

## NGOs environmental legal mobilization and their access to the Spanish Supreme Court

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### Abstract

Environmental NGOs in Spain are well known policy actors. Since the nineties some of them have been invited to participate in governmental committees and/or to

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provide expertise to Parliamentary committees. They have also an important role in mobilizing public opinion to defend and protect the environment. We know less though about how do they intervene in the judicial arena. In the framework of a growing role of the Courts in the field of environmental governance, the goal of this paper is to analyze to what extent Spanish NGOs resorted to the judicial arena, specifically the Supreme Court, to enforce international and European higher standards of environmental protection and advocated against wrong or inadequate praxis in the implementation of environmental regulations. Several non-judicial factors seem to have strengthened that trend in Spain: increasing environmental national and European regulation as well as the NGOs organizational capacity to make judicial claims in line with their policy preferences.

**Key words**

NGOs; environmental policy; Spanish Supreme Court; legal mobilization

**Resumen**

Desde la década de los noventa, las ONG medioambientales de España participan en comités gubernamentales y/o como expertas en los comités parlamentarios; además de tener un papel importante en la movilización de la opinión pública. En cambio, sabemos menos sobre hasta qué punto recurren a la arena judicial. En el contexto de un creciente de papel de los tribunales en el campo de la gobernanza ambiental, el objetivo de este documento es analizar en qué medida las ONG españolas inician litigios, específicamente en el Tribunal Supremo, para exigir el cumplimiento de los estándares internacionales y europeos de protección del medio ambiente o en contra de malas praxis. Varios factores no judiciales parecen haber reforzado esa tendencia en España: el aumento de la regulación ambiental nacional y europea, así como la capacidad organizativa de las ONG para iniciar litigios en línea con su posición sobre una política determinada.

**Palabras clave**

ONG; política de medio ambiente; Tribunal Supremo de España; movilización legal

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## 1. Introduction

Since the eighties, when the first *green* NGOs appeared in the Spanish national scene, important structural changes have taken place, but two are crucial: on one hand, the construction of a multilevel system of governance and, on the other hand, the increasing regulation of environmental issues at European and national level. Those changes have transformed the institutional and political context in which environmental NGOs interact, thus affecting their strategies; they have adapted to continue to influence the policy decision-making process and the political agenda, they have achieved a leader role in mobilizing public opinion and also some of them achieved an authoritative position as relevant stakeholders and expertise-providers as to be usually consulted by legislators and governmental agencies. Those policy strategies have been extensively researched (Jiménez 2001, Casademunt 2016), but we know less about to what extent citizens organizations rely also on the judicial system to achieve their policy goals. This paper aims to analyze to what extent environmental NGOs are mobilized using the judicial arena to enforce international and European higher standards of environmental protection in the Spanish context (case-study), as well as to advocate against wrong or inadequate praxis in the implementation of environmental and climate change regulations. We analyze focus in litigation as indicator of legal mobilization, which a broader concept that includes other actions such as *amicus curiae* or legal advising and legal mediation.

Two key factors are supposed to have reinforced environmental legal mobilization in Spain namely; (1) the increasing body of environmental national and European regulation; and (2) the social mobilization of NGOs that nowadays are much more stable, professional, widely supported and better funded than in the past. As it regards the first, since the nineties we observe that attention to environmental issues has increased in the public opinion and political agenda. Social conflict over the implementation and regulation of water planning, energy construction utilities, road infrastructures lead to a change in the environmental policy community – dominated by public actors, private firms (mainly constructors) and professional association (civil engineers' associations for instance) – towards a more open public debate on sustainability which included new actors (Jiménez 2001, 2003). We think such legislative cosmos creates numerous opportunities for NGOs to span their litigation and push forward their agenda.

When it comes to the second driver of change, we start from previous research on this field that has shown how NGOs modernization and professionalization has helped them to play a leading role in mobilizing public opinion and introducing environmental concerns in policy making (Casademunt 2016). At national level, the traditional confrontational strategy that opposed decision makers to environmental NGOs has shifted to one of negotiation and involvement in solving problems, if not collaboration. For example, some NGOs, such as *Ecologistas en Acción*, *Greenpeace España*, *WWF*, *SEO BirdLife* and *Amigos de la Tierra*, were invited to sit in advisory governmental committees. Some legal mobilization literature strongly suggested that once in an "insider" position, NGOs were less likely to use litigation to shape public policy (Vanhala 2018), but there were also some elements that suggested the opposite, that having resources and knowledge, accessing the legal arena could be an option for some of them. In any case, it was necessary to analyze which NGOs were more eager to start litigation and which less reluctant, and if that was linked to their means or capacities or their "insider role" would be a deterrent.

To analyze to what extent these factors influenced NGOs' legal mobilization strategies, we have reviewed all the environmental case-law produced by the Spanish Supreme Court (SSC) between 2009 and 2015, we have designed a database and tabled information from all the judicial decisions where the main plaintiffs was an environmental NGOs. The database contains information about the NGO, or NGOs, that acted as plaintiffs in the case, the date where the case is accepted by the SSC to consideration, what institution is the main defendant, the main claim of the

plaintiffs, which is the law or norm that supported such claim, and among them the role of EU legislation, and/or international laws.

In doing so, we follow several lines of research that we interpret as complementary to understand NGOs legal mobilization: interest groups, legal opportunity structure and organizational theory to draw some expectations on the degree and characteristics of Spanish environmental NGOs legal mobilization. We argue that changes in institutional structure have prompted NGOs capacity to go to court. But more favorable and increasing regulation doesn't mean that all NGOs will choose to go to court... Institutional structure is not only regulation but also, the degree of openness or closeness of policy networks where these NGOs interact. Based on organizational theory and legal mobilization previous research we expect a skewed distribution in the degree of legal mobilization and access to Courts by those NGOs, due to institutional factors but also organizational factors such as the degree of specialization within NGOs and the inside culture or propensity to use litigation.

A preliminary analysis of the data gathered shows run counter to previous intuitions or certain assumptions. For example, the research provides evidence that suggests that changes in the institutional structure – mainly Europeanization and regulation of NGOs' participatory rights –, has actually shaped crucially legal mobilization in the Spanish context. The research also suggests that it is EU Law more than other international instruments such as the well-known Aarhus Convention that frames legal mobilization. Against some of the literature that pointed at NGOs institutionalization or insidership as a deterrent of legal mobilization, the findings show that some other insiders such as *Ecologistas en Acción* have clearly favored legal mobilization. But the opposite may also be true for some organizations, such as *Greenpeace*, that acts as an insider in the sense that they are usual actors in the political and social arena, but does not undertake legal mobilization, so the degree of insidership becomes a factor quite difficult to assess as a driver/deterrent of mobilization. Precisely, as there might be other reasons that could explain better why NGOs embrace legal mobilization beyond usual explanations based on the institutional and political context, it is reasonable to take into account complementary explanations like their history, composition, organizational roots, etc. that conform the culture of each organization.

From here the paper is organized as follows, first we discuss different branches of the literature on interest groups and legal mobilization that help us to contextualize the Environmental Spanish political context and describe their institutionalization and access to the policy process. It is in this framework that in a second chapter we analyze the role of the Spanish Supreme Court and the features of the social mobilization conducted by NGOs on this area. Then we analyze the features of the strategic litigation conducted by Spanish NGOs before the Spanish Supreme Court. Finally, we conclude with some reflections on the characteristics of Environmental NGOs legal mobilization and lay down some ideas for future research.

## **2. Advocacy groups, legal mobilization and organizational roots**

In what follows we put together different approaches that in our view are complementary to explain NGOs' legal mobilization, more specifically litigation. Interest groups literature and legal opportunity structure emphasizes that the political context as well as the legal opportunity structure shape NGOs litigation. But we stand here that these approaches explain a lot but it is need to take also into account other ideas from the organizational theory to explain differences between NGOs in terms of their behavior and strategy preferences.

Literature about interest groups reminds us that the relevant role of advocacy groups in influencing the policy process is constrained by their capacity to exchange resources with the policy-makers. One of the most important resources for advocacy is information, by exchanging their knowledge and expertise on policy issues advocacy groups ensure that policy makers choose is close to their own preferences

(Austen-Smith and Wright 1994, De Figueiredo and De Figueiredo 2002, Beyers *et al.* 2008, Chalmers 2011). Other resources can be electoral support of advocacy group's constituents or even legitimatization of certain policy goals, this way policy makers share responsibilities with those groups that try to influence the final decision (McCubbins and Schwartz 1984, Lupia and McCubbins 1994).

The range of possible strategies is undoubtedly wide, ranging from "outsider" strategies (media campaigns, organizing demonstrations and rallies and staging protests, strikes or boycotts), to "insider" strategies (participating in consultations or expert committees and direct contact with decision-makers). Until very recently, despite attempts to include interest-group litigation as part of a full-blown theory of interest groups in all institutional arenas, in most models, the analysis stops at the legislative or rule-making stage (De Figueiredo 2002).

Within the subset of studies that have focused on why interest groups in general, or advocacy in particular, privileges some advocacy strategies and not others, and why specifically they decide to go to Courts (Bouwen and Mccown 2007, Vanhala 2011, 2018, Hofmann 2017). Here we will focus mainly on the importance of resources and access to institutions from the different points of view of two of them: the "opportunity structure" studies and the "interest groups" analysis.

