NATIONAL REPORT: SPAIN

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PART A:
RECENT DEVELOPMENTS IN SPANISH ENVIRONMENTAL LAW

In a nutshell, the main environmental law developments in Spain during the year 2001 may be summarised as follows:

1.- LEGISLATION

Under Spanish constitutional law, the power to enact environmental legislation corresponds both to the National institutions (Parliament and the Government or Council of Ministers) and to the Autonoumous Regions (regional parliaments and cabinets). Briefly described, the basic legislation corresponds to the State, while the Regions may pass legislation which introduces more stringent environmental standards. Under this situation, any notice of Spanish environmental legislation has to mention both the national and the regional norms approved during the year.

1.1.- State legislation

1.1.1.-Horizontal legislation

The most important piece of horizontal environmental legislation is the Act of May the 8th, 2001, on Environmental Impact Assessment (EIA). This new law is the final result of the parlamentary debate of the Decree-Law (*Decreto-Ley)* 9/2000, which was approved by the Cabinet on October the 6th, 2000.

With this Act, Spain has finally got a piece of parliamentary legislation on EIA, something the country has lacked since its accession to the European Communities in 1986. So far, the relevant legislation in this field has always been approved by the Government, through "urgent" laws (decree-Law, *Decreto-Ley*) or governmental legislation "delegated" by the Parliament.

While many expected that this new statute would consist of a comprehensive new regulation of EIA, the fact is that, compared with the Decree-Law of last year (explained in our paper for the Bremen meeting), this Act has introduced few changes in the governmental text. The most noticeable improvement of this new law is that it improves and enlarges dramatically the annexes listing the projects and activities that have to go through an EIA. However, many weaknesses remain, especially for what concerns the procedural aspects of the EIA. New governmental regulations should fix this problem in the year 2002.

1.1.2.- Sectorial legislation

The Cabinet has passed Legislative Decree (*Real Decreto Legislativo)*[1] 1 / 2001, of July the 20th, which approves the consolidated text (*Texto refundido*) on the Water Management and Potection Act (*Ley de Aguas*). The previous Water Management Act, of 1985, had been amended in several ocasions since its enactment. The new text does not introduce any revolutionary change in the law, but fixes, clarifies and harmonises all the legislative amendments of the past.

Still in the field of water management, Parliament has passed an Act on the National Water Management Plan (*Plan Hidrológico Nacional):* Act of July the 5th, 2001. This National Plan is a key element in the Spanish law on water management, and was foreseen by the previuos Water Management Act of 1985. Since Spain is such a diverse and heterogeneous country from the perspective of water suply and demand, the national plan tries to lay down the fundamental, strategic policy options for solving the recurrent problems of droughts and water distribution, aswell as depuration of residual waters. Concerning the first problem, the plan foresees the construction of damms and water management projects, namely water transfers from one region to another. As for quality objectives for waters, the plan approves the construction of several depuration plants in many sensitive areas, and improves the mechanisms and devices for the control of the quality of water. Since essential interests are at stake, the framing and negotiation of the Plan has been very long, cumbersome and controversial, as evidenced by the fact that the Plan was foreseen by a Law of 1985 and could only be approved ...fifteen years later. Furthermore, all the interests have not seen their demands satisfied. Some regions (namely, Aragón) have shown a fierce oposition to the Plan, and still have planned to bring claims under the constitutional court.

Another noticeable piece of state legislation, which is not openly "enrivonmental" but has several ecological implications is the Act of March the 6th, 2001 (*Ley 3/200*1) on maritime fishing. This law pretends to achieve a comprehensive regulation of this key economic sector in Spain. Among several aspects of this Act, which are irrelevant for the purposes of this paper, we shoud underline the existence of provisions dealing with: (a) management of fisheries resources, (b) limitation of captures, (c) protected areas and marine reserves, (d) protection of certain species of fish and (e) the regulation of methods of captures. The statute, however, does not regulate this items by itself, but ask for future, implementing rules and regulations, to be approved by the Ministry of Agriculture and Fisheries.

