

GENERAL ADVICE FOR ANY ENVIRONMENTAL LITIGATION AT DOMESTIC LEVEL

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EUDEL *Jean Monnet Chair on
European Union
Environmental Law*



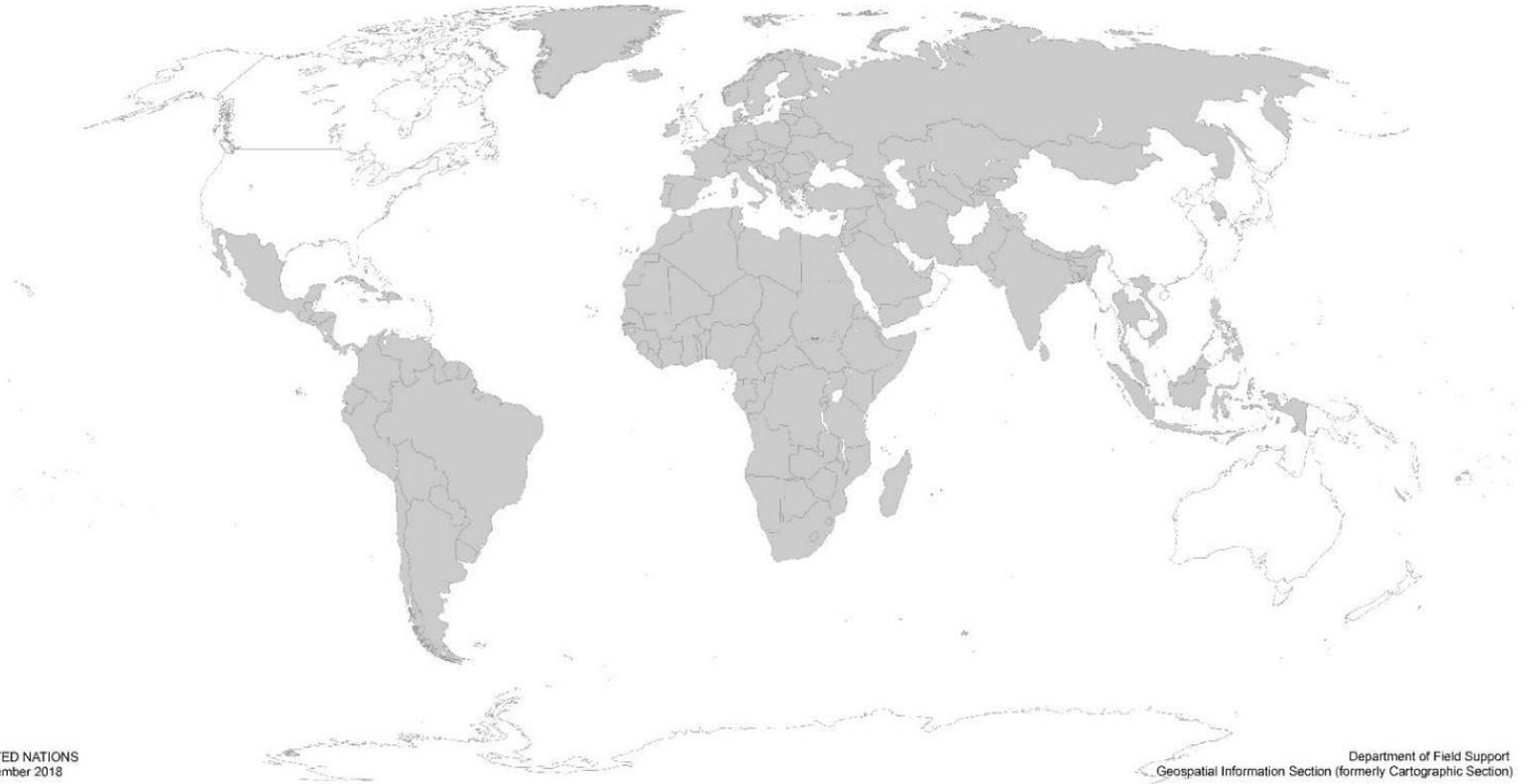
TRANSJUS

INSTITUT DE RECERCA. FACULTAT DE DRET

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1. Why is Access to Justice in Environmental Matters (AJEM) important? *To protect Environmental Human Right*



1. Why is Access to Justice in Environmental Matters (AJEM) important?

To protect Environmental Human Right

- African Charter on Human and Peoples' Rights of 1981 (art. 24).
- Arab Charter on Human Rights of 2004 (art. 38).
- Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) of 2018 (art. 1).