Those more concerned with the role of institutions, consider that it is important to take into account how political factors constrain interest groups' strategies (Truman 1951, Schattschneider 1960, Kingdon 1995, Baumgartner and Mahoney 2008). By the same token, those within the social mobilization tradition consider that both stable and contingent political factors constitute specific opportunity structures (formally and informally) for social movements and interest groups to exploit when pursuing their goals (Wilson and Rodríguez Cordero 2006). On the other hand, we also follow Hilson (2002) to consider that the Legal Opportunity Structure (LOS) is independent variable from the political opportunity structure and has its own characteristics. Like the political opportunity metaphor, the legal opportunity metaphor consists of both structural and contingent features (Cichowski 1998, 2016, Hilson 2002, Vanhala 2018). On the structural side one might include, the relatively stable features related to access to justice such as the procedural norms on standing before the courts, the availability of free legal aid and fees and the rules to bear the courts costs; but also we can consider as a contingent feature the level of judicial receptivity to policy arguments in particular cases, as well as judges preferences, that may vary considerably in different jurisdictions and at different court levels (Hilson 2002, 243-244).

The variables attached to the institutional structure theory can be very broad in relation to access to justice and litigation, for example in the case of environmental NGOs in Spain changes in the recognition of NGOs standing to engage in litigation to preserve collective rights or the limitation of the lawyer fees and courts' costs when the judgment is adverse (Bonine 2009), are major obstacles removed or minimized to support their access to justice although litigation costs continue to be a barrier to the access to Justice as in many other countries<sup>1</sup> (Law 27/2006 regulating the rights of access to information, public participation and access to justice in environmental policy, that incorporates European Directives 2003/4/EC and 2003/35/EC).<sup>2</sup> According to Ortega, the law allows for

the introduction of this new active legitimacy in favor of environmental NGOs, provides a final response to the need to expand the means of challenging the environment beyond the reactionary rights that derive from the protection of subjective rights or legitimate interests, In any case, necessarily reportable to

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<sup>1</sup> See the *Report of the Third Meeting of the Task Force on Access to Justice at the Aarhus Convention 2005* (ECE/MP.PP/WG.1/2005/5). See, more recently, the 2013 *Study on access to justice in environmental matters in Spain* presented at the Task Force meeting 2013.

<sup>2</sup> Law 27/2006 is not confined to jus transposing both Directive 2003/4 and 2003/35 into the national legal system, its goal was also to adapt Spanish Environmental Law to the Aarhus Convention.

injuries in the legal sphere of physical and / or legal persons, irrespective, in principle, of the incidence of damage to the environment as a collective legal right. (Ortega 2011, 3)

However, some authors have pointed out that Law 27/2006 in practice did not introduce relevant changes in access to the Courts, it only recognized standing to certain NGOs and their right to enjoy legal aid.<sup>3</sup> In any case, this regulatory change in the NGOs access to justice in environmental policy is the result of international law obligations, primarily due to the ratification of the Aarhus Convention in 2004 – six years after its signature, a delay that shows that the conservative government at that time was not keen to open access to Courts to Environmental NGOs –. But also to the inclusion of the obligations imposed by such Convention in the European Directives 2003/4/CE and 2003/35/CE, the first one regarding public access to environmental information; and the second one establishing public participation in the discussion and elaboration of plans and programs with an impact on environment and its public participation.<sup>4</sup> According to this, *we could reasonably expect that the legal opportunity structure opened by changes in the procedural aspects of the right to access to the Courts increases degree of Environmental Spanish NGOs legal mobilization.*

A second set of explanatory reasons for legal mobilization is the accumulation of all kind of organizational resources, like availability of funding but not only, because other type of resources such being an insider are, in general, considered also crucial means to enjoy direct and institutionalized interaction with -and ultimately impact on-, policy makers. Admittedly, there is no academic consensus about how much having an insider status may influence the probability to use litigation to influence public policy. Although there is certain consensus on the recognition that resources play a central role in the ability of a group to litigate (Börzel 2006, Bouwen and Mccown 2007), it is less clear what profile of litigants might be more successful. Whereas Galanter's important study *Why the "Haves" come out ahead* (Galanter 1974) highlights the advantages that well-funded and experienced litigants (so-called "repeat players") enjoy over others in court proceedings., others have argued precisely the opposite, that litigation is a valuable resource for groups who are politically weak in the legislative or governmental arenas. It is true that this is mostly a perspective coming from the USA case, for example Cortner (1968) who argues that smaller groups "are highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions". But if we go beyond this apparent contradiction, for our case, it is important to note that the literature also found differences between jurisdictions and judicial levels. For example, Galanter (1974), argued that the "haves" should be advantaged in courts. While, Wheeler and colleagues (1987) found little evidence for this hypothesis in state supreme courts, in most cases, litigation cannot and does not reach that level. Instead, in the lower courts, resource-intensive groups appear to have the advantage (Epp 1998).

In the same tune, the conclusions about other type of resources, such as access to parliament and governmental officials also differ. In the case of USA, as we said before, some scholars have shown that weaker groups (leaving aside "lone wolfs") with limited or no access at all to policy makers are more willing to litigate against

<sup>3</sup> On this concrete issue, see the controversy regarding access to legal aid reflected on the 2013 *Study on access to justice in environmental matters in Spain* and the position of the Supreme Court in its Judgement 29th April 2016 reminding that access by NGOs to Courts should only be subjected to minimal rules.

<sup>4</sup> Directive 2003/35/EC on public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC was rebutted and substituted by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and Directive of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

policy decisions. Litigation in this view is the result of social distance (Coglianese 1996, pp. 735-736) or a strategy by outsiders that are excluded from policy-making relationships (Cortner 1968). But in the case of Europe corporatist systems, research has come to mixed results, where on one side of the spectrum some research indicates that privileged access to policy-making discourages the use of litigation (Soennecken 2008), whereas in the other side, studies find no such effect (Vanhala 2018). Being Spain closer to the neocorporatist model or the European tradition interaction between interest groups and government,<sup>5</sup> *we expect that resourceful NGOs in terms of institutionalized interaction not necessarily discard more confrontational strategies including litigation as part of their broader agenda for environmental change.*

Being resourceful (in terms of funding or institutional access) is undoubtedly more than helpful, but the likeability to end up in courts also depend on other factors We can bring here another branch of the literature that emphasizes the importance of internal organizational characteristics, such as the internal NGOs culture, beliefs and inheritance to explain why and how strategic decisions are made. With this we support the idea that strategic decisions rely on shared views on the ideological roots of each NGOs, pre-existing institutions and legacy that affect the way they solve internal conflict and ultimately bargain for their own organizational survival (Vanhala 2018). From the analysis of organizations, we learn that NGOs as any other organization have an internal structure that result from the interaction between endogenous and external factors that shape their behavior. They can be depicted as open systems subject to external and internal pressures (March 2008). NGOs, then, are relatively autonomous in the sense that they are able to process contextual changes and interpret them with their particular lens, while the assimilation and interpretation of social changes allows them to influence and modify their external context (March and Olsen 1984). The institutionalist analysis of organizations also tells us that NGOs are rooted in pre-existing institutions and have different legacies that mediate conflicts and outcomes within the organization (Thelen and Steinmo 1992, Scott 2008).

These ideas are in line also with the social movements literature, which is relevant in the case of Environmental NGOs in Spain, where some of the key NGOs where born as social movements. Diani (1995) and McCarthy and Wolfson (1996), for example, argue that three factors can help to explain the organizational structure and collective identities of social movements: their territorial origins, the nature of links with pre-existing social and political organizations, and the type of leadership. *We expect then that, the organizational roots of Environmental NGOs explain, in part, the variance in the degree of legal mobilization (litigation) between repeat players and occasional players.*

### **3. Contextualizing Spanish Supreme Court role and environmental NGOs social mobilization**

Before going into the features of strategic litigation of Spanish Environmental NGOs, we need first to correctly frame our case study. On one hand, to better understand the role of the Spanish Supreme Court in relation to environmental law cases something needs to be said about the characteristics of the Spanish judiciary system. On the other hand, a brief description of Environmental NGOs' evolution and of the changes in the political context is necessary to better contextualize and understand

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<sup>5</sup> Previous research stand that from transition to democracy, Spain has developed a system of interest groups close to the corporatist model (Giner and Pérez Yruela 1985), which refers to the interaction among the State and interest groups or civil society organizations in contemporary capitalist societies, based in a hierarchical and institutionalized relationship, in which some interests groups are recognized by the State as the main policy actors. At present different authors consider that the main characteristics of a neocorporatist state prevails in Spain though there is an increasing pluralisation of interest groups, in terms of their number and the policy issues in which they are active (Gunther and Montero 2009, González and Luque 2014).



their policy strategies, in particular the choice of resorting to legal mobilization. By framing these two key preliminary questions we also acknowledge the specific limits of this case-study and the preliminary character of the outcomes of the present research.

### 3.1. *The Spanish Supreme Court*

In order to better understand the position of the Supreme Court in Spain, some clarifications are needed. As it is well known, the Spanish legal system abides to the rule of law and the separation of powers, with the Judiciary controlling the Executive Branch, but strictly subjected to the laws of the Land, including the Constitution, which is interpreted by the Constitutional Court inspired on the Kelsen model of concentrated constitutional control (Kelsen 1934/1967). This means the Constitutional Court, composed of 12 members, is charged with the function of deciding whether a piece of legislation from the Legislative Branch is in conformity with the supreme law of the land, which is the Constitution.