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[1] Under Spanish constitutional law, a Legislative Decree (*Real Decreto Legislativo*) is a norm aproved by the Cabinet, but having the same power and force as a parlamentary enactment. For doing so, the Cabinet must be granted prior authoritizing legislation from Parliament

Apart from the above parliamentary legislation, the Council of Minister ("cabinet" or "government") has also approved several regulations on environmental affairs, among which we should underline:

(1) Royal Decree 4/2001, of January the 12th, which sets up a subsidies scheme in favor of the use of environmentally-friendly production methods in agriculture.
(2) Royal Decree 287/2001, of March the 16th, fixing a reduction on the sulphur content in petrol.
(3) Royal Decree 581/2001, of June the 1st, on the prohibition of the use of hunting, leaded ammunition in certain protected wetlands

1.1.3.- Other noticeable national developments

Apart from the purely normative developments, I find interesting to mention that, in the domain of waste, the government has approved the National plan on end-of-life vehicles (ELV) managenement (decision of the Council of Ministers of August the 3rd, published in the Oficial Gazette on October the 16th, 2001). The Plan (not a *"law"*, formally speaking, but binding for operational purposes), sets the environmental targets in the field of ELV for the period 2001-2006.

It is important to notice that the national government (Ministry of the Environment and other bodies) lacks any actual power or competence in the field of waste management, recycling of elimination whatsoever, since that is a regional and local responsibility. Accordingly, prior to this plan several regions had already approved their own regional plans on ELV, namely Andalucía, Basque Country or Navarra). The present, national plan, which has been negotiated with the Regions, should be an instrument for coordinating those regional plans on this subject (through several techniques, such as: sharing of information, setting up of cooperation devices, subsidies, public infrastructures, public information and awareness campaigns, etc.). It mentions expressly the obligations stemming from Directive 2000/53/CEE, of September the 18th, but this european norm has not been expressly incorporated in Spain yet.

In 2001, two other National Plans on the management of specific kinds of waste have been approved: (a) the plan on the management of sludges coming from plants for the treatment of residual waters, and (b) the plan on construction and demolition waste. Both plans, more or less, follow the lines of the ELV national plan.

1.2.- Regional legislation

1.2.1.- Horizontal legislation

Autonomous Communities may approve "parliamentary" legislation aiming at the comprehensive protection of the regional environmental, or enshrining "horizontal" instruments of environmental protection. The year 2001 is fairly

poor from this perspective, since most regions have already passed this king of norms n the past. However, we may mention the following developments:

(a) By Act of July the 13th, 2001, the parliament of Catalonia has amended the Act of February the 27th, 1998. This latter provision regulates the IPPC technique in the territory of that region, and is a noteworthy norm because Spain still lacks nationwide legislation in this field.

(b) By Act of August the 21st, 2001, the parliament of Galicia has approved a comprehensive law for the conservation of nature, which will be the framework for future regional legislation on protection of flora and fauna, environmental impact assessment, and so on.

1.2.2.- Sectorial legislation

Two pieces of regional, parliamentary regional legislation deserve our atention, both in the domain of water management and protection:

(a) By Act of August the 2nd, 2001, the parliament of Galicia has approved a law for the protection of the quality of certain kinds of water, aswell as the depuration od residual water.

(b) The Parliament of Aragón approved the Act of May the 17th, 2001, on public participation in the management of water resources.

Apart from the abovementioned regional "parliamentary" legislation, the several autonomous communities have approved dozens of administrative and technical regulations on different environmental topics, (management of natural parcs, organization of administrative bodies, detailed procedures for granting subsidies or licences, administrative inspections and sanctions, regional catalogues of endangered species of flora and fauna, regulation of specific categories of waste, etc.). The high number of Regions (17) and the technical nature of those provisions prevents any comprehensive listing of them.

