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The Impact of Human Rights on Environmental Legal Procedures: The Aarhus Convention and Injunctive Reform

The Aarhus Convention and directives guarantee a human right to a healthy environment. Parties to the convention must "provide adequate and effective remedies, including injunctive relief a appropriate, [that are] fair, equitable, timely and not prohibitively expensive."

This paper focuses on the impact of the Aarhus Convention on the development of injunctive relief. First, it will describe problems with injunctive procedures that have led to non-compliance, and provide quantitative analysis of how often and where those problems currently occur. Next, it will describe jurisprudence in the ECJ and Aarhus Convention compliance committee, and how injunctive procedures are likely to be affected. Lastly, it will argue that the requirements of the Convention are likely to expand injunctive procedures in areas of law beyond the scope of the Convention, and discuss how this expansion may be limited.

While over all, the trend has been towards improved injunctive procedures in the last few years, there are several categories of problems that remain. They are as follows: 1. Laws that are adequate as written, but not adequately applied. 2. Criteria that are too restrictive to allow injunctions to be properly granted in environmental cases, such as a requirement that harm be truly irreparable. 3. Criteria for granting an injunction are so vague that a claimant cannot reasonably predict whether a request would be likely to be granted. 4. The cost of an injunction may be prohibitively high if claimants are required to put up a bond in order to receive an injunction, or if a claimant may be ultimately liable for damages flowing from the injunction if he or she loses the case. 5. Lack of independence of the body granting the injunction. 6. Lack of enforcement of injunctions that are properly granted.

Injunctive procedures are sometimes uniform across a county's legal system. Other countries have specialized environmental procedures that have their own tests for when injunctions are granted. Others have a single test for granting injunctions, but use judicial discretion to apply a different standard to environmental cases when required by the Aarhus Convention.

Recent decisions by the ECJ and Aarhus Convention Compliance Committee have suggested that reliance on judicial discretion rather than a concrete formula may be insufficient to comply with the Convention. For this reason, countries with specialized environmental procedures may be more likely to prevent the expansion of injunctive relief in areas of law outside the scope of Aarhus.