

"...every person has the  
right to live in an  
environment adequate to  
his or her health and well-  
being, and the duty, both

# The Aarhus Convention

25

years on

Aarhus Roundtable Cymru/Wales  
19 September 2023

25 years on from the Aarhus Convention: what threats  
do its provisions face now? What is its future? Do we  
need more rights?

# Aarhus Convention – 25 Years on in Cymru

The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) was made in June 1998 at Aarhus in Denmark.

Article 1: In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

## Insight Report

The following insights were collected in a roundtable discussion with a range of stakeholders, who shared their different and differing experiences. This report reflects as far as possible the views of the participants involved taken as notes during the meeting in anonymity, but is not a representative study. With very grateful thanks to all participants for sharing their views.

# Environmental Democracy

The Aarhus Convention describes the elements of 'governance' – the relationship between decision makers and society - as a series of rights that are deemed necessary for securing environmental protection outcomes. This is a part of 'environmental democracy'.

## *Does the system of decision making protect the environment?*

Some participants offered that when looking at the scientific evidence of the state of the environment, such as reports on biodiversity, ecological quality, climate change, from their view it seems that the decision processes that exist have not achieved a recognition of planetary boundaries and of environmental protection to a level that has meant that environmental quality has overall improved.

## *How devolved is decision making?*

Transferring power to local people requires system change and different values. The town and country planning system was born of the post second world war social settlement. Recently, the nationalisation of the right to develop land has been rolled back through permitted development rights (although not in Wales). The principle of the right to develop being controlled by local democracy may need rethinking in line with the subsidiarity principle as local councils have large electorates, covering large areas, and for decisions to be closer, smaller democratic structures could be better placed to make more 'ecological decisions'.

## *What is the settlement of rights and responsibilities?*

The settlement of people and governments' respective rights and responsibilities in relation to land remains a contested issue, when the overall sense is that society is not operating within safe environmental limits. If we take that communities and people are the natural guardians of place, it is necessary to move beyond rights to information; to participation and to access the review of decisions as well as to a governance system that is based on sharing power and 'co-production'. Participation and consultation can only secure so much environmental protection as procedural rights – the power balance is still too much in favour of neoliberalism and economic growth to effectively achieve good environmental outcomes.

## *What is our measure?*

Different approaches have been discussed for measuring 'success' - from top-down figures for growth based on projections of household formation or population growth, to bottom-up figures based on need as described by communities themselves. There are some uncomfortable (for vested interests) truths around stability rather than growth for private sector stakeholders.

## *Devolution - how far can we go?*

Historically there has been a fairly cautious approach to law-making in Wales. In addition there is a fear of being challenged by the UK and of a claw back of powers - that is already happening post-Brexit – as well as the extent to which devolved powers are evolving and being promoted or restricted in the future.

### **Questions:**

- *Could power be transferred lower than local government level i.e. to communities (community councils?) to make local decisions on land?*
- *What sort of system changes are needed?*
- *Is it merely who is making the decision (and therefore that those decision-makers' responsibilities need to change) or is it that the law describing development in Wales (the Future Generations Act) is simply not yet the fundamental principles of how society operates?*
- *What does devolution mean for Wales and its communities?*

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## **Access to Justice**

There is a question about the effectiveness of legal action, and the role of court oversight with regard to environmental matters that was raised.

Those involved in the law were of the view that legal action has forced a focus on the issues brought before the court. It can also be observed that policy change 'behind the scenes' is also influenced by the issues raised and points made in legal challenges. On specific cases, the outcome is often that decisions are remade (planning decisions) that for example contain more onerous or protective conditions, that improve the overall environmental outcome of the decision. Barriers remain, as some expressed the view that it is difficult to get cases before the courts, and then the majority of environmental cases fail. So there is an argument to be made, as expressed by some, that changes in the law are required or law needs to be more inventive.

This could particularly be the advantage in Wales, where environmental law, for example in the Wales Future Generations Act 2015 and other legislation has shown that there is an appetite for stronger environmental protection. But some of this legislation lacks ‘teeth’ and has limited or no enforcement powers according to some.

For environmental ‘justice’, as in redress, to occur, there needs to be sufficient resources is a view expressed by some. Others were of the view that redress can occur in different ways with different systems. Despite the costs cap, it is expensive and difficult in general to initiate judicial review, both in terms of expertise, legal resources and access to counsel. This burden of resources and environmental defence often falls upon affected communities, although there is also a role played by non-governmental organisations (NGOs).

### ***Questions arising:***

- *Should other forms of enforcement, other than the Courts, be introduced in Cymru/Wales – for example a role for the Future Generations Commissioner, as an inquiry or compliance body?*
- *How should the Courts (of England and Wales) take more account of the different legislative auspices in Cymru/Wales?*
- *Should judges be required to train or gain experience of the Welsh legal corpus?*

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## **Evidence and Expertise**

Access to independent expertise and ‘equality of arms’ in advocacy is an issue that has never been properly resolved or addressed in planning decision-making was the view of some. While community groups can draw on many skills, their knowledge is sometimes categorised as lay knowledge (a contested term), meaning the knowledge of experience. Some communities have found that their experiential knowledge of a place e.g. flooding, traffic, wind direction, has been recognised and weighted in decisions, while others have found that their knowledge cannot compete e.g. with the expert ecologist.