2.- CASE-LAW

It is almost impossible to summarise all the environmental case-law produced in the different jurisdictions and courts of Spain. It then seems better to focus on a single development, extracting a couple of court decisions which have an exemplary value. In this occasion we will focus on the field of noise pollution. We are not talking about "ambient" or "general" noise, coming from traffic or public works, but the one coming from entertainment businesses, such as bars, discotheques and night-clubs. A mixture of lack of respect for the rest of the others, bad soundproofing techniques, endless sessions lasting untill sunrise, loose or non-existent administrative control, together with a certain culture of "permissivity" makes that Spanish night-life stands for a major tourist atraction for millions, ... but remains an unbeareable nightmare for thousands of citizens in Spain, those who are so unlucky to live close or above one of these attractions.

In the year 2001, two noticeable cases have reached the papers. The first one was rendered by the Constitutional court on May the 24th, 2001. In that proceedings, the applicant claimed that the noise coming from a group of clubs operating in the basement of the building where she lived interferred with her right to a decent environment (enshrined in article 45 of the Constitution), aswell as with her rights to physical, moral integrity and privacy (articles 15 and 18 of the same Constitution). The Court dismissed the case, on the ground that the "right" to an environment is not a true "fondamental" right (see my paper of last year on this topic), and that the applicant was unsuccessfull in proving the actual level of noise in her appartment, or that that level seriously impaired her health.

In the light of Spanish Constitutional law, the decision may seem to be just "correct", and many –as in my case- have criticised that: (a) the decision does not seem to be in line with the ECtHR case-law on "environmental" violations of privacy and health rights under the EconvHR (López Ostra and the Heathrow litigation, 2001); (b) The burden of proof placed on the applicant is too stringent, for she had to prove that the noise produced a "serious" damage on her health (there´s a dissenting opinion on this point). On the contrary, it should be enough, from a progressive perspective, to show that the noise significanty put her health at risk.

Some months later, a similar case arrived to the newspapers. In that ocasion, another affected person, living in Cartagena, suffered from a similar situation. She first tried to stop the operations of a night-life complex, by urging the local government to enforce the local ordinance on noise, but the agency responded with passivity or loose enforcement. In the face of this situation, the applicant then sued the local government, asking for monetary compensation for the damages produced (lack or rest, sleeping difficulties, emotional and psicological problems, etc.) The administrative court partially granted the applicant what she asked for, and the local government was condemned to pay a compensation.

The "striking" remark that this case deserves is that the origin and the cause of the damage is a private action, produced by the business operating the complex. However, instead of sueing those people under the civil courts, the citizen preferred to sue the Public Administration, claiming that "if" it had controlled the private activity, the damage would have not taken place (the other reason is that the government is never insolvent). In my view, this is an absolute twist of rationality, together with a patent denial of the "polluter-pays" principle

3.- COMPLIANCE WITH EC ENVIRONMENTAL LAW

By its judgement of September the 13thth, 2001 (Case C-417/99), the ECJ condemned Spain for not fullfilling its obligations stemming from Directive 96/62/CE, the "framework" directive on ambient air quality. As already

known, this directive imposes several obligations on the member states. Namely, they are supposed to designate at the appropriate levels the competent authorities and bodies responsible for: the implementation of the Directive, the assessment of ambient air quality, the approval of the measuring devices (methods, equipment, networks, laboratories), ensuring the accuracy of measuring devices and checking the maintenance of such accuracy. Article 11 requires Member States to inform the Commission of the competent authorities, laboratories and bodies referred to in Article 3 ('the obligation to inform). Finally, the second paragraph of Article 3 provides that Member States must make the information referred to in that article available to the public at the same time as they supply it to the Commission ('the obligation to make public). Those bodies should have been designated by Mat the 21st, 1998, at the latest.

Spain has got a comprehensive, national legislation on atmospheric pollution, dating back to 1972. That year, the Act on the protection against atmospheric was passed, and later, the Decree 833/1975 served as a comprehensive regulation of main sources of pollution and evironmental quality standards. After the accession of Spain to the European Communities, this norm has been amended several times, in order to transpose into national law all relevant air pollution EC directives. The point is that, in spite of this legislation, its implementation, management and enforcement is a regional, and even local, responsibility, and the central authorities have been unsuccesfull in framing a workable scheme for fulfilling these obligations of Directive 96/62. The prospects of doing so are not very promising, since coordination and cooperation is a matter in which Spain has still many improvements to make.