The Judiciary on its side, is organized geographically and in areas of specialization in a manner that ensures all Judges, albeit remaining independent, have superior Courts above their heads that ensure, the interpretation of the Law is as homogeneous and consistent across the whole territory as possible. To do so, the Judiciary is organized into five areas of specialization that more or less mirror some of the main legal disciplines: civil, criminal, administrative, labor and military law jurisdictions. Geographically, at the lowest level are the district Courts and over them the provincial Courts, which are under the High Regional Courts, at central level we find the National Court and the Supreme Court both in Madrid. Regarding the topic of this paper, briefly, in addition to being the most authoritative court regarding statutory interpretation, the Supreme Court, and specifically its Administrative Chamber (Sala Contencioso-administrativa) plays a triple role: first, it is a Court of first instance against decisions from the Council of Ministers and its delegated commissions, the Council of the Judiciary or the Parliament; second, it is also a Court of extraordinary appeal against judgements from the National Court (Audiencia Nacional) and Regional Courts (Tribunales Superiores de Justicia) and even the Supreme Court; third, it is also the "court of cassation" following the French model, in the sense it ensures an homogenous interpretation of the law whenever any inferior court, or even the Supreme Court, take contradictory decisions., As a result of this, the Supreme Court is in a prominent position to control administrative general norms contradicting pieces of legislation passed by the central Parliament in a sort of direct appeal against non-statutory norms, although this is a procedure that can be started by any Administrative Judge or Administrative Court<sup>6</sup> (cuestión de legalidad). This is a very relevant function in environmental matters, because the legality of governmental norms and decisions is often directly challenged before the Supreme Court. Similarly, being Spain a decentralized State with Autonomous Regions enjoying important legislative and executive powers on environmental protection Regional Supreme Courts (Tribunales Superiores de Justicia) also enjoy a key position to control the exercise of those powers by the governments of the Autonomous communities.

And last, as a result of the adhesion to the European Union, an additional source of legislation and interpretation was incorporated to our legal system. This legal order takes precedence over Spanish ordinary legislation and administrative regulations. To do so, and to the difference with the United States that created a judicial federal system that runs parallel to that of the States, in the European Union national courts are in charge of ensuring harmonic applications of the European law, with the

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<sup>6</sup> Administrative Judge or Administrative Court in Spain are fully independent and specialized judges or courts belonging to the Judiciary whose main task is the control of the Administration and its attachment to the rule of law, to do so they are vested with judicial powers as any criminal or civil law judge. They are not, as in other European countries, civil servants appointed by the Administration to adjudicate administrative claims or appeals within the Administrative branch.

European Court of Justice as the highest court on matters of EU Law, which can be consulted through referral by the national judiciary, but also by EU institutions and the Member States. As a result, a court or even the Supreme Court can solve domestic issues, issues where EU Law is involved or even refer a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling. This way such unique system ensures the homogeneous interpretation of European norms across Europe.

In summary, the Supreme Court is in a unique position as the highest ordinary court of the land in charge of statutory interpretation, and in so doing it has been trusted with several key functions, including solving direct appeals against non-statutory norms. And, very much like the rest of the judiciary, it can also refer cases for a preliminary ruling before the CJEU. That is why NGOs have important incentives to go to the Supreme Court and if they win the case, not only settle the interpretation of national and European law but also to nullify governmental regulations and non-statutory norms. But of course, the Supreme Court does not concentrate or has the monopoly in practice of the whole jurisdictional functions, and strategic litigation might be conducted also in certain relevant cases before other Courts, like the Constitutional Court (especially if it is legislation what needs to be nullified or there is a direct plea of Fundamental Rights infringement); or the regional Courts if it is regional legislation or administrative action what is challenged.

### *3.2. Spanish Environmental NGOs social mobilization features*

Environmental NGOs in Spain are earmarked by their late emergence within a cycle of mobilization in opposition to a dictatorial regime and the transition to democracy in the late 1970s. Jiménez (2007, 359) argued that their organizational roots differ from other Western European environmental NGOs in three ways: 1) weak links as they did not experience a common counter-cultural wave as in other countries like France or United Kingdom. The absence of links reduced their patterns of mutual identification and cooperation (intermovements). 2) Violence did not figure in their protest repertoire, reflecting the moderate nature of the Spanish protest culture during the transition to democracy. 3) Local and decentralized organizational models that make difficult to develop stable coordinating structures on a state-wide basis, as a result, the environmental NGOs population is regionally fragmented.

Nonetheless, in the 1990s, about 170 Environmental NGOs were part of CODA (Coordinadora de Organizaciones de Defensa Ambiental/Coordinating Committee of Environmental Defence Organizations, founded in 1979). It was formed by all kind of grassroots organizations, like ADENAT (Asociación Ecologista para la Defensa de la Naturaleza/Ecologist Association for the Defence of Nature, founded in 1976), which was the best example of a typical participatory protest organization. None of these two organization exist anymore, as in 1999 most of the groups belonging to CODA, including ADENAT decided to join up with many other groups to create *Ecologistas en Acción* (Ecologists in Action) [Jiménez 2005]. In the meanwhile, other non-participatory professionalized NGOs emerged attracting new followers, less willing to protest and closer to the model of check-book-members (Jordan and Maloney 1997), represented by the national branch of Greenpeace (1984), WWF-Adena (World Wildlife Fund-Spain, 1968), and Amigos de la Tierra (Friends of the Earth). Another key organization at national level is SEO-BirdLife (Sociedad Española de Ornitología/Spanish Ornithology Society), which was born in 1954, being the first conservationist Spanish NGO. In 1963, the Spanish Ornithology Society became part of the International Committee for Bird Protection (ICPB) and 1994 when the ICPB was renamed as Birdlife International; the Spanish branch changed its name to SEO-BirdLife. All five organizations are the core of the environmental movement at national level. Despite clear differences among them in terms of organizational models, political repertoires, issue agendas and so on, their interaction has been based on cooperation rather than on competition (Jiménez 2005, 2007). We can also echo this trend in their legal mobilization strategies, as we will explain later.

At the same time with its organizational enlargement, the environmental movement has broadened the number of issues in their agenda to include environmental quality issues (such as industrial pollution or urban ecology) and global issues like climate change more recently. Issues relating to environmental quality, which in the past received scarce attention due to the movements' conservationist and anti-nuclear origins, acquired gradually more relevance.

According to a survey of Asociación Ecologista de Defensa de la Naturaleza (AEDENAT) within 100 environmental groups, in 1987, the main issue in the agenda of environmental NGOs was the defense of the fauna and natural spaces, whereas only 30 percent of them carried out activities related to industrial or urban issues (Varillas 1989). In 1993, six years later, another survey conducted by Coordinadora de Organizaciones de Defensa Ambiental (CODA) confirmed the conservationist bias, notwithstanding some other issues were winning wider attention such as industrial and urban ecology issues. At the state level, the successful implantation of Greenpeace, as well as the gradual shift in CODA towards political ecology postulates, boosted this tendency. In fact, environmental representatives interviewed in the late 1990s usually presented the incorporation of environmental quality problems as the major organizational change in the movement (Jiménez 2005).

The inclusion of new issues in the NGO's agenda seems to be influenced by the evolution of environmental policies in Spain, and in particular by the implementation in the 1990s of a sectorial approach on a set of environmental issues, which before had only received few and non-systematic attention from the State. During the 1990s, it is also possible to see a trend towards a wider political repertoire and the increasing relevance of institutional (public hearings, petitions, lobbying, among others) and media channels to exerting political pressure. In other words, their interaction with the government became more institutionalized in the nineties, after a decade of confrontation with government, especially from the antinuclear contestation NGOs.<sup>7</sup> The environmental movement improved its capacity to manage environmental conflicts in order to influence the decision-making process (Jiménez 2003, Casademunt 2016). The dynamics of interaction between the state and the environmental movement remain though attached to the conflict-access logic (Jiménez 2001). In this sense, Jiménez (1999) pointed out that as the process of institutionalization progresses, conventional forms of action and negotiation with authorities prevail, and the role of NGO members shift from activism to that of mere supporters. The question is how this organizational expansion and consolidation have interacted and adapted to the changes in the political context, more precisely in the institutional structure on Environmental policy.