1. Why is Access to Justice in Environmental Matters (AJEM) important?

To protect Environmental Human Right

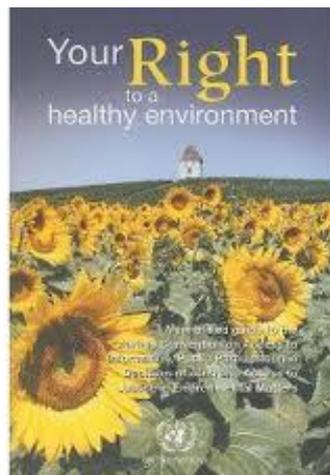
- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (**Aarhus Convention**) of 1998 (art. 1).
 - The right of every person of present and future generations to live in an environment adequate to health and well-being.
 - [United Nations Economic Commission for Europe \(2014\): The Aarhus Convention: an implementation guide, United Nations, New York and Geneva, 2nd edition.](#)
 - [UNECE Studies in Access to Justice in Environmental Matters.](#)



1. Why is Access to Justice in Environmental Matters (AJEM) important?

To protect Environmental Human Right

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998 (art. 1).
 - “Effective judicial mechanisms should be accessible to the public, including organizations, so that its **legitimate interests** are protected and the **law is enforced**” (preamble).
 - **Environmental right or collective interest**
 - **Environmental Public Policy with public participation**



1. Why is Access to Justice in Environmental Matters (AJEM) important?

To protect Environmental Human Right

- **Environmental public policy:** art. 37 of the Charter of Fundamental Rights of the European Union, December 7, 2000 (with binding legal effect in December 1, 2009): “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.
- **Human Right to Environment:** Aarhus Convention - Decision of the Council of the European Community 2005/370, February 17 (OJEU L-124, May 17, 2005).



europa.eu

1. Why is Access to Justice in Environmental Matters (AJEM) important?

To protect Environmental Human Right

➤ **Art. 45 of Spanish Constitution of 1978:**

- **Human Right to Environment:** “(1) Everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to preserve it.”
- **Environmental Public Policy:** “(2) The public authorities shall watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity.
- **Legal consequences:** “(3) For those who break the provisions contained in the foregoing paragraph, criminal or, where applicable, administrative sanctions shall be imposed, under the terms established by the law, and they shall be obliged to repair the damage caused.

1. Why is Access to Justice in Environmental Matters (AJEM) important? *To protect Environmental Human Right*

- **Human Right to Environment:** art. 27 Spanish Organic Act 6/2006 of the 19th July, of the [Statute of Autonomy of Catalonia](#).
 - “1. Each individual has the right to live in an environment that is balanced, sustainable and respectful of health, in accordance with the standards and levels of protection established by law. Each individual also has equal rights to enjoy the landscape and natural resources, and has the obligation to use these responsibly and to avoid squander and damage of natural resources.
 - 2. Each individual has the right to protection from different forms of pollution, in accordance with the standards and levels determined by law. He or she also has the obligation to collaborate in the conservation of the natural heritage and in actions designed to eliminate any form of pollution, with the objective of maintaining and preserving the natural environment for future generations.
 - 3. Each individual has the right of access to environmental information held by the public authorities. The right to information may only be limited for justifiable reasons of public order, within the terms established by law.”