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PART B: CITIZENS ACCESS TO JUSTICE IN ENVIRONMENTAL AFFAIRS

1.- PRESENT STATE OF THE LAW

Article 24 of the Spanish Constitution is the paramount provision in the field of citizens access to justice and states that everyone has the right to obtain an effective protection from the courts, in the exercise of their rights and legitimate interests, and that no situation of lack of defence will be allowed.

However, the state of the law is not as simple as that, and as a matter of fact there is not a single or universal state-of-the-law concerning citizens access to justice. The reason is that, due to peculiar historical and legal developments, and like many other countries, there is not a single jurisdiction, but five: civil, criminal, administrative, social/labor, and militar. Each jurisdiction culminates in one chamber (Sala) of the Spanish Supreme Court, but each one is regulated by a different statute, coming along with a specific case-law on standing and access to that specific courts. This five-prong legal regime is supposed to be

harmonised by the case-law of the Constitutional law on article 24 of the Constitution.

In the light of this complex situation, the best seems to neglect those jurisdictions in which environmental controversies have little or none significance, that is, the social and the military ones, and focus on the other three. Among these jurisdictions, the most important is by far the administrative jurisdiction (*jurisdicción contencioso-administrativa*), since most environmental cases involve a challenge to governmental action (a penalty, a sanction, a licence, ans so on). Environmental litigation is much less important in the civil and the criminal jurisdiction. The first one is strictly limited to environmental cases where there is a breach of property rights, such as patrimonial damages or nuisances law. Finally, the criminal jurisdiction is relevant here since the Spanish criminal code establishes some kinds of criminal offences where there is a severe environmental damage.

1.1.- Access to administrative courts.

As said above, administrative courts play the leading role in environmental affairs, since administrative agencies and bodies do : (a) grant licences to polluting activities (zoning and building permits, pollution and discharge permits, etc.); (b) impose restrictions or bans on private business and industries; (c) licence new products and activities; (d) conduct inspections on polluting activities; (e) identify the environmental impact of proposed projects; (f) impose fines and sanctions on polluters, illegal hunters, and so on. It can be said that any major environmental litigation in Spain involves either an administrative decision...or the absence of it.

Article 19 of the Act of July the 13th, 1998, regulates standing before spanish administrative courts. Among other rules, it lays down two deserving our attention:

A) General rule on standing

Under the general rule, access to court is restricted to those “legal and natural persons claiming to have a right or a legitimate interest” which result adversely affected by the administrative decision, or the lack of it. This general provision has been traditionnally and narrowly interpreted in the sense that only problems affecting “personally” the applicant could be scrutinised by administrative courts. From that traditional interpretation (dating back to the equivalent, 1956 statute), a citizen may challenge an administrative decision which refused to grant what she asked for (i.e. a permit or licence to operate a polluting facility), or imposed on her a fine or penalty, and so on. Also, a citizen may seek monetary compensation for damages resulting from governmental activity, for instance, when she or her property is damaged or impaired. For what concerns the criteria that need to be met in order to get monetary

compensation from governmental activities, they result from a long standing case-law, originating in a 1954 statute: (a) actual impairment of damage, that the citizen is not supposed or obliged by law to support; (b) governmental activity involved in the "public services"; (c) causal link between the governmental activity and the private damage.

In a nutshell, the traditional interpretation on standing demands a "personal" or "closiness" link between the administrative decision and the personal or patrimonial domain of the plaintiff. Consequently, no citizen can challenge an administrative action which is not directly related to her, or which does not directly affect or damage her.

On the other hand, the controlling statute (amended in 1998) also speaks of a "legitimate interest", and this statement is beeing interpreted by the courts in a more and more "progressive" way, admitting law-suits triggered by applicants which are not affected in their vested "rights", but in their "legitimate interests". The paramount example is the standing recognised to NGOs and associations to defend environmental interests, which to not "belong" personally to the different people affiliated to the association.