### *3.3. Environmental policy: changes in NGOs' political opportunity structure*

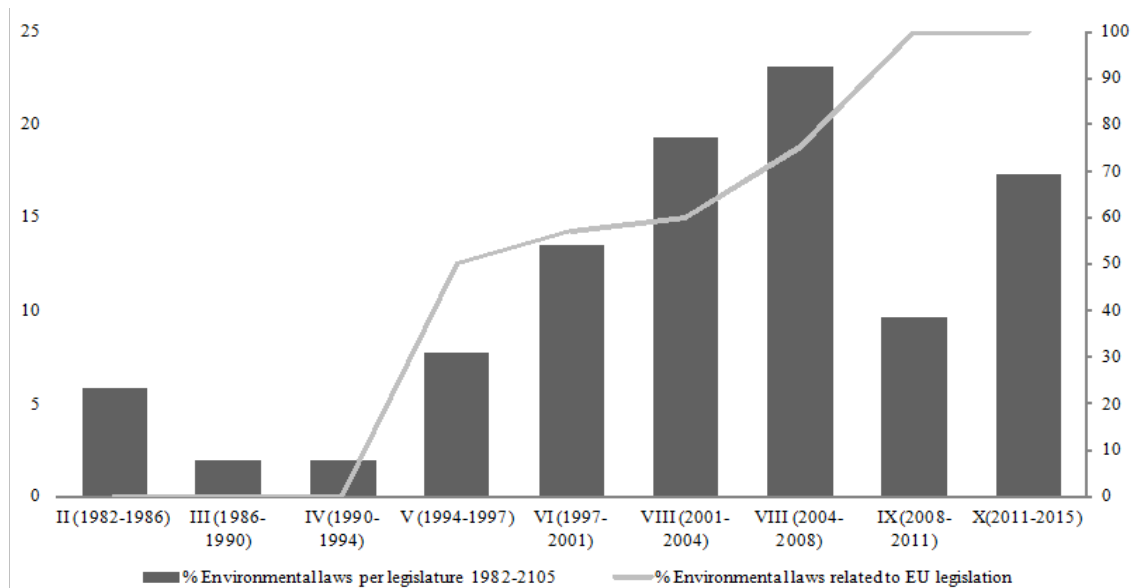
The institutionalization of environmental politics has been decisive in shaping Environmental NGOs approach to the policy process and inversely NGOs have also helped to attire and increase attention to the issue as well as to maintain a critical point of view towards some policy decisions, through campaigning, petition and legal mobilization. More recently, the increasing attention public opinion pays to environmental issues (Palau and Chaqués 2012), hand in hand, with a more detailed and sophisticated regulation partially due to the intense Europeanization of such policy, has strongly impacted on the political "opportunity structure" enjoyed by environmental NGOs in Spain. Figure 1 shows how Spanish environmental legislation was almost inexistent at the beginning of the 1980s, while at present there are 52 different pieces of legislation related to issues ranging from biodiversity and pollution control to urban planning. If we want to measure the degree of Europeanization, figure 1 shows how more than 70% of Spanish legislation adopted since 1980 is the

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<sup>7</sup> Antinuclear contestation faced strong state repression, since energy policy maintained the pro-nuclear orientation that had characterized it in the past. Many environmental demands clashed with the dominant discourse of economic modernization and the (neo)liberal orientation of economic policy (Jiménez 2007).

result of the transposition of EU norms or mentions them as the reason for their adoption, with steady increases per legislature since the middle nineties. It can be reasonably argued thus, that EU has had particular influence in the context of Spain's underdeveloped environmental policy in the eighties dragging the country towards a more Europeanized policy, following the trend of other European countries (Cichowski 1998, 2007). The intense Europeanization of Spanish Environmental policy and law has profoundly redefined the environmental policy field (Font 1996), and as a result has opened up new political structure opportunities for social mobilization.<sup>8</sup> The downside of the story of the Europeanization of Spanish Environmental Law is that whereas it is intense in terms of transposition of legislation, it is far more weaker in terms of its implementation, Spain is lagging behind when it comes to the application of EU Environmental Law or even its own laws, as many reports from the European Commission repeatedly show (see COM(2017) 370 final).

FIGURE 1



**Figure 1. Spanish environmental laws 1982-2015 and Europeanization.**

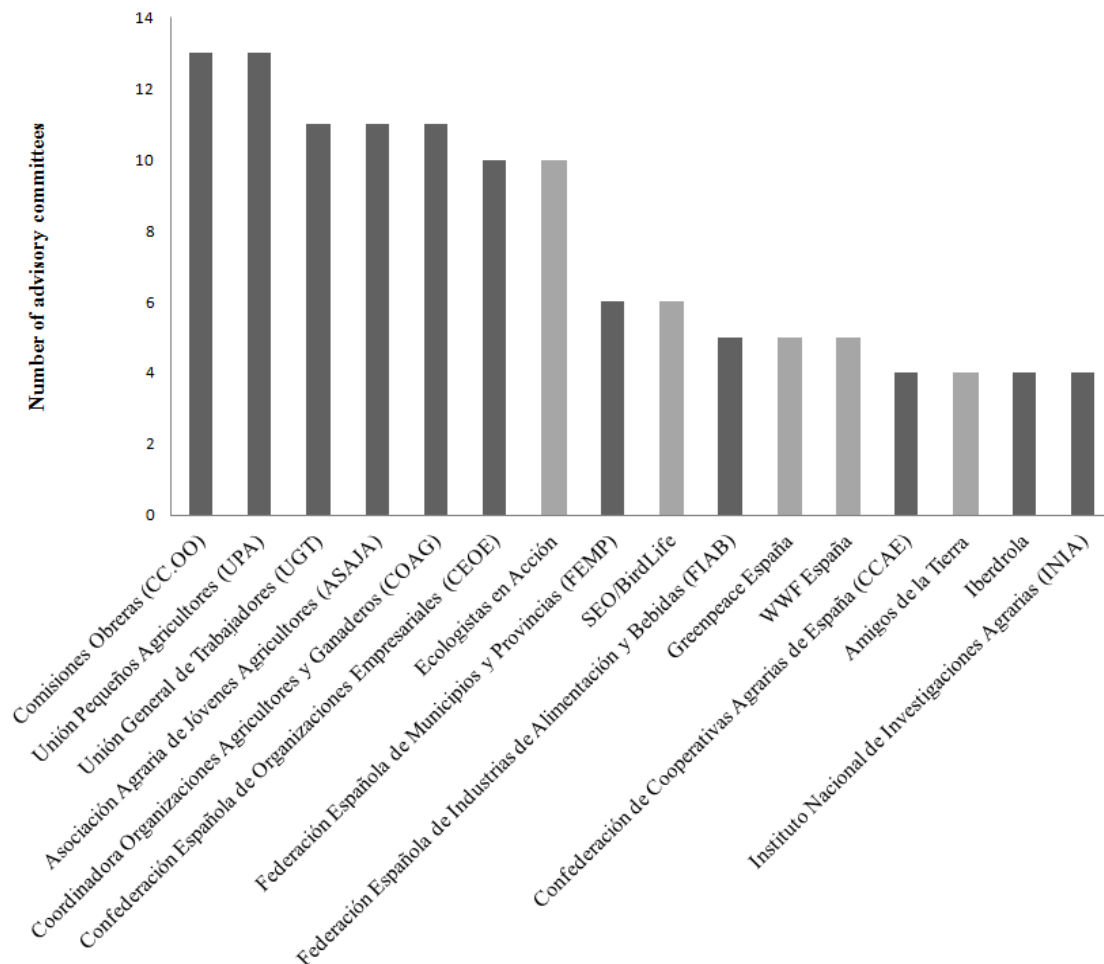
Source: Own elaboration from Qualitat de la Democràcia research group dataset ([www.q-dem.com](http://www.q-dem.com)). See also Chaqués *et al.* 2015.

Europeanization and Environmental regulation open opportunities for NGOs to be integrated in the Environmental policy network as formal stake holders. The national government, has tried to attract support and the strong social legitimacy being vested on Environmental NGOs, resorting to several strategies of co-optation including the use of public funding. From the 1990s, Ecologistas en Acción, WWF, Greenpeace, Amigos de la Tierra and SEOBird Life were included in governmental advisory committees and have been invited to provide their advice in the Spanish Congress frequently. NGOs have participated in many committees (most of them advisory, but some with policy responsibilities) [Jiménez 1999]. For instance, CODA joined the advisory committee for the Environment created in 1994 by the Ministry of Public Works, Transport and the Environment and later the Consejo Nacional del Agua (National Council of Water). Figure 2 shows the present participation of Environmental NGOs in advisory committees related to agriculture and environmental policies. The most present organization is Ecologistas en Acción that participates in 10 governmental bodies related to environmental issues, the same number as for example the main national business association Confederación Española de Organizaciones Empresariales (CEOE). Other main Environmental NGOs are also

<sup>8</sup> It is also important to mention that at the same time, regional governments have developed their own Environmental policies, following the trend of the increasing attention to the issue and the process of decentralization initiated in the early 1980s that has led to a quasi-federal state structure.

present SEOBirdlife, Greenpeace, WWF and Amigos de la Tierra in less proportion. It has to be said though that their role as insider players have consequences in terms of their capacity to mobilize citizens in a broader sense to pressure governmental decisions and to attract them to belong to the organization and other type of participation.

FIGURE 2



**Figure 2. Main environmental NGOs in advisory committees.**

Source: Own elaboration from Qualitat de la Democràcia research group dataset ([www.q-dem.com](http://www.q-dem.com))

Also, we can see in Table 1, how NGOs have been incorporated in the Parliament debates, at national and regional level. The table resumes the institutionalized interaction between NGOs and government at national level; and gives us information about their interaction with legislators in order to discuss legislation – which can be also understood as part of their legal mobilization strategy –. There are important differences among NGOs which means they behave different and they have different access to institutions in the same political opportunity structure. Ecologistas en Acción has more access to the governmental arena, while Greenpeace participates more in the Parliamentary arena, especially at regional level in the case of the Catalan Parliament and also this is the case for SEO BirdLife with access in the Parliamentary arena only at regional level. To show the effects of decentralization in NGOs strategies in the table there is also information about Liga por la Defensa Natural de Cataluña (DEPANA, Alliance for the Catalan Natural Patrimony Defence), which only appears in the Catalan Parliament but at the same time it is more present than the rest of NGOs, except for Greenpeace.

