is an infringement, by act or omission, of the applicable environmental regulation. Even more, it does not include those acts or omissions that contravening environmental legislation do not have an administrative nature or are attributed to a private natural or legal person. For these cases, it limits to making in Article 3.3 in its section 4 a generic reference to the rights to access to justice recognized in the Constitution and laws. That is why modifications that guarantee the requirements of Articles 9.3, 9.4 y 9.5 of the Convention, are not introduced in criminal or civil jurisdiction. So, in criminal jurisdiction the recognition to anyone of actio popularis is maintained when an authority, a civil servant or a natural or legal person commits any of the environmental crimes classified in the Penal Code. And in civil jurisdiction, the procedure remains restricted to the affected parties, either when there is civil liability after a contravention of environmental law, or when the conviction to do is pursued, after a private person omission.

“Article 3. Rights in environmental matters.

To put the right to an appropriate environment for the development of human beings and the duty to preserve it into effect, everyone will be able to exercise the
following rights in their relations with public authorities, in accordance with that referred to in this Act and in compliance with article 7 of the Civil Code:

(…)

3) With regard to access to justice and administrative protection:

a) Appeal the acts and omissions attributed to public authorities that contravene the rights that this Act recognises as information and public participation regards.

b) To exercise the actio popularis to appeal the acts and omissions attributed to public authorities that contravene environmental legislation in the terms provided in this Act.

4) Any other that the Constitution or laws provide.”

How do interviewees value the effectiveness of the access to justice when there has been an environmental law contravention by act or omission of a particular natural or legal person, taking into account the time to obtain an enforceable judgement, costs and effective protection of the protected juridical good?

The interviewees’ discourses are divided in a more balanced way on this topic, so, 6 people maintain a positive assessment while the other 9 maintain it negative or very negative.

😊 From the most positive assessments concerning the effectiveness of the access and judicial protection in cases of environmental law contravention attributed to a natural or legal person the following questions can be emphasized:

- There is usually a bigger effectiveness rate in the sphere of criminal jurisdiction, convictions are more abundant there. Unfortunately the effectiveness of the access is bound to the strength or weakness of the private individual
in question that has contravened environmental law. So it can be easier, for example, “convicting a shepherd in Las Alpujarras for pulling up protected camomile than obtaining a judgement against a power station or a refinery for years of illegal emissions”. We can find tens of examples of little and medium environmental criminals’ convictions against very few convictions for big or medium companies. It seems as if there were “two measuring rods depending on who the criminal is”.

- The effectiveness of civil jurisdiction is bigger, of course, only in these cases in which the possessions or rights of some individual are affected. However, costs are high and you have to prove the damage that has been done. For example, concerning noise, you have to include the sound measuring expert report. Costs can get higher in matters that are more complicated to prove from a technical point of view.

- The bigger effectiveness in the access in cases in which the contravention is attributed to a natural or legal person highlights the scandalous difference with the access difficulties in those cases in which the contravention is attributed to an administration. It seems to be a matter of magnitudes, especially relevant, the more weak the individual in question is. In these cases complaints are usually very effective. The effectiveness is high in those cases in which an act or omission of an individual damages the possessions or rights of another one.

- Effectiveness depends on who contravenes. In some cases administration is very strict and coercive following a procedure. However, in other cases, administration does not intervene, omits, keeps quiet, and you have to go to the contentious-administrative so that it acts. If you get a judgement in favour, administration is reluctant to act and measures from the jurisdictional body must be sought, to force administration to execute the judgement. This subject goes on forever in time.

- Although the access is considered to be ineffective when administrative jurisdiction intervenes, in the case of civil jurisdiction the effectiveness is high. The big problem here is the costs. And this is because although in the contentious there is not usually conviction to pay costs, there is in the civil, and
they are usually considerable. In the civil the main problem is to find trained professionals, and there is also the problem of specialization of the competent judges to know the case.

From the negative or very negative assessments the following points of view can be highlighted:

- There is a big deficit in the access to justice. The obstacles of excessive time to obtain a firm decision and the prohibitive cost impede the effectiveness of the access. Although it is true that, each time the environmental damage assumption is more important thanks to the regulation of the act of environmental liability. Administrations have not exercised their jurisdiction administering prevention and redress. Judges do not sharpen their powers. Judgements are very different if they are about administrations. In these cases, judicature convicts administrations to do, but there are not similar judgements for individuals. We have to be very critic with the incorrect “transposition” that Act 27/2006 makes.

- The access is equally ineffective. Administrations do not exercise an effective protection of environment and they do not even protect it against economic interests.

- In the 90% of criminal cases, the protection is not effective. The implementation in practice of disciplinary proceedings that administration is making protects the person that has been accused. Two months after lodging an accusation there has to be a notification, otherwise, it expires. Six months after, a disciplinary proceeding must be open otherwise it also expires. In all the cases you come to an agreement with the accused person, everything is made after legally established time limit in order to avoid punishing, so, the decisions are taken with files that have already expired. This way, it is achieved to eliminate everything thanks to the induced expiry. Administration acts in connivance with property development companies, this happens, especially in the sphere of construction industry.
3.3. Obstacles and solutions for the achievement of environmental law access

3.3.1. Active legal capacity and changes introduced by Act 27/2006

One of the most important legal obstacles admitted by the doctrine and the studies in the matter of access to environmental justice that compare different procedural systems has to do with active legal capacity, procedural assumption and “sine qua non” condition to be a party in an administrative procedure or exercising legal proceedings, that is, the aptitude to sue or charge.

Legal capacity has to do with the existent connection between the protection complainant and the object of the action, that is, if the person that sues Administration defends his/her own possessions, if the complainant tries to avoid an impairment of resources, etc. This concept has been related to the concept of “person concerned” in the administrative procedure, which has been the target of extension with the acceptance of collective or fuzzy interests as it happens in environmental matters.

The establishment of actio popularis in the Spanish Constitution of 1978 and in the Organic Law on the Judiciary should be enough criterion to interpret legitimation widely and extend it to all the environmental matters, closely related to the right to protect environment enforced to everyone in the article 45 of the Constitution, as proposed by numerous authors.8

Unfortunately, actio popularis has only been legally recognised in the criminal sphere and the problem of legitimation still persists in many environmental Administrations, for example in hydrological matters, in Contentious-Administrative Courts, and also in civil Courts, to which people go to a lesser extent as it will be expounded, especially for fear of the costs of the procedure.

In matters that are closely related to environmental matters, such as town planning, protection of the coasts and historical heritage there has been instituted in the corresponding

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legislation a public action that allows any citizen to demand in Administration and Courts the respect to legality, a side of the right to participate. It also happens the same as regards National Parks and in many environmental autonomous laws, with which it seemed to be confirmed a tendency to understand public action in environmental matters, that does not demand any requirement to the person that tries to operate the defence of legality and this would be before long recognised by the state legislator.

In spite of this legislative tendency and a bigger jurisprudential permeability thanks to recent judgements of the Third Chamber of the Supreme Court the state legislator has avoided the establishment of environmental actio popularis and has limited to enable legally, environmental defence organizations under certain requirements, an approach that was criticised to the proposal of Access to Justice Directive.

Despite everything written previously, what matters for this study is what really occurs in the forensic practice and the majority of the interviewees answer to that.

A.- Do you consider matters relating to active legal capacity to be an obstacle?

There are two positions among the consulted lawyers; ten of them consider legitimation to be an obstacle even at present and five of them do not consider it to be an impediment now to access to justice.

Those who do not consider legitimation to be a barrier to the access, admit that it was previously so and that Act 27/2006 eliminates the previous doubt situation. Despite the preceding, they explain their position as for the existence of requirements for the associations that intend to sue does not fit with the need to have established a real public action.

In this group of opinion there are also included those who do not consider legitimation to be one of the main barriers and they also show that the true challenge is the real application of the wide conditions for legitimation in Courts, and not the legislative recognition of a wide legitimation that they consider to be sufficient (In the end legitimation is a problem although it is not in its legal recognition, but in the judicial application of it- problem with the judges that do not understand the defence of collective interests-).
Some of these interviewees likewise show the existence of surety bonds in contentious-administrative and criminal jurisdictions that frustrate legitimation and that involve true barriers, although they are financial ones and they actually prove that access to justice is not resolved extending legitimation from legislation, but there are other economic pitfalls linked to the inadequate judicial application.

The lawyers that have opted to assert that the in the question of legitimation we face an objective obstacle to access justice, criticise the lack of coherence of the state legislator who has not introduced an environmental public action and that, in view of the increase of public actions in autonomous and sectoral legislations -coasts, town-planning, national parks, historical heritage-, the legitimation or legal capacity of environmental defence associations with certain requirements of Act 27/2006, means a step backwards, a retreat, compared to the previous situation and it is even a failure to comply with Aarhus Convention.

With public action everyone is legitimated to demand the compliance of the regulations that protect public goods, with legal capacity for associations with requirements of Act 27/2006 a dangerous confusion and a restriction has been created and the solution to the problem of legitimation as a requirement has been obviated, and this was its elimination suppressing the need for accreditation of environmental collective interest. These new requirements, such as two years experience and territoriality, go beyond the classic obstacle of statutes and aggravate enormously the situation.

It is admitted that the requirement of legitimation has been a procedural hindering argument on the part of Administrations and individuals that have been sued or charged by citizens or associations, and that it has been welcomed by Courts, in what is considered as a “conventional drift”, a mere formal aspect independent of the content of the litigation that has meant serious beatings in many cases, that moreover are considered in the end of the procedure, in the judgement, with the frustration it means once the application and evidence have been dealt. It is also stated that being it the “Gordian knot” of the NGOs intervening ability, this formality must be overcome trough associations training.

Another difficulty pointed out by several interviewees is the different interpretation
of the possibility to be a party in an administrative procedure depending on the different Administrations. This circumstance will also exist in the administrative and judicial restrictive interpretation of the requirements of Act 27/2006 that will mitigate a first didactic effect of recognition to environmental NGOs in all the environmental procedures to recently-created administrations.

In practice it is pointed out that legitimation is an obstacle for the residents associations created to defend the rights related to territorial defence through the implementation of environmental regulations, that moreover would not be considered in the wide legitimation of Act 27/2006.

B. What is your assessment of the changes introduced by the Title VII of the Act 27/2006 in this respect? Does it improve or worsen the situation?

With regard to this question there are two opposite discourses that are equally shared by our interviewees.

😊 Half of them think that Act 27/2006 has been a big step, similar to that of the recognition of public action in the Law of Coasts in 1988.

At the same time the aforementioned Act makes it clear for the whole of Spain that the environmental NGOs that fulfil such requirements can be considered as a party in any environmental administrative procedure, apply for an administrative remedy and sue in contentious administrative Jurisdiction, not recognising public action as in some Autonomous Communities, where the problem had been solved.

😊 The other half of the interviewees believe that the situation has worsened with the passing of the Act 27/2006 that has meant a backward movement because it has restricted access to justice not taking into account the previous juridical situation and it has caused a lot of confusion with new requirements.

C. If you consider them to be an obstacle: what would you propose in order to solve it?

The vast majority of the interviewees that consider legitimation to be a barrier, propose as an evolution of the juridical system itself the creation of a clear environmental public action similar to these recognised in town-planning, coasts
and historical heritage. This universal action would make the requirements of legitimation and its restrictive interpretation disappear, that as regards environmental collective interests would be completely open. Some of them remember that this solution would not avoid the real problems to access that are the slowness and the financial ones and that have to do with surety bonds, professionals fees and legal costs.

Others have defended the creation of a special body that went to law in favour of citizens in defence of environment and that was funded by the Ministry of Environment itself. It is also proposed to create and qualify services of environmental mediation and arbitration.

The intervention of the Ministry of Environment before the Ministry of Justice is also proposed with the aim of creating the necessary abilities to the compliance of Act 27/2006, which includes the information and training of judges. Otherwise it is even recommended an action of political and juridical complaint before the European Union.

3.3.2.- Slowness on judicial procedures

It is a commonplace to state that “Justice that comes late is not Justice” and, in the practice of legal profession it is usual to conform to a slow functioning of procedures in any of the orders: civil, criminal, contentious-administrative, constitutional or labour, although it has very few exceptions such as quick trials created in criminal jurisdiction a few years ago, or special contentious-administrative procedures owing to the defence of the right of free assembly before an imminent strike call. The slowness varies and depends, all the same, on each Court, each Provincial Court or each Tribunal. The delay on the procedures of the cases in one or another judicial seat is sometimes the reason for the choice of the court.