1. Why is Access to Justice in Environmental Matters (AJEM) important?

To protect Environmental Human Right

- **Environmental public policy** : art. 46 Spanish Organic Act 6/2006 of the 19th July, of the Statute of Autonomy of Catalonia.
 - “1. The public authorities shall ensure the protection of the environment through the adoption of public policies based on sustainable development and on collective and inter-generational solidarity.
 - 2. Environmental policies shall be particularly addressed to the reduction of different types of pollution (...).
 - 3. The public authorities shall create conditions for the preservation of nature and biodiversity, promote the integration of environmental objectives into sectorial policies (...).
 - 4. The public authorities shall ensure economic and territorial cohesion (...).
 - 5. The public authorities shall provide citizens with environmental information and encourage education in values concerning the preservation and improvement of the environment as a common heritage.”

1. Why is Access to Justice in Environmental Matters (AJEM) important?

To enforce environmental law

➤ Aarhus Convention:

- Environmental Law must be **enforced by public**
- Law in action



1. Why is Access to Justice in Environmental Matters (AJEM) important?

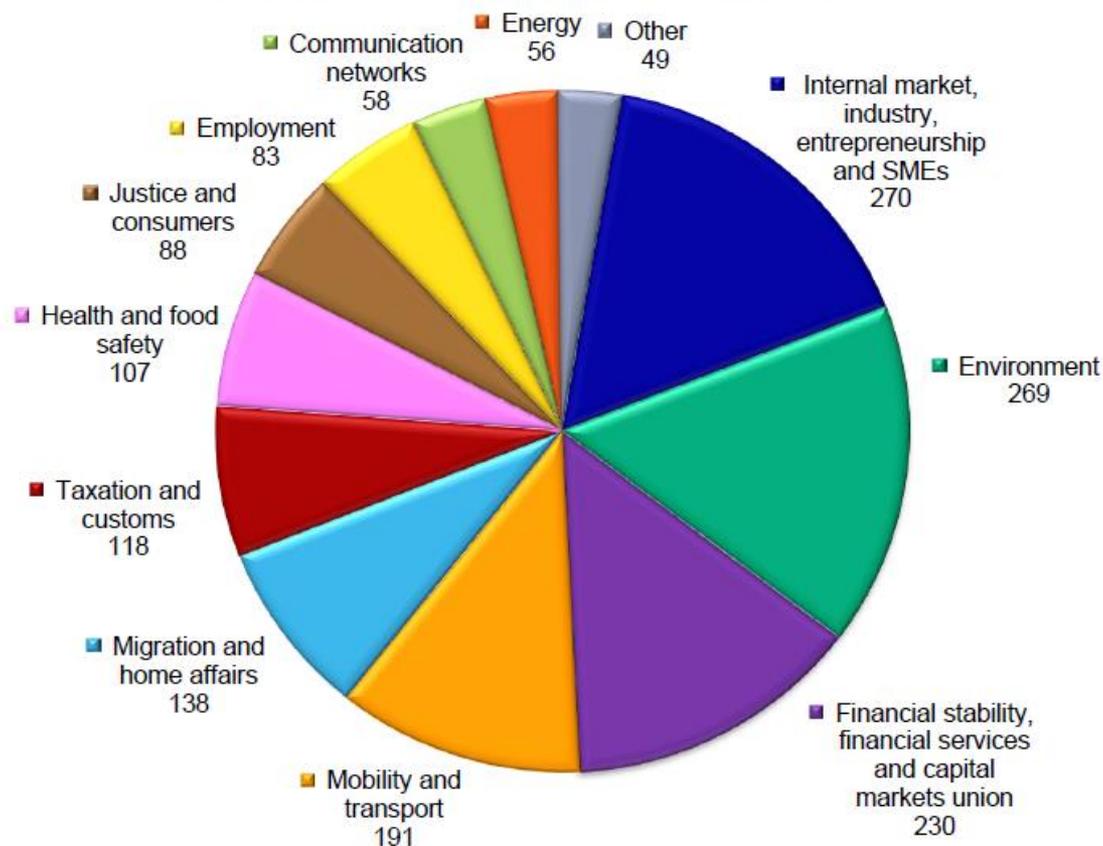
To enforce environmental law

- **General Union Environment Action Programme to 2020**
'Living well, within the limits of our planet' (DECISION 1386/2013/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 November 2013):
 - Implementation of Environmental Law is one of the nine priority objectives for 2020 (art. 2)
 - Access to justice is a tool to enforce Environmental Law (ap. 62 and 65)