TABLE 1

Organization name	Number of governmental advisory committees		Parliamentary Testimonies (1986-2015)		
	Agriculture and Environmental Ministry	Industry Ministry	Spanish Parliament	Catalan Parliament	Basque Country Parliament
<b>Ecologistas en Acción</b>	<b>10</b>	0	<b>6</b>	<b>3</b>	<b>1</b>
SEO/BirdLife	6	0	0	9	3
<b>Greenpeace España</b>	<b>5</b>	<b>1</b>	<b>10</b>	<b>20</b>	<b>5</b>
WWF España	5	0	2	2	0
Amigos de la Tierra	4	0	0	2	0
Depana	0	0	0	<b>16</b>	0

**Table 1. Institutionalized interaction of Environmental NGOs.**

Source: Own elaboration from Qualitat de la Democràcia research group dataset ([www.q-dem.com](http://www.q-dem.com)). See also Chaqués *et al.* 2015 and Chaqués and Muñoz 2016.

As the policy process is increasingly becoming a multi-level game in Spain, opportunities have increased for previously excluded political demands such as the protection of the environment. Nonetheless, we cannot affirm that the institutionalization of Environmental policy together with greater access or NGOs' "insiderness" mean that they have abandoned other pressure and confrontational strategies, the nature of this interaction is "back and forth", and sometimes cooperation and confrontation overlap

The changes in the political structure described above have modified some of the main channels through which NGO exert political pressure. If we focus now on legal mobilization, opportunities at national level have also changed. In the 1990s, the legal system was hardly adapted to deal with the protection of public goods and much less by means of collective claims.<sup>9</sup> Until 1996, Spanish criminal law envisaged very few crimes against the environment. The notion of environmental crimes was first introduced in the 1983 reform of the criminal law, and basically refers to those crimes involving pollution caused by the disposal of waste products, forest fires, and security in nuclear plants (Jiménez 1999). More importantly in terms of litigation as tool of legal mobilization, judicial procedures were not developed or were closed to environmental groups and also the efficacy of this channel was reduced by the lack of environmental awareness, ecological and technical, of prosecutors and judges (Jiménez 1999, Peñalver 2016). More recently, though the combination of international, European and national laws increased the protection of NGOs as legitimate claimers in public goods litigation (Peñalver 2016). Also, prosecutors have improved their technical knowledge on the topic. So, as we stand in our expectations, these changes may suggest a growing number of Environmental NGOs that use the judiciary arena to influence the final result of the public policy.

#### 4. Features of strategic legal mobilization of Spanish Environmental NGOs

In order to analyze Environmental NGOs legal mobilization we have developed a database containing all judgments in the Supreme Court (Sala de lo Contencioso-

<sup>9</sup> Although the right to a healthy environment is recognised in the 1978 Constitution and the standing rights of groups defending public goods were legally sanctioned in 1985, poor environmental legislation has placed restrictions on NGOs' ability to take environmental cases to the Courts (Jiménez 1999).

Administrativo)<sup>10</sup> that involves a NGOs as a party, be it the plaintiff against one or more Administrative authorities in conflicts related to environmental policy implementation, or the appellee once a previous judgement was made in a lower Court but the Administration or the NGO appealed it. The database is still in construction so here we present preliminary results for the period 2009-2015.<sup>11</sup> We recognize that this option has some limitation since the Supreme Court judgments will only accounts for those cases that require the sanction of the higher judiciary instance because they are cassation cases or because the procedural law allows going directly to the Supreme Court. So, with this analysis we lose all the cases closed before, for instance in regional Supreme Courts, which in the future we intend to analyze. We have identified 55 judgments that show important variation in terms of which organizations are the most mobilized at the judiciary arena, also in terms of who is the counterpart, which includes national, regional and local governments. There is also an important variation in terms of the issue at stake, being biodiversity, energy and urban planning the most conflictive issues.

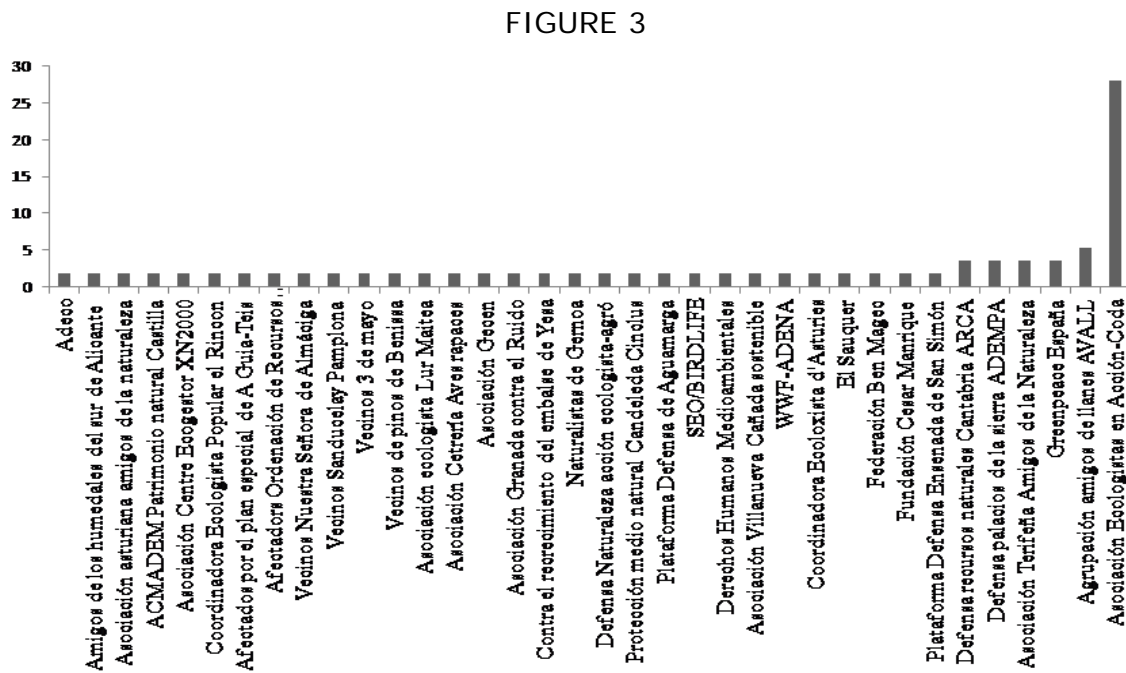
To conduct the analysis, it is also important to remember our expectations according to the previous literature which briefly can be summarized as: 1) legal opportunity structure in procedural regulation to access justice may increase the degree of Environmental Spanish NGOs legal mobilization. 2) Institutionalized interaction is not an impediment for Environmental NGOs to follow a confrontational strategy like litigation. 3) The organizational roots of Environmental NGOs explain, in part, the variance in the degree of legal mobilization between repeat players and occasionally players.

About the first expectation, we argue that the regulatory framework, based in the rights of access to information, public participation and access to justice in environmental policy and the European law (specifically Directives 2003/4/CE and 2003/35/CE) doesn't seem to increase the degree of mobilization of Environmental NGOs, at least when we look at the Supreme Court level. From previous research we know that Court litigation as strategy to influence public policy was scant within Environmental NGOs in the 1990s. According to the survey conducted by the NGOs umbrella organization CODA, 60% of their 100 members have chosen litigation to change policy but the average frequency was 1.3, where 0 was "never" and 7 "very often" (Jiménez 2007). The data we have collected shows that this trend is still valid since the average frequency of Supreme Court judgments initiated by NGOs is 1.5 during the period 2009-2015. We can say that the level of NGOs litigation remains almost unvarying, even after the legal opportunity structure opened by the regulatory framework that enhanced NGOs participatory rights, especially the right to information in 2006. This trend can be observed in Figure 3, where the number of law cases per NGO in the Supreme Court is showed; we can see the great majority access only once. At the same time, we can also identify some repeat players, it is interesting the case of Ecologistas en Acción, that have lead 28% cases, while other main Environmental NGO such as Greenpeace, SEO BirdLife and WWF have initiated one or two cases. We will go back to this argument later when we analyze how organization roots influence organizations' legal mobilization.

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<sup>10</sup> This is the Chamber of Supreme Court in charge of the judicial control of Administration. Although Environmental Law relies also on criminal provisions (Criminal Law) and Torts (Civil Law), etc., we have confined this research to the litigation against the Administration before the Supreme Court and only before the Administrative Judicial Chamber thus excluding criminal, civil or labor cases, because we think they may follow different rationales. However, we plan to expand our research in the future because we are aware that Criminal and Civil Law to capture whether more elaborated and complex litigation strategies also exist.

<sup>11</sup> Our goal is to extend this database to the beginning of the nineties when the environmental policy issues entered more clearly in the political agenda, but also to expand it to include more recent case-law, in order to evaluate the impact of the economic crisis in Spain on Environmental NGOs' access to the Courts and their use of strategic litigation.