In general, all the juridical professionals accept that “abbreviated” procedures are euphemistic and the procedural time limits to bring an action, for Administration
to send a file, for a Judge to solve proceedings for reform, an appeal to the highest authority, an appeal from a judgement, to take evidence, to convene an oral trial, señale audiencia previa o vista, or to issue judgement depend on time limits that get prolonged and increased. If we pay attention to procedural laws, they fix the previous time limits in days, and, however months and even years can go by before you get a file or before a judgement is issued. The time limits fixed for citizens to bring an action, present evidence, have recourse against an unfair judgement, etc are a very different matter. These time limits can be three, five or twenty days that cannot grow longer without running the risk of the right declining.

To give an idea of the Justice situation of obstruction or overflow we can say that in Courts for Contentious Administrative Proceedings in Madrid or in Murcia parties are being summoned for the hearing of the contentious-administrative abbreviated procedures one year and a half after admission a trámite of the application.

It can be stated that the time taken to issue a judgement in relation to any case, concerning any matter is a chronic ill afflicting the Justice Administration. What happens in the majority of the cases relating private and patrimonial interests is that people turn to provisional principles to allow the passing of time not to worsen the satisfaction of the rights at stake, by means of principles such as interests on arrear, preventive annotations in the Land Registers or conditional release. In the case of environmental goods, associated to collective or multi subjective interests, the delay of legal proceedings risks seriously their conservation or environmental quality (pollution). If the judgement arrives after the perpetration of environmental damage, most of the times restoration is going to be very difficult. That is why protective measures such as the stay of the project or plan, become crucial, in such a way as not to harm the end of the procedure and to apply in the matter the prevention principle- in such a way that the eventual environmental damage is avoided and it is weighed up with the individual good whose safeguard is tried- and the precautionary principle- that mitigates the requirement to prove the danger of a potentially damaging activity.

Do you have to make any observation in relation to the time taken from the beginning of the respective administrative or judicial action to the issue of a final judgement?
In this question about the time that it takes Courts to give a well-founded in Justice answer in any environmental defence action there is an unanimous answer considering the procedures to be slow or very slow.

Although it is admitted that it is a general problem of the judicial system, a matter of lack of agility in the procedures, in environmental cases it is considered to be especially slow. The slowness comes from the complexity of many environmental cases, which derives from the plurality of the parties; this requires the intervention of different experts and the practice of costly trials.

The special slowness is also made clear because of the type of juridical good that is being tried to be protected, the slowness turns into an obstacle that frustrates the action of defence: if the judgement in favour arrives late and the environmental damage has taken place, the legal protection is ineffective as the object of the procedure has disappeared.

If in the interval of the judicial procedure, the environmental and physic reality is modified by the development of a plan, project or polluting activity, afterwards, the restoration is going to be very difficult or impossible. Sometimes if you go to higher authorities, the environmental problem can even have disappeared because of the elimination of the values that were tried to be protected- "now, there is not anything to be protected". In view of this reality, that is frustrating for many of the interviewees, these have stressed the necessary immediate adoption of construction work stay protective measures, so that the judicial action can be effective.

Among the time periods referred to, some lawyers have stated an average of 3 or 4 years at first instance, the same for the holding of a hearing and 7 or 8 years at Supreme Court, the tremendous slowness of the sanctioning files in environmental Administration is also mentioned.

The slowness problem as one of the interviewees points out is also evident in the enforcement of judgements. This matter is even more complicated as it is about enforcing a decision that has already been made but that is not implemented and the reasons adduced are the lack of resources.
A. Could you give an example or any specific case?

Among the examples given by the interviewees it stands out the case of a paper mill dumping in a river, which was reported in 1992. The hearing in the criminal first instance – after the investigation- was in 2006, and the interviewee considers that he has been lucky to have been able to negotiate a conviction, although symbolic, and not having to go to the Supreme Court.

In another case, in view of a pollutant emission of a chemical company in 1994, the first instance Sentence was not issued until 2003 and that of the Supreme Tribunal in 2005.

Another case that can exemplify the need for a more agile environmental judicial protection are the administrative and judicial appeals lodged against close season orders in the matter of hunting. It is mentioned a case in which an Order of close season for hunting of 1997 was appealed and the procedure was solved in 2001, the sentence being not applicable. If the procedures delay for more than a year their resolution does not make any sense as the Order appealed has stopped taking effect.

In the concrete case of an urbanization that someone wants to question, it will have been already carried out when the final Judgement is issued five or six years later.

In cases of enforcement of sentences the situation is even more serious, and it is mentioned a case of a demolition legally agreed in 1999 that was executed in 2008.

B. In the event of considering this matter to be an obstacle for the access, what would it be your proposal to solve it?

The simpler proposal is that asking for the time limits required by procedural laws to be applied. These laws assume that a contentious-administrative or criminal procedure has to be solved in not many months.
Among the common proposals these stand out: making a study to explore the possible solutions and creating more Tribunals and Courts, creating specific posts for judges, public prosecutors and civil servants, even doubling them…

Many interviewees are convinced of the need to create specific Tribunals and Courts or specializations in the existing Courts, as in the case of gender violence, or creating uniform criteria to implement Environmental Law at Courts. In order to do that it would be necessary to train judges and public prosecutors in environmental matters. These judicial bodies would just exclusively know matters related to environment. It is also proposed creating regional Courts specialized in enforcing judgements.

Another proposal refers to the creation of a special and summary procedure for serious environmental damage cases that would have shorter time limits.

The previous proposals do not leave out the need, present in the answers, to assign to Tribunals more personal and economic resources to process environmental cases, including assigned environmental experts whose fees must be satisfied by the Tribunal. There is also a proposal to finish the transfer of Justice powers to the Autonomous Communities so that they make an effort to provide Tribunals with resources.

There have also been references to the scarce interest of judges, which must be increased in environmental matters, that may be a factor that slows down procedures. At the same time this lack of conscience or commitment spreads to Administration themselves and their experts, whose lack of protection is the blameworthy of the collective interest environmental defence action.

3.3.3.- Costs of access to Environmental Justice

“How much Justice are you prepared to pay?” reads other expression said in law courts, mentioning the costs entailed in the beginning and processing of any lawsuit and
that, of course, accompany an environmental case, in which we will find polluting big companies, Administrations, all of them equipped with enough economic resources to the defence of their acts such as big projects or plans that imply important money sums for their carrying out or their stoppage.

The expenses that any citizen or association must accept to access to Justice and that will come across as the procedure moves forward are the bonds or securities that can be imposed for the exercise of judicial procedures or for the suspension of the administrative procedures appealed, the fees of the participant professionals in the case, such as Solicitors, Lawyers, Notaries, Registrars, Experts- private or judicial- and investigators, the cost of other pieces of evidence (analyses, cartography, videos, informs) and even procedural costs, that include the expenses in which has incurred the defending party when you are convicted to pay them, sometimes under the maxim “the loser pays”, being this last concept the one that causes more previous reflection to citizens or associations that want to turn to Justice and that get dissuaded from doing that. It must be taken into account the value of a citizen or a group of them deciding to require the implementation of environmental Laws and the loss that it means if they do not do it. That is why in other legal systems such as the American one the citizen or group that defends the environmental public interest is rewarded. Other concepts such as judicial fees cannot be required to citizens and associations, and in the case of deposits they are usual in labour jurisdiction.

Considered as one of the big obstacles to the exercise of legal actions, with regard to the cost of the procedure it must also be taken into account that the clients in these cases defend a collective interest, normally neglected by Administration, and that our society is not precisely structured to defend democratically public goods such as the environment inasmuch as some few operate in the name of community against polluters and governments. Aware of that, Aarhus Convention intends that these costs are eliminated or reduced and in its article 9 alludes that judicial remedies must be “inexpensive” and also that financial barriers must be eliminated as far as possible in administrative and judicial procedures.

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10 Article 20.3 of the Organic Law on the Judiciary that establishes “securities that due to their being inadequate impede the exercise of actio popularis, that will always be free of charge, shall not be required”
Do the costs to access to environmental justice mean to be an obstacle? Please, consider in your answer the assessment of questions such as professional fees both juridical and expert and costs imposition.

The answers have been almost unanimous with the exception of two, one of the interviewees does not consider the costs to be an obstacle and another one that does not know but does answer.

😊 The person that answers in a negative way is based on the personal experience of an environmental organization that does not constantly go to law and that has not had to put up with big expenses. Moreover, he was hopeful of the recognition of free legal aid.

🧐 The rest of the interviewees consider that the costs of the procedure- fees, bonds and costs- are the most important obstacle for the access to environmental justice, a “remora” for the actions, a “handicap” impossible to overcome. The high costs in our procedural practice, limit and condition the lodging of actions. For example, if they go beyond two actions, reports or accusations they can imply unacceptable costs even for big organizations having a certain financial standing.

It is proposed that on the part of the holders of the contentious-administrative Tribunals they admit more easily claims of accumulation of court records and procedures so that plaintiffs save costs, given that many actions are directed to connected acts.

This situation of slowness implies that there are actions of environmental defence that are not lodged, that is, that the participation in Justice in defence of the environment is not encouraged, and that environmental problems that could be judicially solved, are only solved when any accident or catastrophe happens.

The request of guarantees for the adoption of protective measure means an obstacle as these are sometimes exorbitant and unviable for associations, that is interpreted as a contravention of Aarhus Convention which refers to “inexpensive or free” procedures.

Inside the costs, the fees of the professionals that take part are included: lawyers, solicitors, “official” and impartial experts, the latter must be hired at Universities or
neutral institutions in the cases in which you go to law against Administrations or big companies and there is a procedural imbalance.

Although some lawyers and experts renounce their fees and work voluntarily to contribute to access to environmental justice, even then the procedures are costly for the associations that do not have enough standing. Moreover, some of the interviewees say that the access to free justice is not functioning well and it is under valued as this implies little money for professionals.

Some interviewees question that the legal aid of lawyers and solicitors cannot extend to the citizens that try to defend environment.

In the costs of access we have included these of access and copy of administrative files, which neither associations nor citizens can escape from and have a high cost given their volume.

The interviewee that could not decide on the costs being an obstacle declares that it is really about the price of access to Justice, that fees cannot be fewer because of the dedication that the cases and the performance of the commissions imply. The NGOs will be able to stipulate costs with their lawyers, although in his opinion these will be high for them and even more for citizens. He also states that the lawyers in spell of court duty are not specifically trained in environmental matters so legal aid would not be very effective.

A. Could you give any example or specific case?

The interviewees have given examples of damage avoidance because of the length of the procedures as a precautionary measure of stoppage of dredging activities in a sandbank, that was a priority protected habitat in Directive 92/43/EC and that was going to be made with a heavy plant brought from the north of Europe.

Another of the examples that can contribute to a mentality change in judicial bodies happened with the provisional enforcement of a sentence that sided with a naturist group that appealed the endorsement of a residential housing estate in
a pine grove zone, a critical area where the black stork nested, and that, in spite of their application being estimated, they observed how the promoter initiated clearing works and massive wood-cutting.

B. What is your opinion on the article 23.2 of Act 27/2006 increasing free access to justice for certain environmental organizations?

Few interviewees have answered to this question expressly but these who have, have had a positive or extremely positive meaning.

So, they have considered it to be an important good decision, an advance or a positive step that gives facilities. Nevertheless they point out that professionals and experts lack bigger skills, experience and training and that it even lacks culture for the mechanism to be successful.

C. If you consider the measures adopted with Act 27/2006 to be insufficient, what would you propose to avoid that the cost of a procedure hindered the access to environmental justice?

There have been a lot of proposals, some of them are very creative and others are already present in other legal systems.

Among the strategies proposed, it would be that of correcting the inequality between those who invoke and promoters mainly in questions such as Environmental Impact Assessment and that of promoting institutional democratic culture and the active participation of citizens. It is also asserted that the public promotion of the implementation of the Act would be sufficient, as the majority of the legal disputes with NGOs would disappear.