In some cases, communities and advocates have relied on a policy issue (interpretation and argument) to avoid the issue of expertise. It could be that crowdfunding is a route that should be explored more for communities to purchase expert advice and submissions.

Another matter is the assumption of bias, for example, the developers' commission of environmental statements could contain inherent bias. Examples exist of councils testing the evidence submitted to them through their own commissioned hydrology or ecology reports. In order to address bias in both evidence and as held by decision makers, impartiality (in those leading or enabling consultations), acknowledging unconscious bias (using impartial experts rather than in house for developers) and independently verified environmental protection outcomes would improve the current situation were some of the views expressed.

Many councils may lack the ecological expertise that would be required to properly assess and analyse the evidence submitted with applications with significant environmental impacts for example, or it has to be purchased.

It should be recognised that there is sometimes a perceived gap between the officers, who have to possess a wide range of expertise (and therefore as planners will not be a specific ecology or hydrology expert either) and councillors, who are essentially members of the public with some additional training, and who must generally rely on their own lived experience together with the duty to think about the public interest. Councillors, in making high public interest decisions, may refer to the case on public interest issues e.g. the economy, or climate change, while the decision itself, in planning terms, has to be made on 'narrow' planning grounds, for example a technical point about ecology. This was an area with a high level of differing views.

Another example of where a policy is open to interpretation is, for example, 'biodiversity net gain'. The ways in which this could be delivered can vary over criteria such as time frame / longevity, quality and proximity. That means that an 'environmental benefit' could be delivered as a tick box exercise or as a high-quality environmental outcome. For Inspectors and decision-makers, scrutinising evidence and valuing expertise are part of professional conduct. Bodies and the codes of conduct are important in maintaining integrity and the substance of professional processes.

However, some views expressed pointed to examples of bias against community input that does not respect either the calls to scrutinise evidence or the value of evidence that comes into legal processes from community or public submissions, either through inquiries, appeals or planning committee decisions. The value of technical expertise and in depth specialist knowledge is recognised and highly regarded.

### **Questions arising:**

- *Should environmental statements in future be commissioned from an independent body?*
  - *What do we do when the system fails and the evidence is not properly investigated or tested?*
  - *Should the code of conduct for inspectors, planners and councillors be reviewed to consider public participation (Aarhus Convention)?*
  - *Environmental Impact Assessment regulations could include rules for objectivity, bias and functional separation?*
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## **Public Participation**

In the making of laws, policies and plans, different procedures apply. There is only one legal right to be heard in person, and that is at an examination of a local plan in front of an Inspector. To be heard at an inquiry or an appeal in a decision, the Inspector generally decides, apart from where specific rules apply.

There is no ‘right to be heard’ at planning committee meetings – each council will have different standing orders describing public speaking rights. Some views were that consultation gathers ‘perspectives’, but the extent to which these impact the outcome vary. Some expressed the need to move away from passive involvement, but there is widespread apathy and only a small active citizens network.

Participation has to be relevant for it to be meaningful, which means that it needs to happen within a relatable space. There is little appetite for ‘risk’ amongst planning authorities in terms of arranging and opening up to public participation and there is a lack of resources for civic engagement.

Changing incentives either through regulation forcing a cultural change, or by demonstrating the advantages to development approval rates would support more public consultation is the view held by some.

Meaningful public participation implies some ceding of control to the public over decisions. Participation requires more time; in general, rights need time for them to be exercised. Developing 'community active' citizens takes time and energy, and is difficult to promote when there are few outcomes that can be achieved or guaranteed was the perspective of those involved in supporting this sort of activity.

The view was expressed that this why the 'power balance', and the ceding of power to more local arrangements is fundamental to increasing public participation. The understanding that councillors have around 'public interest' is a cornerstone of democracy – it removes the decision maker from considering their own private interests. Some structures would need to be in place to frame public participation and to maintain that 'public interest' objective.

The majority of the public, even counted by communities themselves or those active, have little time or inclination for participation. By age range, there is also less perceived participation by younger people, and children do not have specific arrangements to support their participation as yet. This could be characterized as 'learned helplessness', where people are actively encouraged to dismiss or be distracted from participating. Nevertheless in engaging participatory processes such as community mapping or planning, much social learning takes place that increases personal and community capacity for understanding what needs to happen where in a broader, even global context - if framed appropriately in terms of climate and ecological emergencies.

Communities can feel excluded from local plan-making, despite the processes that are in place. Often involvement is at a late stage and concerns are excluded as the momentum is hard to change or redirect. Participation and shaping of the plan by communities should therefore be incorporated earlier. Local council lead plan-making in a way that is very influenced by officers and is, therefore, data or policy-driven. Plans can also seem to be made by rote, for example cutting and pasting text from the Future Generations Act goals or from Planning Policy Wales, and need some more critical thinking. However, the lack of resources impacts this – with more resource LPAs could improve practice in this area.