**Figure 3. % Supreme Court judgments of NGOs' claims 2009-2015.**  
 Source: Own elaboration from Q-dem/Litigs research group database ([www.q-dem.com](http://www.q-dem.com)).

In relation to our second expectations, in table 2 we can see also that the institutionalization, which mean organizations with access to governmental and parliamentary arena, is not an impediment to follow a more confrontational strategy such as litigation. But still there are important differences between NGOs. Our data shows that the main defendant of NGOs Supreme Court cases is the national government (45% of the cases) followed by the regional governments (35%). The general lecture of the data can be confusing though not all Environmental NGOs that we have found in the Supreme Court have participated in governmental advisory committees or parliamentary testimonies. Actually, most of them have not. If we look at individual level we found interesting variation within NGOs that participate, for instance, at the governmental arena. Again, figure 3 shows that Ecologistas en Acción, which is the most active NGO in governmental activities, is also the leading organization of 16 law cases in the Supreme Court during the period analyzed, this is 28% of the times. This also confirms in part our second expectations, and it is in line with previous research that have found that in European countries that stay close to the neocorporatist model (Vanhala 2016), institutionalization does not necessarily mean a lesser probability to undertake legal mobilization strategies as the Spanish case shows (Medina *et al.* 2016), but further research will be needed to fully support this initial evidence.

TABLE 2

Law cases mentioning EU directives	Law cases mentioning Aarhus Convention	Non-mentioning Aarhus neither EU directives	Main defendant national government	Main defendant regional government	Main defendant local government and other local authorities
64%	23%	13%	45%	35%	20%

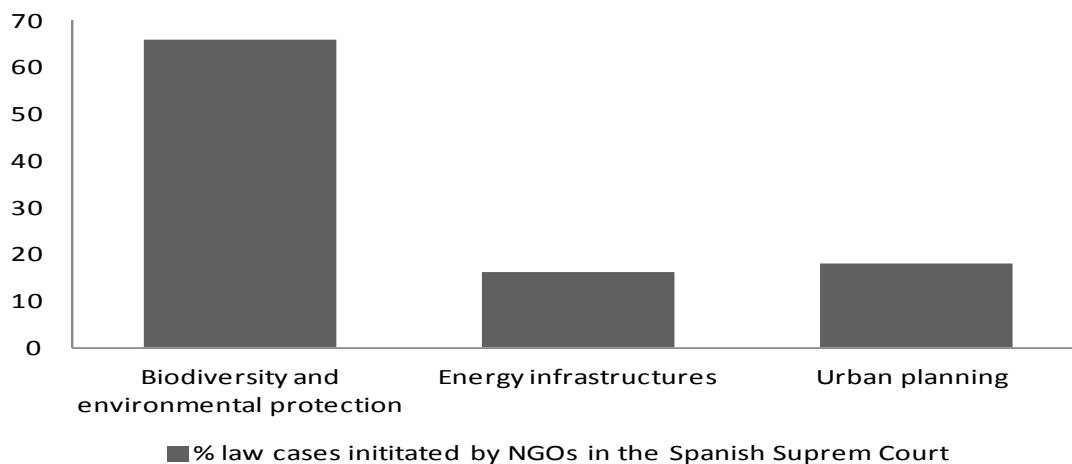
**Table 2. Summary of % European law and Aarhus Convention mentions and the main defendant.**  
 Source: Own elaboration from Q-dem/Litigs research group database ([www.q-dem.com](http://www.q-dem.com)).



If we follow up the argument of the political opportunity and legal opportunity structure, it is also interesting to explore to what extent European directives and the Aarhus Convention are in the main legal arguments used by NGOs. We can see, for instance, in table 3 that Aarhus Convention is only mentioned in 23% of the cases while the European directives are mentioned in 64% of the cases. The explanation of this can be that European law goes beyond participatory rights, targeting also specific regulation of policy issues such as environment and biodiversity protection, pollution, urban planning impact on environment and so on (see Annex for a complete list of the European directives mentioned in the Environmental NGOs claims).

In this regard, we find important variations in terms of the policy issues of the claims. There is very few in terms of climate change claims, and we think this is because the Spanish laws and the European laws open some opportunities but not directly. There is only one judgment (STS 7400/2009) where we find a mention of the Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air. This judgment was initiated in 2007 by Ecologistas en Acción, ending in 2009, which was against the authorization for the installation of a combined cycle thermoelectric plant in the municipality of Villaseca de la Sagra (Castilla-La Mancha) by the Directorate-General for Energy Policy and Mines. In this claim, similar to other authorization to build energy infrastructures, there were energy corporations involved (Unión Fenosa Generación and Iberdrola Generación). As we can see in Figure 4, most of the cases are related to biodiversity and environmental protection, energy infrastructures and urban planning with impact in the environment.

FIGURE 4



**Figure 4. Policy issues claimed by NGOs in the Spanish Supreme Court (2009-2015).**

Source: Own elaboration from Q-dem/Litigs research group database ([www.q-dem.com](http://www.q-dem.com)).

In relation to our third expectation, in regard to the data we collected we argue that variation between NGOs are related also to organizational characteristics, for example financial resources since legal action can be costly (due to the need for expert witnesses and financial guarantees). But also, it is related to the organization willingness to use this channel to change policy or, in other words, how litigation is intrinsically attached to the NGOs organizational culture and expertise. At the moment we don't have information about budget and legal staff in the organizations that we have identified, but we can see that resources may have an impact in the degree of legal mobilization since all Environmental NGOs have lead only one or two cases in the Supreme Court, while only one NGO – Ecologistas en Acción – has been able to be a repeat player, with 16 judgements from 2009 to 2015. Not only that, if we compare Greenpeace (another insider in the governmental arena) and Ecologistas

en Acción, there is not any mention in Greenpeace España (<http://www.greenpeace.org/espana/es/>) official documents and web page about its legal mobilization strategy, whereas Ecologistas en Acción (<https://www.ecologistasenaccion.org/rubrique161.html>) on one hand, takes advantage of its confederal organizational structure to give room to its regional branches to engage in legal mobilization and litigation strategies thus maximizing its role as legal watchdog, and on the other hand has a strong and very active legal team of in-house lawyers supporting their legal mobilization strategies, with one of its subcommittees devoted to judiciary affairs. We think these differences tell us something about the importance of organizational roots of NGOs, though it is important to complement this argument with more empirical evidences.

In a recent article, Vanhala (2018) shows that organizational culture is important to understand NGOs legal mobilization, in particular she find that international professionalized NGOs such as Greenpeace and WWF are not specially attached to legal strategies, since organizationally they feel more comfortable and more confident with other lobby strategies. The Spanish case gives support to these findings. As we explained before, Greenpeace España and WWF España are active mainly in the Parliamentary and somehow at the governmental arena, but we find very few cases of legal mobilization. One of our goals will be to interview those NGOs to clarify our findings. On the contrary, regardless its status as an insider group in the governmental and parliamentary arena, Ecologistas en Acción seems to be strongly attached to litigation, leading 28% of the cases identified in the database.

And finally, if we look at the kind of NGOs active in litigation strategies, and bearing in mind the limitations of the present research that is confined to litigation strategies that ended up before the Supreme Court, it is nevertheless clear that regional and local NGOs are also taking more cases to the Supreme Court than nation-wide or international NGOs. This finding opens up a list of questions our research cannot answer without further complementary research looking into Regional Supreme Courts to verify whether it is smaller and more local NGOs the ones that are being more activist in terms of legal mobilization, and if so why is this (are they more participate and their members more actively engaged?), because the answer to such questions may have direct policy-making consequences.<sup>12</sup> Preliminary research shows that this is a complex question and that size and limited geographic scope might be relevant but in equal footing with other factors, like the internal structure of the NGOs or the clarity or specialization of their strategies, like the case of Ecologistas en Acción shows.

## **5. Concluding remarks on Environmental NGOs legal mobilization characteristics**

Analyzing NGOs legal mobilization in the Supreme Court gives us some interesting insights about the degree of mobilization in Spain and its main features. With the data we have collected, we cannot confirm in this case how the legal opportunity structure increases NGOs litigation. Important changes in regulation related to the NGOs participatory rights doesn't seem to influence the degree of mobilization though it can be argued that for some NGOs may favored the decision to go to court. We also recognized that this first insight is not conclusive, and that in multilevel systems of governance like Spain it is also important to look other level of the judiciary systems, especially regional Supreme Courts. In relation to the political structure we also find that Europeanization of Environmental Spanish regulation remarkably present (64%) in the NGOs law case before the Spanish Supreme Court, suggesting that this factor may be is not important to explain to the level of legal mobilization

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<sup>12</sup> See, the Compliance Committee of the Aarhus Convention pointing out the need to change current legislation introducing barriers to the access of small NGOs to the Judicial System in the *Report of the first meeting of the Parties* (ECE/MP.PP/2), page 7, and in particular *Decision IV/8j Compliance by Spain*, where it explicitly recommends clearing access to legal aid for NGOs in Spain advocating for environmental protection. There is also case-law by the ECJ in the same line.

but the framing and the content of litigation. By other hand, we find support to the idea that being resourceful in terms of having access to other policy arenas does not mean less conflict, at least not for all NGOs. The analysis here has to be nuanced to in the sense that we find two opposite behavior, we find one repeat player in the Supreme Court (Ecologistas en Acción) that is also the most mobilized NGOs in terms of litigation, but at the same time we also find that most of NGOs that go to court do not participate in the governmental and parliamentary arena, at least at national level.