It is also proposed the creation of a spell of court duty in the matter of environment open to every citizen not only to NGOs, creating multidisciplinary teams in the Bars and another option is the improvement in the funding of the groups, obtaining subsidies or even specific lines for environmental defence or an environmental litigation fund.

The interviewees have also proposed specifically that Administration repays litigants all the expenses in the exercise of the environmental action when it has not acted
as established in the neighbouring action in the local legislation or as established in the law of coasts when the action of Administration has encumbered.

Complementing the aforementioned some interviewees have proposed to review the system of costs imposition and to condemn to costs automatically to the defendants that are defeated in order to benefit collective litigants and that otherwise when the action is rejected it was the State that assumes the costs of environmental associations as they defend public interest, as it occurs in the criminal sphere. The imposition of sureties should also be reopened, starting from the recognition of the social function of the organizations that protect a good that is not individual but collective.

Also as a specific measure it has been proposed the extension of the cost-free status to sureties and guarantees requested for personaciones penales or the adoption of protective measures, by means of the exemption of them in environmental collective interest cases.

3.3.4.- Adoption of protective measures

Protective measures hope to achieve the securing of the effectiveness of the eventual sentence and are part of the right to an effective legal protection. Although there are different types of measures and creativity is an important factor in collective interest cases the most usual and effective is the stay of the activity or the effects of the administrative act. In administrative procedures and environmental lawsuits these measures are used to make up for the fast answer that the administrative or judicial procedure does not give and this way avoiding the environmental damage or the deterioration of the quality of life. They are adopted taking into account all the parties except for very provisional measures, which will have to be confirmed later and mean a procedural expression of the precaution or preventive action principle when there is environmental damage based on the guiding principle contained in the article 45 of the Spanish Constitution.

It means for its part the maximum expression of the public participation in environmental
decisions as the public can opt to suspend an approved project or plan not having the required environmental or legal guarantees, sometimes a polluting activity, all of this while the legality of the activity, project or plan is being decided through sentence.

Being the criterion for their adoption the effectiveness of the appeal lodged, that does not have any problem and being for its part easy to prove the “appearance of good justice” the way as the risk for environmental goods, protective measures are not a permanent feature in the environmental procedural practice, on the contrary, they are very difficult to obtain.

On the one hand, the socio-political and economic relevance of a lot of projects with big environmental impact and also their media and political repercussion, means that most of the times protective measures are directly refused by Judges. On the other hand, the “measures against” in the contentious-administrative imply the security or guarantee to avoid eventual damages caused to the titular of the activity, project or plan and must be raised in accordance to the article 133 of Administrative Appeal Courts Law. In most of the occasions the securities or guarantees are so high that the plaintiff or complainant citizens or collectives cannot take charge of the payment and the measure is not adopted.

Some authors\(^{11}\) have pointed out that, in accordance to the case-law of the Supreme Court the judicial criteria for the adoption of protective measures and securities should ponder the public interest at stake, the fact that the damage to individuals can be reparable and also the fact that the damage to environment can be irreparable, the evidence of the particular damages, the exceptional nature and the obviousness of the nullity of the act of which stay is appealed.

It is curious that as contrasted with its importance in procedures and for the environmental protection and the reference in the article 9.4 of Aarhus Convention there has not been any regulation on the subject incorporated into the Act 27/2006, on 18 July, not even in connection with the need to adapt the security to the financial status of the plaintiff.

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\(^{11}\) 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 Tribunal Supremo.”. Revista de Administración Pública (1988) p. 188-197
What is your opinion with regards to the current use in the adoption of cautionary measures? Are these serving their mission of protecting the legal interest under litigation?

There are two views regarding this point. A wide majority replies negatively and a small minority nods positively.

😊 The small minority believes the mission is being served. This view starts by acknowledging significant improvements made to preliminary injunctions in the contentious administrative Law of 1998 (notwithstanding the fact that some of the listed injunctions disappeared) and the fact that there is a higher level of sensitivity of judges and magistrates that redounds on a more frequent application of such measures, but will need to be complemented by the creativity of solicitors that will have to look for new arguments with respect to the innocuousness towards the interests of their counterpart - defendant (i.e.: affected promoter).

It is said that preliminary injunctions are effective on environmental matters whenever adopted, but an abandonment of such measures is observed when unaffordable bails are required by courts from citizen and civil society recurring groups with limited funds.

😢 The majority opinion has, on the other hand, a variety of reasons to consider that at present, preliminary injunctions pose a great obstacle on access to justice. There is almost unanimous agreement on the observation that courts are generally not inclined to implement them and that in most of the cases where they are requested, these measures are not adopted –“practically inexistent”- even though the irreparable harm inflicted over the environment based on economic interests is blatant, resulting in the preponderance of the latter in most occasions.

At the same time, it is said that in 80% of the contentious administrative cases “you either get the adoption of the preliminary injunction or else it is quite the same as having lost the case”, even though you later win the case with a “moral decision”, which is quite regrettable.

The lack of the adoption of measures of suspension is particularly serious on urbanism related issues, and rarer on contentious administrative issues than it is on the
criminal jurisdiction. Some of the subjects interviewed understand that preliminary injunctions normally lack efficacy and are not adopted against the Administration when environmental protection laws are not observed by it. When preliminary injunctions are adopted, highly disproportioned bails are requested, these sums being “stratospheric” when dealing with megaprojects, unaffordable to the social collectives, with no attention to the group’s economic capacity or its trajectory.

This negative predisposition of courts is due to an avoidant mentality, a lack of political will and a fear long established in the judicial system, but these are all easy hurdles to overcome with the proper environmental education and training.

A. Could you provide examples or specific cases you are aware of?

Among the positive examples that can be mentioned, is the avoidance of the construction of a urban development in the shoreline, the adoption of a preliminary injunction without the requirement of a bail on a national park, and the suspension of work on a big port ordered by an autonomic court due to the intervention of the Spanish Government in defense of its administrative attributions in coastal matters.

Among bad experiences, at least two cases are brought to memory. One involves the overwhelming imposition of a disproportioned bail for the adoption of a suspension measure with regards to a dam, above which a favorable decision had already been obtained. The other case involves the suspension of works on a highway development project, where a high bail was imposed in order to obtain the suspension. A large amount of funds were raised for this purpose by the environmental group litigating the case, but the requested sum was not fully attained and the court decided not to adopt the requested suspension.

B. In your opinion, can the use of precautionary measures be improved? How?

All the opinions heard with regards to the specific point agreed that the use of precautionary measures can be improved, although different solutions are described.

One proposed solution is the amendment of the precautionary measures, by acknowledging the extreme frailty of environmental interests over which even the
slightest action or omission can have enormous impact, always keeping in mind the “Precautionary Principle” of international environmental law. This view notes that it would be necessary to moderate the presumption that the Administration is the guardian of environmental interest, understanding that the environmental protection can many times be required from the civil society and the people even facing the Administration’s criteria. Therefore, this view requests a moderation of the presumption favoring the environment. It is said that a legislative change of this nature would need to establish measures conducing to avoid abuses that at the same regulate the requirement of bails according to the solicitants trajectory.

Some of the people that were interviewed are claim that a change on needs to be seen on the environmental consciousness of the judges, more than on the spirit of the laws. They claim that judges should enter the game in the awareness of the risk that environmental damages pose.

Another possible solution that has been pointed out is the specialization of the attorneys that request the application of the precautionary measures, and the possibility of having expert witnesses and professionals that could assess judges on trial as to the adoption of precautionary measures and preliminary injunctions, or any such measures aimed at avoiding environmental hazards.

Finally, the intervention of Environmental Prosecutors on trial and on the decision making process of judges when facing the adoption of precautionary measures is positively regarded.

3.3.5.- The imposition of bails and judicial cautions

As previously exposed, procedural laws require bails from any citizen or group that wishes to initiate the trial or the impersonation on popular accusations (broad standing action) in criminal actions, according to the Criminal Prosecution Law\textsuperscript{12}, although the Organic Law of the Judicial Power\textsuperscript{13} imposes limits on excessive bails. On occasions, by

\textsuperscript{12} Articles 280, 589 and following articles of the Criminal Prosecution Law.

\textsuperscript{13} Articles 19.1 and 20.3 of the Organic Law of the Judicial Power.
using the Aarhus Convention, bails have been reduced to be adapted to the economic capacity of the environmental groups. This happened at the provincial hearing of Murcia where the bail was dropped to 300 Euros, on a case that was initiated by the Minster of Treasury, and where in order for environmental groups to adhere a bail of 6,000 to 9,000 Euros was initially requested. Since Law 27/2006 does not deal with criminal issues, article 9.5 of the Aarhus Convention –about the reduction of economic barriers to access to justice- doesn’t find an easy application. What’s more, existing reports by the Minster of Treasury allege that Law 27/2006 does not apply to criminal procedures.

Cautions and guarantees are also required –usually a bank endorsement- to avoid and palliate foreseeable prejudice in the face of the adoption of precautionary measures in the contentious-administrative jurisdiction, and in the civil jurisdiction that applies on its subsidy. If ever these cautions do not consider the economic capacity of the plaintiffs and like in many occasions litigation is brought against large projects or activities, the requested amounts will be significantly elevated and, the requested measures will not be adopted (exactly the way it has happened in many cases already discussed here). Law 27/2006 does not provide among its rules for any sort of regulation of the cautions and endorsements in consideration of the solictant’s economic capacity.

Going on the last question and in relation to question 3.3.3 regarding costs, what is your opinion on the imposition of bails and cautions?

The immense majority of the people we interviewed think poorly of bails and cautions. They consider that by impeding petitioners to face payments of great size, cautions represent a manifest obstacle for environmental protection that should be suppressed because it empties precautionary measures of their content.

A bail is a dissuasive barrier that in fact impedes the precautionary measure because it presents too high of a cost for litigators; for this reason bails should be eliminated on a precautionary measure reform, basing their application on the Precautionary Principle and on the defense of a fundamental right.

14 Artículo 133.1 de la Ley 29/1998, de la Jurisdicción Contencioso-Administrativa
15 Artículo 728.3 de la Ley 1/2000, de Enjuiciamiento Civil
Only one positive testimony was found regarding this question, and it expressed that when very high bails are accepted and satisfied, precautionary measures are highly effective.

Some of the testimonies emphasize that the real problem is within the criminal jurisdiction, where judges impose elevated bails, while in the contentious-administrative jurisdiction not many precautionary measures are adopted and therefore, not very many cautions nor bails are required.

It is also said that cautions have become selective filters that should be oriented according to the economic capacity of the solicitor because if they are not, precautionary measures are deprived of their effectiveness and single citizen are required to assume solely the cost of the defense of a collective patrimony.

A. Can you give an example or cite a specific case?

The suspension of works of urbanization in the coast without the need of a bail is cited as a positive example. Another case recalled was the suspension of a residential development on a protected pine grove, obtained again without the requirement of a bail but with the benefit of a court decision that sentenced the project not to be executed.

Among negative examples, a case in criminal jurisdiction that involved mining waste is cited. The court required a bail of 11,000 Euros for the adoption of a precautionary measure, which was too high an amount of money for the solicitant group to raise. In that case, the involvement of the district attorney was crucial. Another case involving a restaurant is cited, where a local environmental group got a favorable court ruling that has not been executed in over 13 years.

B. In case you consider such an imposition as being an obstacle toward access: what solution would you propose?

The majority of the proposed solutions go from the suppression of the bails, their elimination in the case of class actions –that according to the Constitution and the organic legislation needs to be free- as a mere consequence of the application and
development of the law. Also, it is considered as being consequential to the exercise of the fundamental right to take legal action in defense of the environment, right that should never be hindered. The social role of environmental groups should be acknowledged, as they provide a service to local communities. They should be fitted into the hypothesis of the private prosecutor instead of the popular prosecutor.

Other voices express that the bails should be replaced by the application of the Precautionary Principle, which should inform the judicial decision with regards to the adoption of precautionary measures on environmental matters.

Without purporting their suppression, some ideas propose the imposition of bails to the developers and defendants, as to economically value the risk their activities pose to the environment and the affected people’s patrimony.

More flexibility in their application as to consider the plaintiff’s socio-economic capacity is also one of the ideas suggested.

Another option discussed is to establish assessment teams in the court houses, to technically support judges and magistrates before their decision on the adoption of any cautionary measure.