# Securing Environmental Outcomes

Cultural shifts are still working their way through the civil service, and the Future Generations Act is not yet mainstreamed into policy or decisions. New economic models, such as doughnut economics, are fundamental to addressing the climate and ecological crisis according to some views. The housebuilding impetus, driven by associated economic growth benefits (production and supply chains, employment, provision of market goods), and the potential to change the system is part of rethinking growth and instead considering different economic models. For example dropping the use of population projections, and instead looking at basing development policies on identified community need.

Economic growth and projections are mainstreamed in their use by local planning authorities. The prevailing idea of neoliberalism may need to be replaced by prosperity or stability – however there may be as yet no shared policy definition of prosperity that has a common basis. The Future Generations Act sets out objectives that mean that development should be cognisant of natural resource use and being aware of what a fair share of these resources is. The declaration of climate or ecological ‘emergencies’ does not yet weigh sufficiently in the balance of making decisions. In addition, there is a policy lag between climate emergency and the existing regeneration mindset, such as for coastal communities.

The inclusion of caveats in policy is an issue: for example coal policy has too many exceptions in the view of the community, and allows too much discretion for decisions - like the buffer zones put in place to protect communities. Reviewing policies shows that there is ambiguity and internal conflict, which counteract each other according to some views.

Land value and betterment value remain unsolved issues in Wales. Scotland has developed more ways to promote community ownership. There is an imbalance between communities and developers in land use planning decisions.

The Future Generations Act lacks some structures, such as a legal framework for complaints. When the Sustainable Development Bill was being discussed, there was the question of enforcement or other structures to help secure outcomes e.g. a compliance committee structure such as the Aarhus Convention structure.

Looking into the future is a difficult exercise, but is it necessary to have longer timeframes for sustainability to be achieved. A 100 year timeframe was proposed in discussions on the draft legislation for the national plan in Wales.

***Questions arising:***

- *Do we need a different set of rights and responsibilities in Wales?*
- *Are substantive rights needed?*
- *How can we change the way decisions are made to put the environment first?*

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## **Third party right to appeal**

This is the right of communities to appeal decisions made by local planning authorities. It is a limited right of appeal. This has been mooted in the past and is discussed regularly when planning reform comes up. Currently developers have a right of appeal to overturn a refusal, but communities do not have a mirror right of appeal to overturn an approval.

***Question arising:***

- *Should a limited third party right of appeal be introduced in Wales?*

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## **Right to Grow**

System change from within does not happen. There is a need for new powers to change the framework of people's lives, in order to help people to help themselves. Given the decimated resources within local government, communities could be trusted to make good decisions. There is a need to reassess land and people as it is currently a sub optimal framework. In the places we call home – to share food, share skills, and grow a localised economy.

The change would be realised on the streets becoming different once personal responsibility is taken for them. Communities with a right of access to land, could then take responsibility. Stewards of land (public land) have land suitable for cultivation, could create a map, then manage a right of access. Rethink the use of land for a localised food system, leading to better health and well being outcomes. Proof of concept can be tested by piloting the new right in different local authorities.

Co-producing a 'forest plan', is empowering local people over the public asset, using co-operative methods of working. But public bodies lack will and have low appetite for risk was the view of some.

There is a need to create time to enable people to contribute to their communities. Everyone feels overwhelmed but we can trust the power of small actions. We need to trust people to do something in their local space. It is encouraging for people to understand that the public realm needs to be reclaimed. And can motivate a cultural shift and a bringing together – people learn from seeing, so starting small and doing it yourself. A new social contract needs to be built between citizens and public service – to really look at what the council does and what citizens do.

### ***Questions arising:***

- *Should a 'right to grow', essentially a right to access public land for cultivation be piloted and/or introduced in Wales?*
- *How can more co-production structures be introduced into environmental decisions in Wales?*

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## **Children's rights**

'Future generations' are actually the children of the here and now, and generations to come. The UN Convention on children's rights is championed by the Children's Commissioner in Wales. The rights are dependent on each other – they are integrated and need to be delivered together.

The rights have not yet filtered down into policies. There are gaps, for example in national planning rules in Wales. There are duties to consult and allow children to participate and there is a general duty to protect the well being of children – these should be mainstreamed into public decisions.

Children are concerned about the climate crisis and it is therefore justified to try to influence policy so that children's views are incorporated. Consultation with children should include thinking about what they actually want and reflecting their views and needs within plans, such as designing places to meet children's needs. The curriculum could contain more on land use planning. There could be representatives of young people on planning decisions for example, which would lend power and responsibility to children. The rights of children are not visible enough in either discourse or practice in Wales.

***Questions arising:***

- *How do we create structures for children to be involved?*
  - *How should public participation for children be framed?*
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