We argue that these differences can be understood if we consider organizational roots. The expectation that we have in regard to this argument cannot be explained with our data but we see that the difference between Ecologistas en Acción and other Environmental NGOs in relation to litigation can be related to its organizational culture and dynamics. Since the eighties this NGO has initiated different claims against governmental failures in implementing and respecting Environmental law, this expertise is reflected in their role the only repeat player that we have found for the period 2009-2015. Our goal will be to complete the research with in-deep interviews with all NGOs identified in order to understand better if this is related to their resources or with other factors such as organizational values and beliefs about the usefulness of the judiciary arena as a medium to enhance or change public policy.

Departing from these concluding remarks, further research is needed to identify other indicators of legal mobilization. For example, those cases where Environmental NGOs are not the main plaintiffs but have been behind the legal action or they belong to a coalition of NGOs that start a campaign that leads to legal strategies. Probably some of them related to climate change. To exemplify these important trends but also some other questions not covered by the present research but call for further research, we can take the case recently decided by the Constitutional Court. This is a case brought by the Energy Consumption network, gathering more than 20 Environmental NGOs,<sup>13</sup> among them Ecologistas en Acción, Amigos de la Tierra, WWF Spain, together with some unions like Comisiones Obreras and business associations, to support the regional government of Catalonia's challenge before the Constitutional Court of the national government Law-Decree 900/2015 that regulated energy production, sharing and consumption. The Judgment 68/2017 of the Constitutional Court, last May, nullified and thus declared void the article of the Law-Decree that prohibited shared consumption of self-produced energy. In a typical case, the article prevented communities of neighbors from installing, let's say, solar panels and plug it to a common generator to share the electricity generated thereof and defray afterwards the costs associated with their community through the use and sale of electricity to the general network. The prohibition was considered unconstitutional and partially nullified, on the grounds that it was not for the central government to impose such a general prohibition in an area of the competence of the Regional governments, but also suggested that it was not in line with European Law aimed at reducing home consumption of energy and the production of energy from clean sources.

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<sup>13</sup> The names of all NGOs, unions and business associations are Amigos de la Tierra, Asociación Cultural LoQueSomos, Asociación Empresarial de Energías Renovables y Ahorro Energético de Murcia (AREMUR), Asociación de Empresas de Energías Renovables (APPA), Asociación General de Consumidores (ASGECO), Asociación Medio Ambiente (AMA), Asociación Nacional de Productores de Energía Fotovoltaica (ANPIER), Asociación Valenciana de Empresas del Sector de la Energía (AVAESEN), Comunidad Internacional Arquitectura Responsable (CIAR), Clúster de autoconsumo energético de Galicia (AGAEN), Comisiones Obreras (CC.OO), Confederación de Consumidores y Usuarios (CECU), Coordinadora de Organizaciones de Agricultores y Ganaderos (COAG), Ecologistas en Acción, Eco-Unión, Emigrados sin fronteras, Eurosolar-Sección Española, Fundación Desarrollo Sostenible, Fundación Renovables, Goiener S.Coop, Goiener Elkartea, Greenpeace, La Corriente Sociedad Cooperativa, La Solar, Nueva Cultura por el Clima, Observatorio Crítico de la Energía (OCE), Organización de Consumidores y Usuarios (OCU), Plataforma por un Nuevo Modelo Energético (Px1NME), La Red Española de Desarrollo Rural (REDR), Red Estatal de Desarrollo Rural (REDER), SEO BirdLife, Som Energía, Unión Española Fotovoltaica (UNEF), Federación de Industria Construcción y Agro (UGT-FICA), UNCCUE (Unión Nacional de Cooperativas Consumidores y Usuarios de España), Unión de Cooperativas de Consumidores y Usuarios de Madrid (UNCUMA), WWF España

## References

- Austen-Smith, D., and Wright, J.R., 1994. Counteractive Lobbying. *American Journal of Political Science* [online], 38(1), 25-44. Available from: <https://doi.org/10.2307/2111334> [Accessed 31 October 2018].
- Baumgartner, F., and Mahoney, C., 2008. The two faces of framing: individual-level framing and collective issue definition in the European Union. *European Union Politics* [online], 9(3), 435-449. Available from: <https://doi.org/10.1177%2F1465116508093492> [Accessed 31 October 2018].
- Beyers, J., Rainer, E., and Maloney, W., 2008. Researching Interest groups politics in Europe and Elsewhere: Much We Study, Little We Know. *West European Politics* [online], 31(6), 1103-28. Available from: <https://doi.org/10.1080/01402380802370443> [Accessed 31 October 2018].
- Bonine, J.E., 2009. Private Public Interest Environmental Law: History, Hard Work, and Hope. *Pace Environmental Law Review* [online], 26(2), 465. Available from: <http://digitalcommons.pace.edu/pelr/vol26/iss2/8> [Accessed 31 October 2018].
- Börzel, T.A., 2006. Participation through Law Enforcement: The Case of the European Union. *Comparative Political Studies* [online], 39(1), 128-152. Available from: <https://doi.org/10.1177%2F0010414005283220> [Accessed 31 October 2018].
- Bouwen, P., and Mccown, M., 2007. Lobbying versus litigation: political and legal strategies of interest representation in the European Union. *Journal of European Public Policy* [online], 14(3), 422-443. Available from: <https://doi.org/10.1080/13501760701243798> [Accessed 31 October 2018].
- Casademunt Montfort, A., 2016. Las plataformas en defensa del territorio como acción colectiva. In: J.M. Molins, L. Muñoz and I. Medina, eds., *Los grupos de interés en España: La influencia de los lobbies en la política española*. Madrid: Tecnos, pp. 474-494.
- Chalmers, A.W., 2011. Interests, influence and information: Comparing the influence of interest groups in the European Union. *Journal of European Integration* [online], 33(4), 471-486. Available from: <https://doi.org/10.1080/07036337.2011.579751> [Accessed 31 October 2018].
- Chaqués, L., and Muñoz, L., 2016. Explaining interest group participation in the parliamentary arena. *West European Politics* [online], 39(6), 1276-1298. Available from: <https://doi.org/10.1080/01402382.2016.1184862> [Accessed 6 November 2018].
- Chaqués, L., Palau, A., and Baumgartner, F.R., 2015. *Agenda Dynamics in Spain*. Basingstoke: Palgrave Macmillan.
- Cichowski, R.A., 1998. Integrating the environment: the European Court and the construction of supranational policy. *Journal of European Public Policy* [online], 5(3), 387-405. Available from: <https://doi.org/10.1080/135017698343884> [Accessed 31 October 2018].
- Cichowski, R.A., 2007. *The European Court and Civil Society. Litigation, mobilization and governance*. Cambridge University Press.
- Cichowski, R.A., 2016. The European Court of Human Rights, Amicus Curiae, and Violence against Women. *Law & Society Review* [online], 50(4), 890-919. Available from: <https://www.polisci.washington.edu/file/1158/download?token=pCHqif2M> [Accessed 31 October 2018].

- Coglianesi, C., 1996. Litigating within Relationships: Disputes and Disturbance in the Regulatory Process. *Law & Society Review* [online], 30(4), 735-766. Available from: <https://doi.org/10.2307/3054116> [Accessed 31 October 2018].
- Cortner, R.C., 1968. Strategies and Tactics of Litigants in Constitutional Cases, *Journal of Public Law*, 17(2), 287-307.
- De Figueiredo, J.M., 2002. Lobbying and Information in Politics. *Business and Politics* [online], 4(2), 125-129. Available from: <https://doi.org/10.2202/1469-3569.1033> [Accessed 31 October 2018].
- De Figueiredo, J.M., and De Figueiredo, R.J.P., 2002. The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation. *Business and Politics* [online], 4(2), 161-181. Available from: <https://doi.org/10.2202/1469-3569.1036> [Accessed 31 October 2018].
- Diani, M., 1995. *Green networks: a structural analysis of the Italian environmental movement*. Edinburgh University Press.
- Epp, C.R., 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press.
- Font, N., 1996. *La Europeización de la Política Ambiental en España. Un Estudio de Implementación de la Directiva de Evaluación de Impacto Ambiental*. Ph.D. dissertation, Universitat Autònoma de Barcelona.
- Galanter, M., 1974. Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change. *Law & Society Review*, 9(1), 95-160.
- Giner, S., and Pérez Yruela, M., 1985. Corporatismo: el estado de la cuestión. *Revista Española de Investigaciones Sociológicas*, 31, 9-45.
- González Begega, S., and Luque Balbona, D., 2014. ¿Adiós al corporatismo competitivo en España? Pactos sociales y conflicto en la crisis económica. *Revista Española de Investigaciones Sociológicas* [online], 148, 79-102. Available from: <http://dx.doi.org/10.5477/cis/reis.148.79> [Accessed 31 October 2018].
- Gunther, R., and Montero, J.R., 2009. *The Politics of Spain*. Cambridge University Press.
- Hilson, C., 2002. New Social Movements: The Role of Legal Opportunity. *Journal of European Public Policy* [online], 9(2), 238-255. Available from: <https://doi.org/10.1080/13501760110120246> [Accessed 31 October 2018].
- Hofmann, A., 2017. Lobbying and Interest Group Politics in the European Union. In: N. Zahariadis and L. Buonanno, eds., *The Routledge Handbook of European Public Policy*. Abingdon: Routledge.
- Jiménez, M., 1999. Consolidation through institutionalisation? Dilemmas of the Spanish environmental movements in 1990s. *Environmental Politics* [online], 8(1), pp. 149-171. Available from: <https://doi.org/10.1080/09644019908414442> [Accessed 31 October 2018].
- Jiménez, M., 2001. Sustainable development and the participation of environmental NGOs in Spanish environmental policy: the case of industrial waste policy. In: K. Eder and M. Kousis, eds., *The Europeanization of Environmental Politics: Sustainable Development in Southern Europe*. Dordrecht: Kluwer Academic, pp. 225-253.
- Jiménez, M., 2003. Spain: environmental protests in an emerging policy domain. In: C. Rootes, ed., *Environmental Protest in Europe*. Oxford University Press, pp. 166-199.