3.3.6.- Measures for the reestablishment of the affected environment

Along with article 45.3 of the Spanish Constitution –which establishes criminal and administrative liabilities for the polluter and the duty of reparation of the affected environment while enabling the application of the Principle of Communitarian Law “Polluter Pays”– the environmental restoration measures that accompany administrative and judicial resolutions, seem like the most effective penalty towards the ultimate goal of environmental protection. Also effective, is situating the real cost of restoring things to where they were before the harm was done, and locating environmental responsibility in the hands of the material author of the harm or the individual that benefited economically from the environmental degradation.
Even when automatically imposed to the responsible of an administrative environmental illicit behavior, environmental restoration poses a big challenge to Administrative Law. In the practice, Administrative Law is many times impotent due to a lack of agile mechanisms, and even because of a lack of committed political will once the harm is determined and responsibility –most of the times quasi-objective- is established. In criminal procedure specially when facing urbanism crimes, only in the most blatant cases measures such as the demolition of the built structure are imposed, being their execution a much more complicated procedure than the trial itself, all due to a lack of resources and the almost nonexistent collaboration of the Urbanism Administration and the Judiciary.

In the rest of the contentious and the civil procedures, the execution of reparatory measures is very complicated as well. For these purposes Law 26/2007 is of paramount importance, since it establishes Environmental Liability and rules regarding quantification and the execution of the measures.

Are environmental restoration orders effective?

🗑️ The majority opinion tends to reply negatively. Only two of the interviewed participants consider them as being an effective mechanism and three of them do not know and therefore do not answer.

😊 Those who consider the mechanism as being effective, say that being the “polluter pays” principle a matter that is out of discussion, no one argues against the necessity of the reparation orders. Equally, in terms of their effectiveness, cases where the order is to restore the environment to its previous conditions are not as well evaluated as reparation orders are.

People that replied negatively, state that the ineffectiveness of the reparatory measures was resolved in their legislative origins in the XIX century, and that the newer legislation developed after the Aarhus Convention has overlooked it completely, despite the fact that newer legislation doesn’t necessarily has to bring broader and better application.

On one hand, in criminal procedure there was the possibility of executing environmental responsibility through the obligation of restitution to the previous state. There are many
other mechanisms to require reparation from the Administration or the responsible parties, but courts are reluctant to give this type of order even when it is their duty to do so. Another problem that has been encountered is the later execution of these orders. Massive institutional opposition, even in the absence of the concerned businesses and corporations, has been experienced when facing a case of illegal building and construction, making any reparation decision effect-less.

The majority speaks from a day to day basis, where in most of the environmental cases the affected environment is not repaired nor reestablished to its previous state, restoration is not conducted or not effectively executed. There are noticeable cases where restoration hasn’t been required from the responsible party or it has been on an insufficient way, like the case of the sinking of the “Prestige” or the mining waste spill onto The Guadiamar river’s waters in the Doñana National Park, although it is pointed out that the “de facto” exemption of performing the payment or the restoration is not necessarily related to the Corporation’s size.

Among the causes that have lead to this situation, participants mention the lack of political will, the overwhelmed courts and their lack of seriousness towards reparation measures that are in many of the cases not at the stature of the of the caused damages, leaving environmental problems unsolved. The Administration is many times to tolerant of unexecuted reparation orders, and society –participants say- lacks sufficient education to make convictions effective. Because of these circumstances, economic interests prevail over the reparation of the harm.

A. Can you cite specific cases?

A 2007 case is mentioned, that involved the defense of public dominion over a maritime-terrestrial territory, in which the National Audience confirmed the expiration of a maritime concession for the use of that territory against the Law of Shores of 2003. Ever since 2003, the environmental defense group was demanding the recovery and devolution of the affected territories, but to date, and even with the legal recognition of expiration, nothing has been restored yet.

Cases involving land use regulation where demolition orders have been decreed, where out of six cases, there´s only one where the demolition has been executed, while the other five remain pending for administrative execution.
Other cases involve projects and plans that have been declared contrary to Law by judicial decisions, but are yet still constructed and with no restoration underway.

B. In case of considering reparatory measures ineffective: what would you recommend?

The first recommendation is to perform a better application of them, possibly through the creation of a more responsive contentious-administrative system and through the promotion of a larger judicial will to convict and command the reparation not only from the Administration, but also from private parties.

From a competences standpoint, participants suggest that a higher pressure be made from the State Administration to the autonomic and local administration and from the autonomic administration to the city and town councils. Questions are even raised as to the necessity of furthering the distance between the location of the environmental harm and the competent authority to execute a judgment, specifically in the case of small villages.

Another solution that has commonly been suggested by many of the interviewed participants is that of arbitrating a process of personal liability on administrative authorities and servants, with the possibility of being an automatic criminal liability executed from the public ministry’s office.

Finally, the accent is put in the correct application of the Law of Environmental Liability, which can play a crucial part in the design and quantification of restoration and reposition measures for the natural environment, even more with the existence of financial guarantees.

3.3.7.- Execution of judgments on environmental cases

The same way it happens with administrative or judicial reparatory measures - that in many cases are parts of the contents of a judgment - the biggest frustration that individuals, environmental groups and their legal advisor and counselors can
experience, is that of obtaining, after overcoming a series of barriers on access to 
environmental justice, a favorable environmental judgment they are not able to enforce. 
Lack of enforcement or deficient execution has to do with a set of diverse reasons that 
go from the administration of justice and the environmental competences inside of 
governmental agencies, to the little attention that procedural regulation dedicates to 
this point, even while the executive phase is as an important phase as the declaratory 
phase, the way practice on the civil jurisdiction indicates.

Executive pretension are crucial for the conviction pretensions in environmental 
defense cases, and find their legal grounds in articles 24.1, 117.3 and 118 of the 
Spanish Constitution. After the Contentious-Administrative Law amendments, 
one would have expected that Law 27/2006 would have included the compulsory 
execution of environmental judgments in which reparation in natura are commanded 
(i.e. demolition, foreclosure of activities, cease of spills, etc.) and that it would have 
impeded the substitution of a conviction to remediate or cease an environmental 
harm by an “economic equivalent”\textsuperscript{16}. This law hasn’t mentioned any possible means 
for compulsory execution of judgments either, like the possibility to go to an agency 
that has environmental competencies to demand execution, agency that in many 
occasions could be the convicted party on trial.

Judgment execution might just be the weakest spot (“Achilles’ heel”) of contentious-
administrative procedure, as it is on criminal jurisdiction regarding accessory penalties. 
This requires a sounder application of the Law, and very likely the creation of a body 
of expert witnesses on environmental issues that could help and assess with the 
application of the Environmental Liability Law and its Rules and Regulations.

**What is your general evaluation regarding the execution of judgments on 
environmental cases?**

The vast majority has a negative opinion, even a “very bad” opinion of it, with the 
exception of two participants that do not know and do not answer.

\textsuperscript{16} PEÑALVER I, CABRE, Alexandre, at PIGRAU SOLE, Antoni (Director), “Access to Information, public participation and Access to 
justice on environmental matters: ten years since the Aarhus Convention.” Barcelona, 2008, p. 397.
The negative thesis explains that the administrative justice is working at deficit, and that it pays little or no attention to the execution of the decisions. There is no specific organ oriented to this task and with a majority of cases where the convicted Administration refuses to apply and execute what has been ruled on trial, matters stay in a blurry state of “no man’s land” being excessively dilated for extensive periods. This is a difficult procedure to face in environmental cases, and a frustrating one for a practicing attorney that struggles significantly to win his cases, and is later exposed to a reality in which he’s unable to enforce a decision that would finalize them.

To some, the failure of cautionary measures impedes enormously the execution of decisions, because that earlier cautionary step would ensure success in the face of a favorable decision. Facing the lack of the adoption of cautionary measures, one of the persons interviewed anticipated that only 1% of the favorable decisions would actually be executed.

This reality in contentious-administrative trial courts is less severe in criminal jurisdiction, where the execution of judgment poses less hurdles, especially with demolitions related to urbanism crimes. In cases of imprisonment, the convicted usually pays a fee to avoid jail.

The failure to execute decisions, especially in issues related to physical alteration of the territory, shows for some that the judiciary system works better when one has a greater economic capacity. It seems paradoxical, says one of the participants, that when an actor seeking environmental protection loses his case, execution on him is immediate, although it doesn’t work in the opposite sense.

It is also mentioned that District Attorneys and Prosecutors have a very week participation in the survey of the execution of decisions, even when these functions are among their competences as is their involvement throughout the entire environmental procedure. Judges are failing to do so as well, when they ought to accompany the performance of their decisions.

Among the causes signaled, is the fact that the execution of judgments depends mostly of the Administration’s personnel, and that action is normally taken against a negligent agency that after noncompliance to its duty, receives a new –this time judicial- command to execute a decision against its own behavior. Consequently many dilation resorts materialize.
On occasions, some comment, decisions are intertwined with political issues. In these cases what is consequently sought is indemnification without performing what was decided in the ruling. Corrective penalties, it is pointed out, are very mellow.

On other occasions, when a third party has to assume the execution of a sentence and the Administration is supposed to impose such execution, the latter is tolerant and abandons its functions.

A. Can you cite examples or specific cases?

Positive examples are reduced to the demolition commands on urbanism crimes that have already been signaled.

Among negative examples judicial victories are highlighted where no effect at all has occurred on the affected environment, like the case regarding a large hydroelectric dam, a massive mall on a wetland or the annulations of urban developments.

A big failure that is mentioned is that of criminal decisions on urbanism issues, where dwellings have been built without the observation of zoning laws in natural protected areas or at highly valuable traditional farm land, and the decision failed to establish responsible parties and was unperformed, badly impacting a whole community that now understands that the only thing there is to it, is an economical remediation but no demolition at all. It has been transformed therefore into just a supplementary expense of the construction project, project that has by the way not paid any license to be developed.

B. What would it take to improve their effectiveness?

It is suggested simply that actual execution of rulings in accordance to their strict provisions, and that the contentious-administrative domain start imitating what is performed in the criminal domain. The idea of the creation of a specialized organ in execution is also suggested.

Another possible solution would be the improvement of coercing measures to
sanction continuous noncompliance of a ruling, raising the sums or even, in cases involving restoration commissioned to the executed party, the possibility to seize the polluted or damaged piece of property.

It is also signaled, that a proper application of cautionary measures would ensure the effectiveness of eventual estimation judgments.

In criminal jurisdiction it is suggested that criminal liabilities be tightened regarding environmental cases, and that derived economic sanctions be so accordingly, since actually committing environmental crimes is being too cheap.

Again, the creation of an automatic criminal responsibility is proposed, for the public servants and officials that occupy public posts, in the face of the unexecuted orders and rulings, which could be prosecutable by the public ministry.

The creation of regional specialized courts for the execution of decisions is also proposed.

Lastly, on the competencies arena, participants demand a higher pressure from the State administration to the local, from the local to the autonomic, and from the latter to the town and city councils. It is also said that furthering the distance between the location of the environmental harm and the competent authority to execute a judgment, would be beneficial, specifically in the case of small villages.

3.4. Information to the public for the effective exercise of the right of Access to Environmental Justice

3.4.1. Actions towards public information

Are you aware of any concrete action that the Administration may have taken towards informing the public on how to exercise the right of access to environmental justice?
The majority of the professionals that were interviewed indicate that they are not aware of any generalized efforts. Some of them however, explain that in a few occasions and specific cases, have been aware of certain initiatives conducted by specific officials.

Among the latter participants signal that the Ministry of the Environment has a citizen information office and a data base that was created after much effort and concern. Also cited are the European Union publications and the Navarro Service for Environmental Information publications, although these they claim, are only performed to have an appearance of compliance.

**Maybe from an organization or a particular individual?**

Participants say the diffusion and education regarding access to environmental justice rights, has been brought by specific organizations, in the face of an almost non existent activity from the Administration. Some of these are Confederation of Environmental Associations in Action, and the Association for Environmental Justice (Ajá from its initials in Spanish) –promoter of this study- along with the General Council of Spanish Lawyers.