1. Why is Access to Justice in Environmental Matters (AJEM) important? *To enforce environmental law*

- Monitoring the application of European Union Law 2016 Annual Report COM(2017) 370 final

Infringement cases open at end-2016: policy areas



1. Why is Access to Justice in Environmental Matters (AJEM) important? *To enforce environmental law*

- Spain:
 - Formalist view of Law



I. DISPOSICIONES GENERALES

MINISTERIO DE LA PRESIDENCIA

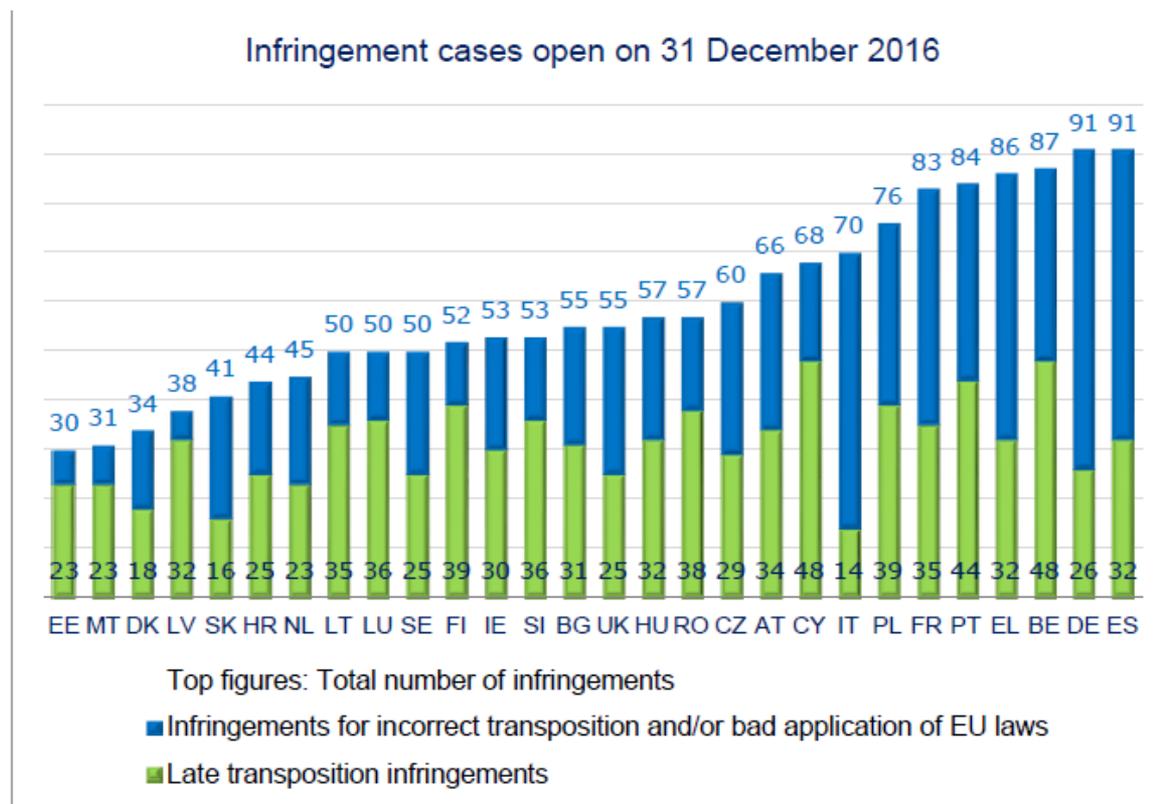
18583 Real Decreto 1673/2010, de 4 de diciembre, por el que se declara el estado de alarma para la normalización del servicio público esencial del transporte aéreo.

El artículo 19 de la Constitución española reconoce a todos los españoles el derecho a la libre circulación por todo el territorio nacional. Dicho derecho está igualmente reconocido a todas las personas en los Tratados y Convenios Internacionales de los que España es parte.