In spite of this more "progressive" case-law, it can be said the the "personal" link still remains the rule, and much environmental litigation is barred from the courts since judges ask for that prerequisite.

(B) Special rule on standing: the public action

The same article 19, at letter h, recognises standing to anyone, without the need to prove a personal damage or interest, in the cases of "popular action" (*acción pública*, actio popularis). This possibility is not open and general, but has to be specifically established by the law.

It is interesting to point, however, that many environmental statutes expressly recognise that possibility: art. 109 of the law on coastal management (Act of July the 28th, 1988), art. 16 of Decree 833/1975, on atmospheric pollution, and many other statutes establishing the most important natural parks.

As for the specific situation of the "passive" administration, several remedies are at the disposition of citizens: (a) First, they may report the situation of environmental damage to the competent administrative agency. In case that no action is taken, the citizen can sue the government before the administrative courts.The court can order the agency to take positive steps (this line is not very developped in Spain yet, due to the principle of administrative discretion in the exercise of police powers). (b) Second, if there is an actual, personal damage, which was "provoked" or "triggered" by the governmental passivity, the affected person may sue the government and ask for monetary compensation (see my "case-law" section, above). (c) Finally, if there is any trace that the

competent government official is knowlingly discharging his duties in a way that unduly favorises the polluter, the citizen could open a criminal proceeding against him for administrative corruption. Despite the availability of these theorical remedies, we must concede that the cases of administrative passivity are too numerous in Spain. Furthermore, litigation and administrative procedures are cumbersome, and citizens feel discouraged to start these lines of action.

1.2.- Access to other jurisdictions.

Access to the civil or criminal jurisdiction is even more restrictive. For what concerns the first one, only the person bodily injured, or the owner or possessor of an asset or damaged property, may sue the person who caused the damage.

As for the criminal courts, in the case of environmental, criminal offences, it is the sole competence of the *Ministerio Fiscal* (Government Attorney or public prosecutor) so sue a person before the criminal courts. Direct access to courts is banned for Citizens and NGOs, who may only intervene in that proceedings at the preliminary stages, by way of reporting the actual activity to the competent administrative agency or to the public prosecutor´s office.

2.- THE FUTURE UNDER THE AARHUS CONVENTION

To begin with, it should be remarked that, contrary to what happens in the UK and in other countries, Spain has got a system of *régime administratif*. It means that the role of government in the reddress of environmental impairment or damages is much more stronger and executive: an environmental, administrative agency may by itself, without asking for the protection or permission of the judges, and after appropriate procedural safeguards, impose a fine on an individual or a corporation, close a polluting factory, seize property or goods which are illegal, etc. Consequently, the spanish law does not allow an individual to “subsitute” in the institutional role of Public Administration. Of course, he might sue the pollutant under the civil courts, but in that case he has to demonstrate that there is a property, personal damage.

On the other hand, the possibility to recognize an NGO a compensation for its efforts to bring environmental cases is not contemplated under Spanish law.

As for the litigation costs, the rule before the administrative courts is that each party has to face their own expenses (lawyers, evidences, etc.) which in fact may be a certain deterrent for NGOs and individuals to sue in the case that no actual monetary compensation is foreseen. In some cases, however, the Act on Administrative control of the administration (and the same applies for the civil jurisdiction), states that the court may declare that the loser is to pay all the costs involved in the process. This possibility applies when one of the litigant has acted in bad faith, or has knowlingly acted with procedural recklessness (for instance, blatantly supporting a clearly helpless position).

Finally, for what concerns the Spanish situation under the Aarhus Convention, it should be noticed that Spain signed the convention on June the 25th, 1998, but has not ratified it. Yet, although the Convention is not binding upon Spain, we don´t see that major changes should take place in order to meet the convention´s standards on access to justice (article 9). In particular, as regards paragraph 1 of the said article, we understand that the spanish legal system fully complies with it, under the law of Decembre the 12th, 1995, on the right of access to environmental information (transposition of Directive 90/313) and the Act on Judicial Control of Public Administration, above mentioned.