**Would you have any suggestions as to how the duty to inform should be performed?**

Many ideas –assuming there is a public budget to fund them- are suggested at this point. Here’s a list of them:

- To use a marketing and informational approach similar to that used with regards to the campaign against violence on women, i.e. press releases and adds in the media and in schools,
- Create a campaign like the one created to stop drug abuse and traffic
- Bigger efforts from the Ministry of the Environment to mobilize the Spanish civil society,
- Creation of a Department of Communications, Information and Participation, in each of the Provincial Administrative Agencies, to promote environmental information,
• The publication of an Access to Environmental Justice Manual for NGOs, labor unions and consumer organizations, etc.,

• Pamphlets, triptychs,

• Training courses for the Administration’s officials

• Citizen education.

3.4.2. Public access to court decisions and rulings on administrative recourses

In your opinion, does the public have an appropriate access to judgments and court rulings, as well as to administrative recourses?

The majority opinion is negative, although some participants think access is sufficient. The latter base their response in the fact that there’s access to court rulings and to jurisprudence through press or through the judicial branch data bases on the web, or else by requiring the information directly. However, it is said that times of wait and response could shortened and that even some Prosecutors (qualified professionals) face a number of hurdles to have access to the rulings and other decisions.

Those who poorly evaluate access state that there’s a lack of informational activity from the public services, and that access is only achieved by professionals and expert witnesses. Participants signal there’s a reverential fear towards the judicial branch, which stops citizen from even trying.

Regarding administrative decisions on environmental procedures, the answer is absolutely negative, since there is no database or publications available, not even for professionals and expert witnesses of the field, much less for the public in general. Participants continue to feel that the Administration does not listen and that problems in this area that people try to bring to courts do not eventually make it. The inactivity in this field has largely been denounced.

When accessing resolutions, things are considerably better in the judicial than the administrative branch.
If considered inadequate, do you have any proposals to improve accessibility?

Among the most recurrent idea, is the creation of a database of general access for all citizen that could be hosted by the Ministry of the Environment or the General Council of the Judicial Power websites, creating a special section for Environmental Justice. This special section could also be hosted by each Administration with environmental competences’ website.

The need to have an automatic system of publication of the administrative environmental rulings is also pointed out. The idea is to lower the costs and the waiting periods for access. It is also suggested that the Supreme Court and Constitutional Court’s websites be improved, to make them openly accessible.

3.5. Needed means to enable the effective exercise of the right of Access to Justice

It is notorious that the mere passing of legislation is not good enough a solution to solve the problems that access to justice faces. A different set of measures need to accompany the adoption of regulation, if regulation is to leave the paper and become real. However, more often than one would wish, these needed measures are unseen and laws stay in paper, giving the people the feeling that laws are not binding since their application is not guaranteed in practice. This weakens the foundations of the entire legal system, which society relies on for our healthy coexistence.

Regarding our present study, the measures we are addressing are non other than the approval and execution of adequate prerequisites, the realization of training and educational programs for the professionals involved, and an improvement of the structures, personal and material means devoted to the execution of the regulation that is pertinent to access to justice in environmental matters. Only the approval of the necessary complementary measures will achieve a real improvement of access to environmental justice.
In this section we’ll attempt to show the perception of several interviewed participants, regarding complementary measures and the real applicability of access to environmental justice regulation. We will inquire on whether regulation will enable a real change with respect to the previous situation or if it is quite the opposite and the law doesn’t go beyond written language on paper. To do this, we have asked participants on their perception of fundamentally 3 aspects, which are: resources the administration sets aside for access to environmental justice, courses and training specifically focused to that objective, effectiveness of the means for free justice.

3.5.1. Resources the administration sets aside for access to environmental justice

Generally speaking, only two out of seventeen interviewed participants evaluate this aspect positively. The fifteen remaining interviewed participants have a negative opinion regarding the question. It is therefore notorious that the perception that professionals have of the situation is not very encouraging. This means that, either the Administration is not set aside sufficient resources to enable an effective access to environmental justice, or the means and resources set aside are not made available for the interested professionals that develop their career in this sector of justice. We cannot forget that all of the interviewed participants are continuously and directly in contact with environmental law, and they are therefore speaking from a closer standpoint than that of a regular citizen. Their view is consequently an indicator sufficiently faithful of the real situation.

We will illustrate the most noticeable aspects manifested by both of the views.

A. Positive opinion.

Both of the participants that positively evaluated this point referred to the creation of the Environmental Prosecution office as a resource of paramount relevance for the effectiveness of access to environmental justice. Specifically, participants adjudicate the success story to the Montes Law[^17] that was the seed for the current environmental prosecution offices. The specialization of the members of the Public Ministry, and their legal recognition, are dubbed as the most important measure adopted to face access to environmental justice effectiveness.
Section 4 of this study discusses the vision of the Environmental Prosecutors, professionals that focus on environment and access issues and whose labor has been significantly important in the recent years, and their responses only confirm the relevance of this type of institution in the field. As from 2006, there has been an important increment in the number of environmental cases that the Prosecutors have been involved with\(^{18}\).

This said, both participants agree that there is a number of deficiencies that make access difficult, among which they signal the lack of means and personnel of the specialized bodies (Mainly SEPRONA and forest agents). There is a common perception that these bodies do not perform in their entire potential due to their poor material supply. Therefore, it is fair to understand that with already created structures, the lack is on their provisions. There’s a need of political will to prioritize their empowerment.

It has also been said that the competence shortening undergone by some of these bodies, especially in the case of the Forest Agents in some of the Autonomic Communities, and due to their status as Agents of Authority and Judicial Police (for matters related to article 283 of the Criminal Prosecution Law) in environmental cases\(^{19}\). If we add to this the lack of coordination amongst the different police and security bodies with environmental competences\(^{19}\), the situation is manifestly improvable. The lack of technical support to Trial Courts when facing environmental matters is also mentioned. There are no specialized or expert witnesses ascribed exclusively to trial courts for the determination of environmental infractions and the establishment of punishable conducts, which is not always an easy task. The lack of environmental and technical knowledge determines many times the impossibility to allocate responsibility, resulting in the impunity of certain behaviors.

The positive evaluation of two of the participants is evidently tainted by the manifested severe deficiencies the structure experiences. Even while it signifies a slight improvement from the former situation, the current state of things is far from being

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17 Law 10/2006 of April 28 by which Law 43/2003 of November 21 was modified. By its first-last provision, Montes Law introduced a new article into Law 50/1981 of December 30, that regulates the Organic Statutes of the Public Ministry: Article 18 quinquies, on which first section it is stated that “the General Prosecutor of the State, once the Public Ministry’s Council is heard, will designate as a delegate, a Prosecutor for the crimes against Land Use regulation and the protection of the historic patrimony, the environment and forest fires, with the rank of a Courtroom Prosecutor”.

18 Memoria de la Fiscalía General del Estado del año 2006, apartado relativo a Medio Ambiente y Urbanismo.

19 Civil Guard, National Police, Autonomic Polices, Local Polices, Forest Agents, Environmental Agents, etc.
correct and requires further improvements that these same participants identify as related to either the complete lack of specialized personnel (expert witnesses like eco-toxicologists, or their insufficient numbers (at SEPRONA, Forest Agents).

Therefore, the overwhelming majority of the negative discourse (fifteen of the interviewed participants against only two) becomes even sharper as we have noticed that the positive opinion is far from being an absolute.

B. Discurso Negativo.
The group of the majority (fifteen out of seventeen participants) goes even further declaring that, not only they are insufficient, but that the resources set aside for access to environmental justice are inexistent.

Among the most noticeable deficiencies, this group also claims that the lack of specialized independent expert witnesses and of the necessary funds to hire them, has a pernicious effect in the contentious-administrative venue, and generally whenever a member of the Administration is involved because in such cases reports are normally commissioned to the Administration’s technicians, subtracting the neutrality the specialists’ activity requires. If we take into consideration the fact that environmental justice is a complex issue, where there are not adequately trained judges yet, and where decisions are on many occasions based almost entirely on the expert witnesses’ reports, the necessity of neutrality acquires significantly vital meaning, because the ultimate solution of the dispute will depend mostly on the expert witness’ report.

The insufficiency is therefore in two different ends: in one end the lack of capable expert witnesses, and on the other, the lack of economic capacity to hire those that are available in the market. It is easy to imagine the frustration that a citizen, while looking for justice (either personally or through a group or association), can experience when, after a long procedure with high costs and difficult obstacles to overcome, finds himself at the end of a process in which the whole decision will be based on whatever the administration technician’s report will establish. This situation has brought the Administration in many cases to assume a role of both party and judge.

Most of the participants agree that the lack of resources is not an exclusive treat of the environmental justice, but a deficiency that affects the Judicial Power as a whole, even though is no relief nor does it improve the situation in any way.
Among those participants who negatively evaluate the availability of resources, there are some that are constructive in their critique, not merely pointing out a lack of resources, but specifying how and where, and proposing possible solutions to overcome the deficiencies they describe, like ways to optimize the scarce available resource, or the possibility or digitalizing the files and records (avoiding the need of costly and unnecessary printed copies) especially in environmental records that are usually extensive.

Evidently, the opinion of the interviewed practicing lawyers should be a call of attention on the parties responsible for allocating the necessary funds.

### 3.5.2. Training programs

As previously noticed, one of the additional measures that need to be undertaken in order to implement the new legislation is, along with the allocation of sufficient material and human resources, the performance of adequate training for the implicated professionals. Because of this, participants were asked whether they knew if either training programs of the administration or the mere education of legal professionals contemplated training on access to environmental justice.

We find that at this point the situation is a little more diverse and equilibrated. Eight of the interviewed participants stated they were aware of specific formation courses, six other replied they didn’t know of any, and three of them did not know how to answer (or does not know - does not reply).

Let’s review the highlights of each of the positions.

😊 **A. Positive opinion.**

Three of the eight feel strongly positive, where as five of them do soften their responses.
In the first group are those who cite as specially interesting the experience the Public Ministry has had on the facilitation to its members of specialized courses, like those offered by the CENEAM\textsuperscript{20}, also the course on access to information, public participation and access to justice celebrated in 2005 –therefore before the 27/2006 Law was passed-, also the efforts being undertaken by the Ministry of the Environment and Rural and Ocean Environments and the Ministry of Promotion. One of the interviewed participants cites a series of courses held by the Autonomic Communities to their officials with environmental competences, in which they are taught about the new legislation but also are trained as to how it should be construed. Courses held by the Bar Association, universities and some agencies are also cited.

Among those who soften their positive view, are those who believe that existing courses are too few, and that where there are courses for prosecutors, there should also be courses for judges that would obviously have an impact in the judicial implementation of the access to environmental justice law. This brings us back to the lack of environmental specialization in the judicial career, which due to the complexity of these matters translates into a serious obstacle on access to justice, issue to be discussed on a following section of the study.

There are also some who have mentioned the inclusion of these training courses in the educational seminars of particular unions. Once more, environmental prosecution offices are mentioned, in the role of educators and collaborators in the organization of these courses, although participants point these initiatives’ scarcity. Some bar associations have had a role, and also environmental groups that with little funding are able to develop highly valuable scientific and educational courses. Some say that even with cases of significant relevance happening, environmental law is not sufficiently considered by universities.

\section*{B. Negative opinion.}
Among those who claim not knowing of any particular educational program, there are those who say that not only courses are needed for training but also for environmental awareness. Some say they are aware of a few generic environmental courses but of none specific to the issue of access to justice. One of the participants says that lawyers

\textsuperscript{20} National Center for Environmental Education (CENEAM for its initials in Spanish), agency that depends of the Ministry of the Environment and Rural and Ocean Environments, located in Valasín (Segovia).
are under educated on environmental issues, but that they have them selves to blame, because they continue to consider that environmental law is too specific and lacking interest. This only reaffirms the need for courses and awareness that would at the same time create a higher demand of environmental education. If the problem is not perceived then there will not be a request for solutions.

3.5.3. Effectiveness of the means engaged towards free access to environmental justice

We observe two opposing perspectives with regards to this particular point: a very small minority of two that considers the means have effectively been engaged -one of whom circumscribes geographically the good performance to its own experience-, and big majority that evaluates the engagement negatively. Out the latter, thirteen participants consider that the available mechanisms are clearly inefficient, and only two other participants do not know – do not reply.

3.6. Final valuations

In order to finalize our interview, participants were asked to perform an overall evaluation of what they had previously replied to. Their responses are classified according to the following subsections.