Las circunstancias extraordinarias que concurren por el cierre del espacio aéreo español como consecuencia de la situación desencadenada por el abandono de sus obligaciones por parte de los controladores civiles de tránsito aéreo, impiden el ejercicio del derecho fundamental mencionado y determinan la paralización de un servicio público esencial para la sociedad como lo es el servicio de transporte aéreo. Todo esto constituye, sin duda, una calamidad pública de enorme magnitud por el muy elevado número de

1. Why is Access to Justice in Environmental Matters (AJEM) important? *To enforce environmental law*

➤ Spain:



1. Why is Access to Justice in Environmental Matters (AJEM) important?

General requirements

➤ Aarhus:

- The key standard: **a real and effective access to justice** must be provided
- **Others requirements:**
 - **A 'floor', not a 'ceiling'**: The Convention establishes *minimum standards* to be achieved but it does not prevent any Party from adopting measures which go further.
 - **Non-discrimination**: The Convention prohibits discrimination on the basis of citizenship, nationality or domicile against persons seeking to exercise their rights under the Convention.
 - 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.
 - **Communications** from public to **Aarhus Compliance Committee**.

1. Why is Access to Justice in Environmental Matters (AJEM) important?

General requirements

➤ **EU:**

- Real and effective access to justice standard
 - Aarhus Convention.
 - Right to an effective remedy and to a fair trial (art. 47.1 Charter of Fundamental Rights of the European Union and art. 19.1 of the Treaty on EU).

- EU Commission studies.
- EU Commission (2017): *Notice on access to justice in environmental matters (2017/C 275/01)*.
- EU Commission (2018): *Citizen's Guide to Access to Justice in Environmental Matters*.

1. Why is Access to Justice in Environmental Matters (AJEM) important?

General requirements

➤ Spain:

- Real and effective access to justice standard (**Spanish Constitution 1978**):
 - **Fundamental Right to obtain effective protection from the judges** and the courts in the exercise of their rights and legitimate interests (art. 24.1).
 - **Public general constitutional mandate** to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are **real and effective**, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life (art. 9.2).

1. Why is Access to Justice in Environmental Matters (AJEM) important?

General requirements

➤ Catalonia:

- Real and effective access to justice standard (**Catalan Statute of 2006**):
 - Regulations shall respect the rights from the Statute (among them, Human Right to Environment as we've seen) and shall be interpreted and applied in the most appropriate way so as to ensure their **full effectiveness** (article 37 of the Statute).

2. Are the three types of AJEM in Aarhus Convention available at Domestic Level?

- **Three sorts of access to justice (Aarhus Convention):**
 - Article 9(1): protects **public's right to access to environmental information.**
 - Article 9(2): enables the **public concerned to challenge the substantive and procedural legality of any decision, act or omission.**
 - Article 9(3): permits the **public to enforce environmental law** against private persons and public authorities who violate law relating to the environment.



2. Are the three types of AJEM in Aarhus Convention available at Domestic Level?

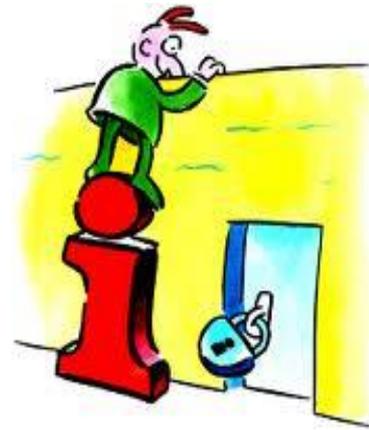
- **Article 9(1): judicial and non-judicial protection of public's right to access to environmental information .**
 - **Judicial and non-judicial review** procedures: shall provide adequate and effective remedies and be fair, equitable and timely.
 - **Non-judicial review procedure** must be free of charge or inexpensive and its final decisions shall be binding on the public authority holding the information.
 - **Non-judicial review mechanisms are more efficient**, timely and cheaper than court procedures, but the court proceedings should be kept in place (Committee on Environmental Policy of UNECE for the First Meeting of the Parties to the Aarhus Convention 2001).