- Jiménez, M., 2005. *El Impacto político de los movimientos sociales. Un estudio de la protesta ambiental en España*. Madrid: Centro de Investigaciones Sociológicas / Siglo XXI.
- Jiménez, M., 2007. The Environmental Movement in Spain: A Growing Force of Contention. *South European Society & Politics* [online], 12(3), 359–378. Available from: <https://doi.org/10.1080/13608740701495244> [Accessed 31 October 2018].
- Jordan, G., and Maloney, W.A., 1997. *The Protest Business? Mobilizing Campaign Groups*. Manchester University Press.
- Kelsen, H., 1967. *Pure Theory of Law*. Translation from the Second German Edition by Max Knight. Oakland, CA: University of California Press. (Originally published in 1934).
- Kingdon, J., 1995. *Agendas, Alternatives, and Public Policies*. 2<sup>nd</sup> ed. New York: HarperCollins.
- Lupia, A., and McCubbins, M.D., 1994. Designing Bureaucratic Regulation. *Law and Contemporary Problems* [online], 57(1), 91-126. Available from: <https://scholarship.law.duke.edu/lcp/vol57/iss1/8> [Accessed 31 October 2018].
- March, J., 2008. *Explorations in Organizations*. Redwood City, CA: Stanford University Press.
- March, J., and Olsen, J.P., 1984. The new institutionalism: organizational factors in political life. *The American Political Science Review* [online], 8(3), 734-749. Available from: <http://www.jstor.org/stable/1961840> [Accessed 31 October 2018].
- McCarthy, J.D., and Wolfson, M., 1996. Resource Mobilization by Local Social Movement Organizations: The Role of Agency, Strategy and Structure. *American Sociological Review* [online], 61(6), 1070-1088. Available from: <https://doi.org/10.2307/2096309> [Accessed 31 October 2018].
- McCubbins, M.D., and Schwartz, T., 1984. Congressional Oversight Overlooked: Police Patrols v. Fire Alarms. *American Journal of Political Science*, 29, 721-749.
- Medina, I., Molins, J., and Muñoz, L., 2016. *Interest Groups in Spain: Still Fragmented, Politicized, and Opaque?* [online]. Paper submitted to the ECPR General Conference, Prague. Available from: <https://ecpr.eu/Filestore/PaperProposal/da5ecbcf-82d7-4fb5-b2d9-681f9a2dd220.pdf> [Accessed 31 October 2018].
- Ortega, J., 2011. ¿Quién ha apostado por la efectiva implantación del derecho de acceso a la justicia a favor de las organizaciones no gubernamentales en defensa del medio ambiente? *Actualidad Jurídica Ambiental* [online], 1-14. Available from: [http://www.actualidadjuridicaambiental.com/wp-content/uploads/2011/09/2011\\_09\\_Julia\\_Ortega\\_Acceso-justicia-ONG.pdf](http://www.actualidadjuridicaambiental.com/wp-content/uploads/2011/09/2011_09_Julia_Ortega_Acceso-justicia-ONG.pdf) [Accessed 31 October 2018].
- Palau, A.M., and Chaqués, L., 2012. The Europeanization of law-making activity in Spain. In: S. Brouard, O. Costa and T. Köning, eds., *The Europeanization of Domestic Legislatures: The Empirical Implications of the Delors' Myth in Nine Countries*. New York: Springer, Studies in Public Choice Series, pp. 173-196.
- Peñalver i Cabré, A., 2016. *La defensa de los intereses colectivos en el contencioso-administrativo. Legitimación y limitaciones económicas*. Pamplona: Thomson Aranzadi.

- Schattschneider, E.E., 1960. *The Semi-Sovereign People*. New York: Holt, Rinehart and Winston.
- Scott, W.R., 2008. *Institutions and Organizations: Ideas and Interests*. London: Sage.
- Soennecken, D., 2008. The growing influence of the courts over the fate of refugees. *Review of European and Russian Affairs* [online], 4(2), 10-43. Available from: <https://doi.org/10.22215/rera.v4i2.199> [Accessed 31 October]
- Thelen, K., and Steinmo, S., 1992. *Historical Institutionalism in Comparative Politics*. Cambridge University Press.
- Truman, D., 1951. *The Governmental Process: Political Interests and Public Opinion*. New York: Alfred A Knopf.
- Vanhala, L., 2011. *Making rights a reality? Disability rights activists and legal mobilization*. Cambridge University Press.
- Vanhala, L., 2016. Legal Mobilization under Neo-corporatist Governance: Environmental NGOs before the Conseil d'Etat in France, 1975–2010. *Journal of Law and Courts* [online], 4(1), 103-130. Available from: <http://dx.doi.org/10.1086/684649> [Accessed 31 October 2018].
- Vanhala, L., 2018. Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy. *Comparative Political Studies* [online], 51(3), 380–412. <https://doi.org/10.1177/0010414017710257> [Accessed 6 November 2018].
- Varillas, B., 1989. *El papel de las organizaciones no gubernamentales en la conservación de la Naturaleza*. In: *Reflexiones sobre el Medio Ambiente*. Madrid: Fundación Friedrich Ebert.
- Wheeler, S., et al., 1987. Do the “Haves” Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970. *Law & Society Review* [online], 21, 403-45. Available from: <https://scholarship.law.berkeley.edu/facpubs/476/> [Accessed 31 October 2018].
- Wilson, B., and Rodríguez-Cordero, J.C., 2006. Legal Opportunity Structures and Social Movements. The Effects of Institutional Change on Costa Rican Politics. *Comparative Political Studies* [online], 39(3), 325-351. Available from: <https://doi.org/10.1177%2F0010414005281934> [Accessed 31 October 2018].

*Supporting documents by UNECE and the EU*

- Decision VI/8j. Compliance by Spain with its obligations under the Convention. Excerpt from the addendum to the report of the sixth session of the Meeting of the Parties* [online]. UNECE. Budva, 11-13 September 2017. Available from: [https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance\\_by\\_Spain\\_VI-8j.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance_by_Spain_VI-8j.pdf) [Accessed 6 November 2018].
- Report From The [European] Commission Monitoring the application of European Union law 2016 Annual Report (COM(2017)370 final)* [online]. Brussels, 6 July 2017. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0370&from=EN> [Accessed 31 October 2018].
- Report of the First Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/MP.PP/2)* [online]. UNECE, 17 December 2002. Available from:

<https://www.unece.org/fileadmin/DAM/env/documents/2002/pp/ece.mp.pp.2.e.pdf> [Accessed 6 November 2018].

*Report on the Third Meeting of the Task Force on Access to Justice* (ECE/MP.PP/WG.1/2005/5) [online]. UNECE. Geneva, 22 November 2004.

Available from:

<http://www.unece.org/fileadmin/DAM//env/documents/2005/pp/wg.1/ece.mp.pp.wg.1.2005.5.e.pdf> [Accessed 31 October 2018].

*Study on Access to Justice in Environmental Matters in Spain, in compliance with Decision IV/9(F) of the Meeting of the Parties to the Aarhus Convention* [online]. UNECE, 2013. Available from:

[https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Spain\\_A2J\\_Environment.pdf](https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Spain_A2J_Environment.pdf) [Accessed 31 October 2018].



**Annex. Table: EU law most cited by Environmental NGOs before the Spanish Supreme Court (2009-2015)**

Name of the European Directive	Number of mentions
Directive 1979/409/EEC on the conservation of wild birds	7
Directive 1985/337/EEC on the assessment of the effects of certain public and private projects on the environment	11
Directive 1990/313/EEC on the freedom of access to information on the environment	2
Directive 1992/42/EEC on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels	2
Directive 1992/43/EEC on the conservation of natural habitats and of wild fauna and flora	13
Directive 1994/22/EC on the conditions for granting and using authorizations for the prospecting, exploration and production of hydrocarbons	2
Directive 1996/61/EC concerning integrated pollution prevention and control	2
Directive 1997/11/EC amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment	4
Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air	1
Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment.	7
Directive 2002/49/EC relating to the assessment and management of environmental noise	2
Directive 2003/4/EC on public access to environmental information	7
Directive 2003/35/EC on public participation in respect of the drawing up of certain plans and programs relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC	8
Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage	1
Directive 2008/1/EC concerning integrated pollution prevention and control	1
Directive 2009/147/EC on the conservation of wild birds	2
Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment	1