3.6.1. Prioritization of the detected obstacles

Once the different obstacles to environmental justice were identified, participants were asked to enumerate them, in attention to their relevance (from more relevant to less relevant). In this fashion it will be possible to identify those over which more energy will need to be displayed and more urgently.
With the responses obtained, the following chart was elaborated. On it, from the A to the Q we’ll display the participants, and they have listed the observed obstacles from 1 to 5 (being 1 the most relevant and 5 the least).

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With the previous chart in mind we can prioritize the obstacles observed by participants. Especially interesting is the fact the three most relevant hurdles described were cited seven to eleven times by participants, and the following hurdles that were only cited by one to four participants:

A. Economic hurdles

B. Slowness of justice

C. Lack of transparency from the Administration regarding environmental information

D. Lack of environmental knowledge by those that need to enforce regulation

E. Difficult access to cautionary measures

F. Miss – information and lack of knowledge of the new legal mechanisms described in the recent access regulation.

G. Standing hurdles

H. Environmental legislation non compliance by the administration

I. Difficult judgment execution once obtained

J. Lack of recognition of the right to a healthy environment as a fundamental right

K. Quality deficiency of environmental regulations

L. Difficult access to free justice

M. Lack of political and administrative responsibility
The following chart shows the number of times an obstacle has been cited and how it has been valued by the participant:

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<td>ACCESS TO FREE JUSTICE</td>
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<td>LACK OF ADMINISTRATIVE AND POLITICAL RESPONSIBILITY</td>
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The following is an evaluation of the above charted results:

A. There apparently is noncompliance with article 9.5 of the Aarhus Convention that establishes each party: “shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”. It this is the view of the majority of the interviewed professionals, who on a daily basis face numerous obstacles to access to justice, it means that mechanisms that should have been implemented by the State have not been implemented, or are not functioning the way they are supposed to.

B. There’s a clear noncompliance with numbers 1 and 4 of article 9 of the Aarhus Convention, respecting economic and financial barriers.

C. Number 4 of Article 9 is under noncompliance regarding procedural speed

D. There is noncompliance with articles 4 and 5 of the Aarhus Convention (access to environmental information) and of Title II of Law 27/2006 that regulates the right to access to information in Spain.

E. Noncompliance with: article 3.2 of the Aarhus Convention, and the Eleventh Additional Disposition of Law 27/2006, that announced the launching of a training plan within the Administration, to specifically sensitize and inform its functionaries regarding rights and obligations regulated by the same law.

3.6.2. Good practices of effective access in our system

Environmental Prosecution offices are once more praised as valuable assets and particularly to this point, good practices. Forest Agents rise as highly important in the environmental police role, which defers to and recognizes the broad environmental knowledge whose collaboration in environmental procedures has a paramount importance.
Access to justice is positively highlighted by one of the participants. We think this is odd considering that the factual majority qualified both the regulation and its implementation of as deficient, particularly with regards to access to free justice.

Some say the broad standing is highly good, not only regarding current legislation but also what courts have interpreted of it. We also feel strangely about this remark, since in previous sections of this study, not few of the participants have stated that standing (or its lack thereof) is from time to time an obstacle hard to overcome within access to environmental justice.

One of the participants expressly signals out that a practice that should be imitated and extended, the ascription of the Superior Court of the Valencia Community of an eco-toxicologist as an expert witness and independent specialist for environmental matters.

3.6.3. Strategies to overcome the hurdles and extend the use of good practices

Two of the participants have required a higher involvement of the Ministry of the Environment and other administrative agencies with competences on environmental issues, in the diffusion of information for a better understanding from the citizen and a higher sensitization towards the environment. This request concretely wishes for an action to gather and make available the jurisprudence emanated from environmental affairs, the elaboration of specific training courses and programs, not only for functionaries, but also for private citizen and associations.

Another participant suggested the creation of a specific department in the different administrations, to execute the demolitions that be decreed, whether through an administrative procedure, or through a criminal one. There’s a clear correspondence between the observed obstacle of judgment execution and the proposed solution, regarding crimes against land use in which on numerous occasions a conviction is achieved with a demolition order that is executed in many limited occasions.
Two of the participants push for the creation of mechanisms for the diffusion of knowledge regarding access to environmental justice. Another participant expresses that networks are an adequate means of transmission of such knowledge.

Some suggest that, instead of a broad and detailed law, it would have been preferable to have a simpler one by which a public free action on environmental matters was created.

It is suggested that environmental justice users should rise as groups of pressure, in order to achieve the improvements that the system needs. In the other hand the importance of favorable jurisprudence towards access is highlighted, and strategic litigation is recommended. By strategic litigation, one determines the kind of decision that wants to be obtained as to start creating a jurisprudential criterion that favors access; accordingly a strategy for the presentation of the cases is created as to the attainment of those decisions pursued. This tactic is vastly used in other countries by environmental groups, mainly in common law tradition countries, probably because of their reliance on precedent. It has however not been sufficiently explored in our country, although the possibility to utilize it is more and more perceivable.

Some consider the administration should come up with protocols of common behavior, towards facilitating access to the citizenship.

Given the excessive slowness of environmental cases, and established as it is that this is one of the most significant obstacles to access to environmental justice perceived by interviewed participants, some propose that as was done with cases of violence against women and cases of domestic violence, a special procedure be created for environmental matters or, at least, measures to speed up the existent procedure be implemented. Another participant takes it further, suggesting the creation of Environmental and Urbanism Court Rooms, as has been done in the domestic violence arena. Other countries have opted for the creation of a specialized environmental jurisdiction\textsuperscript{21}, although in our system the sole creation of specialized court rooms within criminal and contentious-administrative jurisdiction may suffice. This would simply mean to promote for the specialization of a certain number of judges, the way

\textsuperscript{21} Some states of Brazil have a separate environmental jurisdiction.
it has been done with prosecutors, and amendments to the rules of case assignation as to leave the environmental cases to these judges.

Regarding economic barriers, some propose that the criteria for fees imposition be revised, in such a fashion that they would always be covered for whenever litigating in the public or the collective interests. Due to the present situation where noncompliance with environmental regulation can be cheaper than actual compliance, a participant claims for an increase in the rigor of judgment executions.

One of the participants says it is only a matter of strict and proper application of our existing legal system, and reminds of the hierarchical status that the Constitution gives to International Law. He wishes for a practical application of communitarian law in accordance with the relevance it is given in theory, especially in judiciary application, where European Law isn´t always properly enforced, or even known of for that matter.

3.6.4. The ability of judicial procedures to effectively enforce environmental rights

When asked about this issue, our participants´ opinion grouped in two clearly defined halves, with eight participants considering judicial procedures as capable of enforcing environmental rights (positive opinion) and nine of them considering them as not able to (negative opinion).

A. Positive opinion.
One of the participants highlights the dissuasive role of criminal procedures, and cites the proliferation of news reports regarding criminal environmental cases and urbanism corruption, establishing a clear relationship between the criminal procedure and the communicational treatment that is given to these matters. The media has a great capacity as a voice of denounce in the social level, and there is a great deal of resent from society towards environmental criminals.

There are in the other hand two participants that affirm that regulation is completely
satisfactory, and find that the problem is located on its application. This view states that when it comes to protecting particular interests, the rule is highly efficient, and that when the interests at stake are collective the norm becomes weak, much weaker when these collective interests are diffuse.

Another participant thinks judicial procedures are able to achieve the enforcement required, but that when in environmental matters large economic interests are faced to the protection of the environment, the situation is scarcely equitable in terms of strength, especially when the affected is a private party or the interested in the protection of the environment is a not for profit organization, and they have to face a large corporation. This situates us in the economical barriers mentioned earlier, that are among those more clearly observed and to which participants assign a higher relevance.

Another participant things that, even though established judicial procedures can be the proper means to environmental enforcement, judicial decision take so long to be obtained that in practical terms, justice comes late and environmental legal interests are left undefended.

From an eminently practical stand point, one of the participants thinks that even when populated with defects, these judicial procedures are the sole available mechanism, due to the little and almost residual valuation that environmental issues are given to, only respected when not in conflict with other interests.

Lastly, it is said that even when judicial procedures may have the capacity to enforce environmental rights, the application of those procedures does not reach its objective due to the absence of a commitment of Spanish justice with environmental defense.

**B.- NEGATIVO:**
Curiously enough, some of the participants in this group share opinions with participants of the precedent group. These are those who agree that theoretically speaking, established judicial procedures have the ability to properly enforce environmental rights, but that when it comes to a practical application, their ability becomes inexistent and rather totally deficient. There is even one participant that
grades judicial procedures, on a scale from one to ten, with a three.

Other participants blame the situation on a handicapping lack of means and of managerial organization in justice. Also, they say there is a lack of courage (sic) in environmental judgments that fail to explore all the possibilities legislation offers in order to achieve an effective defense of environmental rights and interests.

3.6.5. If considering that the Aarhus Convention has not been properly applied, what do you think is needed for a correct application to take place?

Three of the participants suggest that a deep modification of Law 27/2006 is required; while they point out that it keeps no correspondence with what the Aarhus Convention directs. These participants advocate for the creation of specific instruments and procedures for environmental matters instead of the current remission of them onto existing procedures. They claim that all the observed contradictions with regards to standing of environmental groups and associations should be eliminated. Finally, an effective judicial defense of natural resources should be reached for, and barriers and obstacles towards access to justice removed, starting with economical barriers (by for instance reimbursing the costs of litigation to those who litigate in the public and collective interest), and continuing by an adequate campaign of information and education regarding the rights recognized in the Aarhus Convention and their practical consequences in the lives of common citizen, campaigns that need to include younger citizen (like early school classes).

There are those who claim that one of the main problems we face is the lack of administrative will towards the application of legislation, lack that could be resolved by means of political resolutions (one of the participants say there is stronger obedience to political direction than there is to technical), or by the attainment of judgments that are favorable to access (keeping in mind strategic litigation, already mentioned in this study), by means of pressure from supranational institutions (the European Union could play an important role through its State-members), and finally through the application of penalties to those agencies that refuse to apply any of the Convention’s provisions or the Aarhus Convention itself. One of the participants says there is absolute ignorance
of the Aarhus Convention in the administrative agencies, and claims that they should be first obliged to familiarize and then required to apply.

A more optimistic opinion expresses that the existing regulation should continue to be applied, and trusts that little by little all the observed deficiencies will be slowly overcome. It could be achieved by means of a broader divulgation and better knowledge of the rules that flow from the Convention, and at the judicial level, by a better understanding and familiar application, until a unitary and peaceful application is achieved. Another of the participants observes that it is a very recent piece of legislation, and that it will take time before its potential is completely displayed.

There are also those who center all the possibilities of improvement in the environmental civil society that should claim, require and ultimately get the actual recognition and application of a series of legal rights that are theoretically already protected. One of the participants believes it is also important to create an international awareness of the application of this legislation.
4. The vision of a few Environmental Prosecutors

The view of environmental lawyers already assessed, we consider it is important to consider the opinion of other environmental actors, also specialized in the application of environmental law. Given that in our system there is no environmental jurisdiction, or are there special rules concerning assignation of environmental cases, we have not considered in our study the views and opinions of members of the judicial branch.

There are however environmental prosecution offices (in the 2006 State General Prosecution Office Annual Report, there were 26 prosecutors specialized in the environment), and this is why we have included some of them in this study. Due to the reduced number of environmental prosecutors interviewed, we need to clarify that what is reflected in this section is based on these particular prosecutor’s opinions, and that it cannot be implied that it is the environmental prosecutor’s opinion in general, depriving it of any statistic pretension. The latter doesn’t mean that this section lacks of interest for the purpose of our study, especially when considering that it is the view of most of the jurists interviewed throughout it, that the creation of environmental prosecution was one of the most relevant advancements towards access to environmental justice.

1. General diagnose on access to environmental justice

When it comes to a general diagnose of access to environmental justice in Spain, all the interviewed prosecutors agree that the situation needs to be improved, although there is acknowledgement of the existent enhancements, specifically regarding continuous education for environmental prosecutors (feat they all miss in judges and magistrates) and regarding the creation of specialized prosecutors, with the possibility of exclusive dedication as a definite highlight. One of them states that environmental prosecution is becoming a valuable support for the canalization and the legal consistency of citizen claims on environmental matters. Another one states that the observed improvements are merely formal and not real.
Participants are not aware of any studies specifically focused on access to environmental justice, being the report published by the General Council of Spanish Lawyers, in association with the Association for Environmental Justice – Ajá, the most popular one amongst prosecutors.