2. Are the three types of AJEM in Aarhus Convention available at Domestic Level?

- **Article 9(1): judicial and non-judicial protection of public's right to access to environmental information.**
- **There is not an effective non-judicial review procedure in EU nor in Spain** to protect the right of access to environmental information:
 - Appeals to the same public authority.
 - These appeals don't provide adequate and effective remedies and they aren't fair and equitable procedures.
 - Aarhus requirements force to create a new non-judicial independent and impartial bodies which resolve these appeals or, at least, make a preliminary and binding report.
 - Appeals on transparency are applicable for access to environmental information? No (Spain, [CTBG](#)) / Yes (Catalonia, [GAIP](#)).

2. Are the three types of AJEM in Aarhus Convention available at Domestic Level?

- **Article 9(1): judicial and non-judicial protection of public's right to access to environmental information**
- **There is not an effective judicial review procedure** to protect the right of access to environmental information:
 - 10 years in Spain for a final Court decision to get environmental information.



2. Are the three types of AJEM in Aarhus Convention available at Domestic Level?

- **Article 9(2):** enables the **public concerned** to **challenge the substantive and procedural legality of any decision, act or omission:**
 - **Good points:**
 - Wide standing
 - **Bad points:**
 - No capacity to sue for groups
 - Important economical limitations
 - Weak remedies

2. Are the three types of AJEM in Aarhus Convention available at Domestic Level?

- There isn't **article 9(3): public to enforce environmental law**
- **Weak implementation:** some environmental NGOs
- **Bad implementation:** to challenge acts or omissions of public authorities against environmental law
- It's an **environmental citizen enforcement** against private and public persons: citizen suits from USA

3. Who have AJEM?

NGOs as the main actors

➤ **Aarhus Convention:**

- States must recognize and promote environmental NGOs (art. 3.4).
- NGOs have an interest to protect the environment (art. 2.5 and 9.2).
- Declaration of Riga in the 3^a Meeting of the Parts of June 13, 2008 (ap. 15).

➤ **Council of Europe**

- NGOs are the key Instrument for the implementation of democracy and human rights (Recommendation CM/Rec(2007)14 of the Council of Europe Committee of Ministers to member states on the legal status of non-governmental organizations in Europe).
- NGOs are the guarantee of transparency and lawfulness of the performance of the public powers by means of the freedom of expression (STEDH of May 27, 2004 (Vides Asizsardzibas Klubs c. Lituania)).

3. Who have AJEM?

NGOs as the main actors

➤ **UE Law:**

- NGOs are the main social subject to protect environment

➤ **CE**

- NGOs as a main subjects of the general mandate of participation and as a necessary requirement to guarantee the principle of real equality (art. 9.2 and STC 64/1988-FJ1-)
- Fundamental right of association (art. 22 CE):
 - Essential instrument for which the participation was real and effective (EM LO 1/2002, of 22 of March, regulatory of the right of association)
 - Environmental Defense is one of the purposes of the associations to be declared of public utility
 - Protection reinforced as a fundamental right
- Constitutional right of foundation (art. 34 CE)
 -

3. Who have AJEM?

Capacity to sue

- There are **two groups without legal personality** very important in environment conflicts:
 - Collective exercise of multiple rights or individual interests affected by environmental pollution (class actions)
 - Environmental collective interests
- **Legal persons as a general rule:**
 - Natural or legal persons (art. 2.4 Aarhus Convention).
 - Groups not legal person remain conditioned to their recognition by states (art. 2.4 Aarhus Convention):
 - Only affected consumers groups (Spain).
- **Groups without legal personality must have capacity to sue** in order to protect the environment



3. Who have AJEM?

Standing

➤ 2.1 International and constitutional framework

- Principle ***pro actione*** (art. 3.5 and 9.2 Aarhus Convention, EUCJ and art. 24.1 Spanish Constitution); wide access to justice.

- **Two situations** (art. 24.1 y 45 CE y 7.3 LOPJ):
 - Subjective: **Environmental collective legitimate interest.**
 - Only NGOs (no natural persons)
 - Environmental protection must be their goal
 - Judge Decision must give a benefit or a damage to their environmental goal
 - Objective: **Environmental Public Policy with public participation**

3. Who have AJEM?

Standing

➤ 2.2 Standing in civil cases

- Traditional restriction for **individual rights or interests**
- But some Spanish Supreme Court cases in **torts actions for environmental damages** (art. 1902 Civil code)
 - STS 1/4/1993: a killed bear (standing of the regional NGO FAPAS).
 - STS 1/2/1997: a polluted river (standing of the local NGO Grup de Defensa del Ter).