Finally, we don´t see any part or feature of our national court system deserving the "honour" to be exported, as litigation in Spain is in general too long, costly, and cumbersome, and the the institutional powers and involvement of spanish judges do not seem to be very satisfactory.

3.- THE EC LEVEL

Under current EC Law (art. 175.4, EC Treaty, and the hundreds of environmental secondary provisions) enforcement of EC environmental law corresponds to the different member states, according to their national constitutional and administrative traditions. In the case of Spain, as reasoned in the lines above, that burden lies primarily on the shoulder of Public Administration, that is to say on the different layers of government: one central Ministry for the environment, seventeen regional environmental "ministries", 8060 Municipalities, etc.

Despite this huge list of "competent" authorities, it is almost unanimously considered that the enforcement of environmental law is very unsatisfactory. The country has got thousands of environmental provisions (central, regional and local), but this normative effort is not matched by an equivalent implication in its enforcement. The reasons are several: (a) in some cases, the environmental enforcement divisions lack qualified staff, or it is clearly insufficient, or even non existent. This situation makes that Pubilc Administration sometimes lacks the necessary human resources to detect the numerous violations to environmental law, and even worse: sometimes, administrative agencies are unable to terminate in due time the files, and then unable to take legally binding decisions; (b) in others, administrative inspections and sanctions face the fierce opposition of the affected, organised sector having a strong economic significance (water management and farmers, for instance); (c) often, the law is little known or even ignored, because they have not received adequate dissemination (i.e., local ordinances, wich are sistematically forgotten); (d) In some aspects, the awareness and implication of the people is too small (i.e. greenhouse emissions) while in others it is too big in relation with the means available (i.e. paper recycling); (e) finally, enforcement of environmental law is postponed in face of economic considerations (i.e. the devastating model of tourism), etc.

Anyway, the worst element in this "chamber of horrors" is probably that the enforcement of environmental law lacks the necessary political strengh and will to be effective: we do not see that this aspect be at the top of political promises, or that prominent politicians of relevant figures be appointed to environmental Ministries or agencies. Politicians are, then, to blame, but beyond that simplistic assertion there could be an even worse situation: since politicians react in the way appropriate to get votes, they possibly think that significant moves in this direction would not compensate their electoral expectations. Furthermore, there is no significant "green" party playing any relevant role at all in the political scene.

Nothwithstanding this overall negative situation, some important improvements have taken place. On the one hand, the people, especially the young generations, are more and more involved in this subject (the number of complaints before DG Environment originating in Spain is among the highest every year). On the other hand, the *corps* of environmental enforcement have been reinforced over the last years. We should underline the current existence of a speficic division of the *Guardia Civil* (the traditional national police) working in the field of environmental protection, the *Seprona,* which is playing an outstanding role in the detection and control of many environmental violations.

As for the EC level, the establishment of a *European corps* for the enforcement of european environmental law should be welcome, although this possibility is very unlikely from a realistic perspective, taking into consideration its budgetary implications, and the current move of the EC administration towards de-regulation, downsizing and outsourcing (the so-called "reinvention of governance"). From the legal perspective, art. 175.4 of the EC Treaty should not constitute a major problem for such an establishment. A possible model could be the DG Competition services and personnel. As in this case, the environmental *corps* should be restricted to european-wide environmental problems (transnational pollution or emissions, migratory species, CITES species coming from third-countries, and so on). This body should be entrusted with powers for conducting investigation and eventually for imposing sanctions (as in the competition case)

In any case, the present situation (infringement procedure, ex art. 228) does not seem to be very satisfactory: the resources of the Commission are too limited, the officials at DG Env. support a too strong pressure from vested interests... and from other Departments; the process of deciding whether to sue a country or not are too cumbersome and pervaded by spurious considerations. On top of that, ECJ decisions do not deserve a great public expectation or interest (at least in Spain) although this could change if frequent recourse is taken to the penalties foreseen at art. 228.2, EC Treaty.

These considerations could perhaps be put forward within the current process of “reinventing” Europe.