2. Evaluation of the Aarhus Convention application in Spain

All the interviewed prosecutors agree that in this respect the situation is improvable. They attribute this circumstance to the absolute lack of knowledge there is, and where there is knowledge, to the complexity of an issue they consider requires a prudential time to be fully sensitized by the ones supposed to apply it.

3. Evaluation of access to justice in the different hypothesis regulated by the Aarhus Convention

When it comes to evaluate the hypothesis contemplated by the Aarhus Convention (articles 1 to 3), prosecutors make the following observations:

- Administration’s response to the information requests made by the prosecutions office is relatively satisfactory, although the information provided is frequently insufficient. However, from the citizen’s perspective, access to information is totally unsatisfactory due to the complexity and dispersion of the regulation and to the costs associated to getting hold of the information. A better application in the autonomic level is perceived this it is at the local level, and deficiency of both material and human resources is noted, that impedes attaining the regulation’s exigencies.

- Regarding public participation procedures, even though prosecutors rarely if ever intervene in them, they view the situation as very difficult even for organizations that have specialized attorneys. One of them goes further into qualifying these attorney’s involvement as heroic, given the hurdles they have to face. One of the prosecutors nonetheless states there’s an improvement in the situation due to legal modifications. All of them agree that at the private
level, public participation remains highly difficult.

- When it comes to legal environmental non-compliances, a higher difficulty in access is observed when the noncompliant party is the Administration, given the legal prerogatives and means it enjoys. When noncompliance comes from a private individual, they say the situation is at least theoretically equitable.

- Access procedures are normally complex and costly, in which who is trying to take action has to face numerous hurdles that make many times impossible any private action. This, added to increase in the lateness -that has traditionally garnished the Judiciary and the Administration- which will be observed due to the increase in the obligations derived from the new legislation without a correspondent increase in the available budget, will worsen the system's efficiency.

4. Obstacles to access to environmental justice

Interviewed prosecutors note the following as hurdles that are currently interfering with access to environmental justice:

- Standing, especially when the one attempting to act is an individual. Curiously enough, some of the interviewed prosecutors state that Law 27/2006 is a bigger restriction than the previous legislation was, while others opine that the situation has improved given the attempt of clarification the situation has undergone. The possibility for prosecutors to act in the civil and administrative venues is highlighted, especially in the defense of collective interests.

- The slowness of administrative and judicial procedures is totally excessive, especially regarding jurisdictions like the contentious – administrative as it makes the final decision useless on occasions. Justice is generally slow but on environmental cases the slowness is even worse; dilations are many times excessive and unnecessary and they end up diluting the responsibility violating article 24 of the Spanish Constitution. Slow justice is not justice and it turns ineffective any proposed solution. A partial solution proposed to this
slowness is the specialization not only of the prosecutors that has already been undertaken, but of the judiciary and magistrates; the ascription of expert witnesses; a larger assignment of material and human resources to prosecutor offices and trial courts. Environmental procedures are not considered as “common” by the judiciary, they way they consider civil procedures are. Therefore, whenever faced to them, they tend to prefer more traditional undertakings, leaving environmental procedures with which they don’t feel as comfortable as with the earlier, for last. The lack of collaboration by the administration, many times the noncompliant party, is a factor that significantly contributes to the slowness of most of the procedures. One of the prosecutor signals out the frustration felt by acting citizen and other legal operators, when facing time frames that are introduced by regulation but they known will be impossible to enforce.

• Procedural costs are one of the main obstacles to access, especially when the acting party is an individual. Attorneys, clerks, bails, experts, and other expenses are to be covered by the party attempting an environmental action, and they happen to be highly costly. This is trying to be solved from the prosecutor’s office, by having costly evidence to be performed by Seprona, toxicological institutes and other institutions, and Article 23.2 of Law 27/2006 is seen as highly positive in this respect. As possible actions to solve the issue of procedural costs, participants in this section highlight the fact that public experts are put at the service of the judiciary and prosecutors, as is done with forensics, and draw attention to the experience in the High Tribunal of Justice, where an eco-toxicologist is hired for the trail courts and the prosecutors the consult with. One of the prosecutors affirms that the renounce of attorneys working for NGOs to their entitled fees, makes the majority of public interest legal actions a possibility.

5. Evaluation of the system of cautionary measures

Cautionary measures and their application within environmental procedures constitute one of the major worries of the interviewed prosecutors, as they are for the Network of Prosecutors for the Environment and Urbanism that would have recommended its members to require them in the procedural phase of instruction, towards the protection
of the legal interest under litigation and which effectiveness has been proved on many different occasions. Prosecutors point out that their application would be improved by a higher general awareness of the judiciary. The lack of application of these measures increase the seriousness of environmental damages and it is proposed by one the prosecutors that cautionary measures be arbitrated, and even so with corrective measures, assigning their cost to the accused. In his opinion, there are legal previsions that are not fully utilized due to a lack of creativity that for instance, impedes that expert inquiries and reports be charged to the ones under environmental investigation, especially when the accused is a large company with abundant resources, although concerns are raised regarding the difficulty of potential reimbursements for the event of an absolution. It is agreed that the imposition of bails for the concession of cautionary measures is a major problem, with the exception of those used as filter against unfair or impudent petitions.

6. Effectiveness of the reparation measures

Environmental reparation measures are deemed by some of the prosecutors as unpractical, because in the majority of the cases they are unexecuted, citing as common example the demolition of illegal buildings that many times due to a lack of judicial survey and local administrative collaboration –normally against whom one actions- is never performed. However, prosecutors observe that the situation has ameliorated, citing cases where high sums have been imposed towards environmental restoration. In this sense, the requirement of the subscription of an obligatory insurance to specific activities is observed as a positive aspect that facilitates environmental restoration. A positive factor is that the suspension of jail convictions is subject to the reparation of the environmental damage.

7. Valuation of judgment execution on environmental matters

Prosecutors show discontent with regards to this subject, although they recognize the complexity of the execution of judgments in environmental cases. They think the root of the problem with execution of environmental judgments is within the structure of criminal procedure that was conceived for the execution of decisions such as the driver’s license retention or the incarceration of a person, but not for the execution of complex
actions such as the ones contained in environmental decisions. Prosecutors would like to see a protocol of administrative action, in order to avoid letting execution of the judgments at the will of the competent jurisdictional organs. One of the prosecutors says a good solution to improve execution would be to establish a mechanism of control from the Prosecutions Office.

8. **Valuation of the information regarding access to justice rights**

With regards to the information that according to the Aarhus Convention should be offered to the citizen in relation to their access to justice rights, prosecutors value it as inexistent and say that there’s at least a lack of information to the general public. A wider diffusion of the rules, a simpler redaction of the statutes in order to make them more accessible to the general public, to incentivize the use of internet in order to achieve these goals, and the creation of organisms and technical bodies that could facilitate public understanding of the regulation are parts of the solution that the prosecutors suggest.

In the same fashion, prosecutors say that public access to judicial resolutions is insufficient and inadequate, and that, by impeding potential criminals and the general public to be informed of them, the dissuasive effect that conviction sentences are supposed to have freezes up.

9. **Additional resources at the service of access environmental to justice**

Prosecutors are very critical on this point, and say that material resources for access to environmental justice are unavailable, and that human resources are totally deficient. A positive practice that is noticed by them is the creation of specialized prosecution offices, and that of the activity displayed by the prosecutors. Some effort from the Administration is perceived, on what refers to access to environmental justice, especially in the work of collaboration between the prosecutors and a certain number of administrative agencies, like the Forest Agents and Seprona of the Civil Guard. However, prosecutors state that the agencies’ knowledge of the access legislation is virtually inexistent and its correct application is therefore very difficult. One of the
prosecutors goes further into warning that on occasions of the specific training courses need to be implemented by environmental associations, and not the administration.

Free access to justice mechanisms tend to be very deficient on environmental matters, notwithstanding that in other areas they are positively valued, like in detainee assistance or the assistance to victims of domestic violence.

10. Prioritizing the observed obstacles

When required to develop a classification of the hurdles according to their relevance, prosecutors agree to prioritize the lack of material and human resources at the judicial level, their lack expertise in environmental matters, also the lack of coordination with environmentally competent administrations, the miss education of the general public and the high costs to face, when entering into environmental litigation.

11. Good practices

Among the good practices toward access, prosecutors cite the creation of environmental and urban prosecutors, the experience in the High Tribunal of Justice where an eco-toxicologist is hired for the trail courts and the prosecutors the consult with, judicial environmental police (through Forest Agents and Seprona) and the coordination of specialized prosecutors and trial courts. At the same time they propose that the strategy for the improvement of those good practices and to overcome the observed obstacles to access to justice, is an increase in the means and resources allocated for the compliance with the regulations, observing they would otherwise by only cosmetic. They also state the importance of informing the public of the efforts and the improvements made to date on access to justice and to environmental information.

12. Effectiveness of the judicial procedures

Prosecutors opine that criminal procedure is performing better than the contentious-administrative jurisdiction is on environmental matters. The slowness is viewed as a
major flaw, but is attributed to justice in general, where it is common to have trials that last as long as fifteen years.

13. Proposals for a better application of the Aarhus Convention

As a colophon, prosecutors consider the Aarhus Convention has a very deficient application, and they propose to improve the situation by better informing about its contents and its binding status, as well as giving administrations, the judiciary and other implicated agencies the necessary means for implementation.
5. Conclusions

Out of the valuations and opinions that were gathered throughout this study, the conclusion that is perhaps most evident is that we are far from benefiting from access to justice in the terms pointed out by article 9 of the Aarhus Convention.

As professor John Bonine commonly puts it when addressing the issue of access, “the issue is not access to justice but equal access to justice”. Few are the environmental cases brought to the courts, not because circumstances in which cases should be brought are not abundant—it is quite the opposite-, but because the obstacles to an effective defense of access rights, public participation rights, and access to information and to an effective application of environmental regulation—with the great benefits all of the precedent would have in our environment and our environmental law-, impede these cases to be brought.

The rights recognized by the Aarhus Convention are no novelty in our legal system. What the Convention does is merely to introduce a set of rules that makes it more suitable to the effective exercise of such rights. The right of access to environmental information for instance, became a binding right in our legal system after December 31, 1991, when Directive 90/313/EEC was passed. Similar is the case for public participation in environmental decision making for many years. Let us for example remember the Rule for Annoying, Unhealthy, Injurious and Dangerous Activities of 1961. The 1992 amendment to the administrative process made easier the activity of environmental defense groups and of neighborhood associations for the defense of the environmental collective interest. Successively after the 1980’s, environmental legislation regarding impact assessment, integrated management and control of pollution and so on triggered the increasing need of an effective public participation in environmentally relevant decision making. Notwithstanding the fact that environmental sector specific legislation dates from before the 80’s and 90’s, it appears that public powers have failed to protect and enforce their application, having disobeyed accordingly a constitutional mandate to survey the rational use of Spain’s natural resources, to protect and improve the Spaniards’ quality of life, and to defend and restore our environment. To say more, the lack of application of environmental laws has not only provoked our inability to
enjoy an adequate environment, but also our inability to protect it.

In 10 years since the Spanish ratification of the Aarhus Convention, the scarce efforts deployed by Spain have been directed towards the approval of legislation that doesn’t go that much further than transcribing the Convention’s dispositions and the Communitarian Directives that implement it. There hasn’t been a development of rules for the regulation of detailed procedures or the adoption of adequate structures that allow for the effective compliance with the Convention’s provisions. Moreover the shy legislative effort undertaken has not been accompanied by the approval of the necessary budgets, human resources or minimal material means for the real applicability of the approved dispositions. There hasn’t been any capacity building or functionary training, and there hasn’t been any general public information either, regarding their rights or how to best exercise them. As a result, very few people of the public, the Administration, the Judiciary and even from environmental groups, are really aware of the rights that Aarhus has recognized for them, and much fewer know how to properly exercise them.