3. Who have AJEM?

Standing

- **Criminal standing:**

- **Public Attorney**

- **Private prosecutor**

- Are NGOs affected by environment damage?
 - No bonds

- **Popular prosecutor (actio popularis):**

- For all environmental crimes
 - Any natural or legal person has standing
 - Bonds must be required

3. Who have AJEM?

Standing

➤ **Administrative standing**

➤ **Environmental legitimate interests**

- A collective legitimate interest is required
- Environmental NGOs have to prove the three constitutional requirements

➤ **Actio popularis**

- Any citizen to enforce environmental law
- A right or legitimate interest is not needed
- Recognition by a specific Environmental Act

➤ **Legal Habilitation**

- Specific NGOs to enforce environmental law
- A right or legitimate interest is not needed
- Legal requirements for Environmental ONGs: aim to environmental protection; 2 years old; active activity and in affected area

3. Who have AJEM?

Economic barriers

- **Economic costs in environmental litigation: a real barrier to access to justice**
 - **High environment costs** of the environmental lawsuits: lawyer, procurator, taxes, experts, bonds, order to pay court costs, etc.
 - **Uneven economic relation between plaintiffs and defendant:** citizens and NGOs versus companies and public administration.
 - **There isn't any right or individual interest** to compensate the expenses of the trial.
 - Environment protection in front of the courts is a **social function** in benefit for everybody.
 - **Law can help** to surpass these economic limitations.
 - Little interest in the Spanish Law: formal vision of access to justice in environment matters.
 - Main subject in other Laws as USA : material vision of the access to the justice in environment matters.

3. Who have AJEM? *Economic barriers*

- **General requirements of access to justice (Aarhus):**
 - **Real and effective protection standard**
 - Procedures shall **not be prohibitively expensive**
 - Procedures shall consider the establishment of appropriate assistance mechanisms to **remove or reduce financial and other barriers** to access to justice
 - Procedures shall be **fair and equitable**

3. Who have AJEM?

Economic barriers

➤ EU

- The cost shall **not be excessively onerous** (Directive 2010/75 and 2011/92)
- The judicial procedures shall be **just and equitable** (Directive 2010/75 and 2011/92).
- **Legal aid** shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.(art. 47 CFREU).
- SEUCJ 1 April 2013 (Edwards and Pallikaropoulos, C-260/11).
 - Definition “cost was not excessively onerous”.
 - Freedom of the states to establish mechanisms.
 - Limits to this freedom of the states.
- SEUCJ 13 February 2014 (European Commission c. United Kingdom of Great Britain and Northern Ireland, C-530/2011) .
 - Reasonable predictability of the costs and of its amount.

3. Who have AJEM?

Economic barriers

- Procedures to protect environment in Spain are so **expensive without appropriate assistance mechanisms to reduce economic barriers** to access to justice
- **Formal access to justice** for environmental matters
- As Aarhus Convention and EU Law, there are **general principles** at constitutional level to remove economic barriers
- All these general requirements are **not well and fully developed**

3. Who have AJEM?

Economic barriers

- **Only Legal Aids:**

- **Environmental NGOs.**

- **Without enough resources** (maximum annual incomes):

- Public utility declaration and less than 19.362,09€.

- Violation of Aarhus Convention: Resolution Compliance Committee 18 June 2010 (Almendralejo case, ACCC/C2009/36).

- **Legal recognition:**

- Only some NGO (art. 23 Spanish Act 27/2006).

- **Natural persons**

- **Without enough resources** (maximum annual incomes):

- 12.908 € (for 1 person).

- 16.135,97 € (up to 3 persons).