As an illustration, there are only four publications in the past ten years that aim at the Aarhus Convention divulgation, three of which were published with limited distribution by non governmental organizations, and that can be found on the internet. In 2002, European ECOForum published and distributed a brochure about Aarhus. Later, in 2006, the Center for Environmental Research in Cantabria published a guide directed to Cantabrian authorities on access to environmental information in the Aarhus Convention. In 2007 Ajá and the General Council of Spanish Lawyers, published and distributed the guide Access to Justice – The Aarhus Convention, and by the end of that same year, the European Office for the Environment and Ecologists in Action published and distributed the report: “Application of the Aarhus Convention in the European Union and Spain” with the support of the Biodiversity Foundation.

As noted in the introduction, the Spanish State has violated its international commitment of timely presenting the national compliance report that the Aarhus Convention requires to assess implementation, silently expressing in this fashion that Spain is not committed to satisfying the obligations that flow from it. Despite the fact that the legal system we are granted for the articulation of the right of access to environmental justice can comparatively be qualified as an advanced
moof the, as it recognizes inter alia the criminal and the administrative class actions under certain regulatory hypothesis, and the possibility of access to free justice and to cautionary measures, the reality is that with obstacles and barriers persist to impede an effective protection of the rights recognized under the Convention. Among the barriers observed by participants on this study, the following were highlighted:

- Excessive slowness of judicial procedures
- Prohibitive cost of judicial procedures, including professional’s payments, bail deposits and cautions, procedural fees when proceeding;
- Severe resistance of the judiciary to the application of cautionary measures to guarantee an effective defense of the environment;
- Lack of qualified professionals to perform the necessary evidence and proof of damages, along with the difficulty of the judiciary for it’s the due valuation of the evidence presented by the parties;
- Lack of preparation and awareness of the judiciary, prosecutors, and other legal professionals, with regards to environmental cases and specially regarding the existence of the Aarhus Convention;
- Very deficient execution of environmental judgments
- General public’s ignorance of the procedural opportunities in the judicial and administrative environmental levels, and the lack of an easy access to administrative and judicial resolutions.

In this way, the need of an immediate compliance with the Aarhus Convention’s obligations and the Spanish Constitutional mandate of article 45 become evident. Therefore, the adoption of further legal dispositions that guarantee a proper compliance with article 9 of the Aarhus Convention, becomes desirable, concretely to guarantee:
- That the judicial defense of the right of access to environmental information be granted at the latest, within 6 months of the request for information;

- That the right to public participation be actually granted before any decisions are made, and that in case this doesn’t happens, the execution of the decision be automatically suspended, or a similar action be granted, in order to guarantee an effective protection;

- That the adoption of cautionary measures, take adequately into account both the economic loss for the ones promoting the questioned activity, plan, program or project, as well as the environmental harm the project could potentially inflict. In other words, that both collective and private interests be;

- That the adoption of such measures be timely, that is, that they be adopted before the execution be performed or totally deployed;

- That any procedural fee be waived from the defeated party that litigated in the public or collective environmental interest, especially in those cases of demonstrated administrative slackness.

Regarding **free access to environmental justice**, an adequate set of rules and measures should be adopted in order to ensure that provisions of Law 27/2006 are effectively executed in practice, like for instance:

i. Educating provincial commissions responsible to grant free access to justice, with regards to Law 27/2006 dispositions;

ii. Giving training to shift- appointed attorneys on environmental matters, and creating a special environmental shift;

iii. Creating an expert witness body to be available for judiciary consultation on environmental cases, for administrative cases, and for civil and criminal cases.
However, legislative changes will not by them selves guarantee an effective access to justice in the terms required by the Convention. This will only be achieved if measures like the following are adopted:

**Generally speaking, with regards to the rights regulated under the Aarhus Convention:**

- To ascribe personal and material means appropriate for compliance with obligations flowing from the Convention, by means of approval of annual budgets and the assignation of prepared personnel, or in its absence, by external consulting with experienced technical professionals, in the administrative, the autonomic and the local levels.

**With regards to the access to justice right in particular:**

- **Regarding the public:**

  - To develop campaigns aimed at public information, in a way that is understandable, and regarding administrative and judicial procedures at their disposal for an effective exercise of their rights under the Aarhus Convention.
  
  - The development of training and formational programs specifically directed to environmental and neighborhood organizations, with regards to eh exercise of the Aarhus Convention rights.
  
  - Financing for people and environmental organizations interested in bringing cases to courts for the protection of environmental collective interests. This could either be by direct funding, or by reimbursing any costs incurred during litigation, once the judge or court decides there was noncompliance by the authority or the administration of their duties towards environmental protection.
  
  - Free accessibility to judicial and administrative decisions involving the environment, maybe through web access or another system for data base accessibility.
- Regarding the administration of justice and the judiciary:

- The adoption of the necessary budgets, appropriate to dispose of the required human and material resources in trial courts so environmental cases can be resolved timely and judgments dully executed.

- Reinforcement of the existing control mechanisms over court houses and tribunals, and over the judges responsibilities and other public authorities involved in environmental cases, especially when any sort of theays are caused on purpose.

- Training and formation courses for judges, and the improvement of their awareness of environmental cases in general, and the Aarhus Convention in particular.

- The designation of specialized and expert witnesses on environmental issues, for them to support judges in the valuation of evidence presented in environmental cases as for the valuation required for the adoption of cautionary measures.

- Informational campaigns directed to the judiciary personnel.

- Tanning and educational programs for environmental prosecutors.
1.- What is your general opinion and diagnose on the access to environmental justice situation in Spain? Are you aware of any study, report, statistic, publication or article about it?

2.- Do you think the Aarhus Convention is applied correctly in Spain?

3.- Towards an evaluation of the applicability of article 9 of the Aarhus Convention, which ensures a person who considers that her right to access environmental information has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with, or that has witnessed a breach of environmental legislation has access to a review procedure before a court of law or another independent and impartial body established by law, we would like your opinion on the following issues:

3.1.- How do you value the effectiveness of access to justice regarding access to environmental information, considering the following criteria: time required for obtaining an executable decision; costs implicated; effectiveness in the protection of the legal interest? Can you exemplify your valuation by means of concrete cases or examples?

3.2.- How do you value the effectiveness of access to justice in public participation on decision making processes regarding the environment, considering the following criteria: time required for obtaining an executable decision; costs implicated; effectiveness in the protection of the legal interest? Can you exemplify your valuation by means of concrete cases or examples?

3.3.- How do you value the effectiveness of access to justice when a violation of environmental law has occurred, either by action or by omission of an administrative entity, considering the following criteria: time required for obtaining an executable decision; costs implicated; effectiveness in the protection of the legal interest? Can you exemplify your valuation by means of concrete cases or examples?
3.4.- How do you value the effectiveness of access to justice when a violation of environmental law has occurred, either by action or by omission of a private or legal person, considering the following criteria: time required for obtaining an executable decision; costs implicated; effectiveness in the protection of the legal interest? Can you exemplify your valuation by means of concrete cases or examples?

4.- In the quest for an effective access to environmental justice:

4.1.- Do you consider that issues relating to standing present an obstacle? What is your valuation of the changes introduced by Title IV of Law 27/2006 in this respect, does it improve or does it worsen the situation? In case you consider it to be an obstacle: what would you propose in order to solve it?

4.2.- Do you have any observation as to the time employed from the beginning of the administrative or judicial action to the achievement of a final judicial decision? Can you cite any concrete cases or examples? In case you consider this to be an obstacle to access: what would be your proposal to solve it?

4.3.- Are the costs associated to access to environmental justice an obstacle? Please consider in your response de valuation of issues such as: professional fees both legal and technical, and procedural fees. Can you cite concrete cases or examples? What is your opinion regarding article 23.2 of Law 27/2006 that broadens free access to environmental justice to certain environmental organizations? In case you consider that measures adopted by Law 27/2006: what would you propose in order to avoid the cost of a process that presents blocks access to environmental justice?

4.4.- What is your opinion of the current use in the adoption of cautionary measures? Are these serving their mission of protecting the legal interest under litigation? Can you cite any concrete cases or examples? Do you think their use is improvable? How so?
4.5.- Going on the last question and in relation to question 4.3 regarding costs, what is your opinion on the imposition of bails and cautions? Can you cite any concrete cases or examples? In case you consider this to be an obstacle to access: what would be your proposal to solve it?

4.6.- Are environmental restoration orders (writs of mandamus) effective? Can you cite any concrete cases or examples? In case you consider them ineffective: what would be your proposal?

4.7.- What is your general valuation over the execution of judgments in environmental cases? Can you cite any concrete cases or examples? What should be done to improve their effectiveness?

5.- The Aarhus Convention requires the public to be informed about possibilities for the exercise of the right of access to environmental justice. It also requires for the administrative and judicial resolutions to be available for public consultation:

5.1.- Are you aware of any concrete action that the Administration may have taken towards informing the public on how to exercise the right of access to environmental justice? Maybe from an organization or a particular individual? Would you have any suggestions as to how the duty to inform should be performed?

5.2.- In your opinion, does the public have an appropriate access to judgments and court rulings, as well as to administrative recourses? If considered inadequate, do you have any proposals to improve accessibility?

6.- To guarantee effective access to environmental justice requires additional measures like the approval and execution of the right prerequisites, the performance of training programs and instruction of the professionals involved, the betterment of the available structures setting aside human and material
6.1.- Means the judiciary sets a side at the service of Access to Justice.

6.2.- Do you know if any of the training programs available for the administration and other professionals contemplate access to environmental justice?

6.3.- Efficacy of the mechanisms engaged towards free access to environmental justice.

7.1.- Can you identify, if possible by relevance, the obstacles that in your opinion block an effective access to environmental justice?

7.2.- Can you identify what you consider to be good practices towards an effective access to environmental justice?

7.3.- What strategies to overcome the hurdles and extend the use of good practices would you propose?

7.4.- How do you value the ability of judicial procedures existing today in our legal system to effectively enforce environmental rights?

7.5.- If considering that the Aarhus Convention has not been properly applied, what do you think is needed for a correct application to take place?


- Organic Law 1/2002, of March 22, that regulates the right of association. BOE num. 73, of March 26, 2002.


- Pozo Vera, E., Masson, N., Krämer, L. and others. 2007. Inventory of EU Member States’ measures on access to justice in environmental matters. Milieu Ltd. for the Commission.


- Rule (CE) Nº 1367/2006, of September 6, regarding the application, institutions and communitarian organisms, of the dispositions of the Aarhus Convention on access to information, public participation in decision-making and access to environmental justice. DOUE L 264 of September 25, 2006.


- UNECE’s Secretariat of the Aarhus Convention and UNEP’s Division for Environmental Conventions. Your right to a healthy environment. A simplified guide to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. UNECE.


- Working Group on Facilitating Public Interest Litigation. 2006. Litigating the Public Interest

A list of electronic links with access to different resources related to this publication is provided next. The selection has been done following firstly a geographical criteria, secondly prioritizing links related to official institutions and organisms, and finally regarding non governmental organizations. This selection does not aspire to be exhaustive but refers to the electronic resources most consulted by those who participated in the crafting of the study.

- **Worldwide**


- **Europe**


- The Public Participation Campaign: http://www.participate.org/

- **Communitarian**


  - European Ombudsman: http://www.ombudsman.europa.eu/home.faces;jsessionid=A74BF22ED68881A5AC46F1538714F6D5

  - Justice and Environment: http://www.justiceandenvironment.org/


- **State level**


  - General Prosecution Office of the State: http://www.fiscal.es/fiscal/public

  - Spanish Ombudsman: http://www.defensordelpueblo.es/


- Spanish Sustainability Observatory: http://www.sostenibilidad-es.org/observatorio%20sostenibilidad/


- ACIMA: http://www.acima.es/

• Autonomic

- Environmental Information Area - Department of Environment and Housing, Generalitat de Catalunya: http://mediambient.gencat.net/esp/ciutadans/informacio_environmental/oia.jsp?ComponentID=55289&SourcePageID=3490#1


- Environmental Council of the Andalucía Board - http://www.juntadeandalucia.es/medioambiente/site/web/menuitem.455d58ef1c0b770b9d6a777661525ea0/


Environmental democracy and access to justice
The implementation of Aarhus Convention in Spain