3. Who have AJEM?

Economic barriers

- **No other mechanisms** in public interest litigation to protect environment such as:
 - Legal aids for all Environmental NGOs.
 - Legal aids for natural persons to enforce environmental law beyond actual annual limits.
 - Special regulation of fee shifting in order to encourage legitimate lawsuits:
 - To encourage meritorious suits as a public service, while penalizing those who bring harrassing or frivolous suits.
 - Elimination of taxes and deposits for lawsuits and appeals.
 - Special regulation of bonds for criminal lawsuits or interim reliefs.

4. What can be asked for?

Remedies

- **General requirements of access to justice (Aarhus):**
 - It shall provide **adequate and effective remedies**, including injunctive relief as appropriate.

General requirements are the **big challenge for environmental protection** and legislative reforms are needed.

- Procedures in civil and administrative courts provide adequate and effective **remedies** for **individual's private rights or interests** but not for environmental interests.

4. What can be asked for?

Interim relief

- Interim relief is **crucial** to protect the environment.
- There is´nt **any special rule** in Spanish Law.
- **New approaches are needed:**
 - General principle to grant interim relief to protect the environment.
 - Elimination or reduction of bonds to the economic capacity of the plaintiff.

4. What can be asked for?

Enforcement of judgements

- Enforcement of environmental judgements is the **last and necessary step** of the access to justice.
- Specific **constitutional ground** (art. 24.1, 117.3 and 118 CE).
- **Wide standing beyond plaintiffs.**
- Reinforce the **means of direct enforcement** in environment instead of indirect ones.
- **Restrictive interpretation** when judicial judgements can't be enforced in the own terms. Then a **enforcement for ecological equivalent** is required.

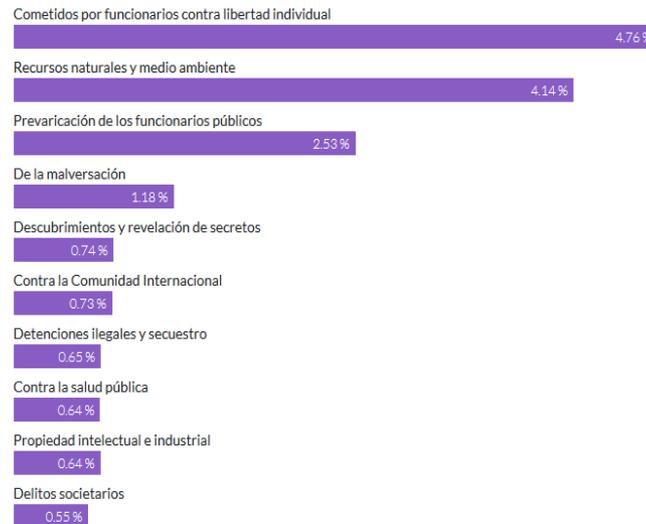
4. What can be asked for?

Clemency

➤ <https://civio.es/el-indultometro/>

CIVIO

Top 10 categorías de delito según el código penal con mayor porcentaje de indultos respecto a condenados para el periodo 2007-2015



5. When can one get a judicial decision?

- **General requirements of access to justice (Aarhus)**
 - They must be **timely**



5. When can one get a judicial decision?

- **Procedures**, in general, **are not timely**.
- 2014 Spanish Implementation Report to MOP of Aarhus Convention:
 - “The main obstacle to the full implementation of Article 9 lies in the excessive length of judicial proceedings”.
- *2016 Justice Date to Date Report (CGPJ)*:
 - Environmental and urban planning cases are the longest proceedings:
 - Environmental (15,2 months) and urban planning (13,5 months) cases in administrative judges.
 - Environmental and urban planning cases (22,4 months) in appeals courts.

5. When can one get a judicial decision?

- **More resources are needed.**
- Spain has 12,5 judges for 100.000 population while the average in Europe is 21,3 judges.



4. Conclusions

- The Aarhus **requirement of an effective access to justice** in order to protect the human right to environment Convention is also in EU, Spanish and Catalan law.
- The **three specific types of access to justice** of Aarhus Convention are not well implemented under EU and Spanish law.
- The **general requirements of access to justice** of Aarhus Convention are the major challenge for environmental protection in EU and Spain. Legislative reform and additional economic resources are needed.

Thank you for your attention

