

# Environmental Justice and the Aarhus Convention



## Introduction

Environmental Justice links a belief in social justice to environmental matters such as climate change. Internationally, environmental justice recognises that the rich developed world has used up more than its fair share of the Earth's resources and that a re-distribution of resources is needed.<sup>1</sup> Within Scotland, environmental justice recognises that the poorest are often those most affected by a dirty environment – be that through living in fuel poverty or living nearby a polluting power station, waste incinerator or major road.<sup>2</sup> This understanding of *distributive* environmental justice underpins the work of Friends of the Earth Scotland and our international network Friends of the Earth International.

However believing in distributive environmental justice is not enough to ensure it happens. Those affected by environmental injustice, for example an indigenous tribe in Canada or a poor community in Scotland, need to be given the tools to fight for justice. This can be termed *procedural* environmental justice – the process by which environmental justice rights can be defended.

## The Scottish Situation

In Scotland if you try to legally challenge a decision that damages the environment you'll find all kinds of practical and financial barriers in your way.

We want to break down those barriers to ensure that communities are properly informed and consulted on developments, and that neither cost nor proximity prevent individuals or organisations from contesting decisions that will have a serious impact on the environment.

Fortunately, these rights are already enshrined in an international treaty that Scotland is committed to: the Aarhus Convention. But the Scottish Government and legal system have yet to fully comply with it.

## The Aarhus Convention

The Aarhus Convention recognises every person's right to a healthy environment – as well as his or her duty to protect it. It seeks to ensure that every individual lives in an environment adequate for his or her health and well-being. This applies not only to those of us living today, but to future generations as well.

The subject of the Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency and responsiveness.

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<sup>1</sup> Of course environmental justice also recognises inter-generational justice – an acknowledgement that we can't continue to use up the earth's resources at the expense of future generations.

<sup>2</sup> A SNIFFER (Scottish and Northern Ireland Forum for Environmental Research) report in March 2005 showed evidence of links between poor environmental quality and poverty

The Convention pursues its objective of a healthy environment for all by upholding the right of every person to have *access to information* about the environment. It places clear obligations on States to ensure greater *public participation* in environmental decision-making. And it promotes easy and effective *access to justice* if those rights are denied, thus enabling the public to challenge violations of environmental law. These three rights – the right to know, the right to participate, and the right of access to justice – form the three pillars of the Convention.

### **1. The right to know**

Anyone can ask for any environmental information possessed by any governmental agency or any private body that serves a public function. The person making the request does not have to be a citizen or resident of that State and does not even have to provide an interest or a reason. NGOs can request information regardless of where they are legally registered.

The Convention's definition of "environmental information" is deliberately broad, including information on any element of the environment, such as air, water, soil or biological diversity (including genetically modified organisms). Also included are all activities and programmes affecting these elements, as well as the effects that the state of the environment may have on human health and safety.

In Scotland this aspect of the convention is largely managed by the Scottish Information Commissioner's Office.

### **2. The right to participate**

The Convention sets minimum standards for public participation when authorities make general plans or license specific projects that could affect the environment. "The public concerned" must be informed of the proposed activity early in the process, while options are still open. They should be able to inspect relevant information free of charge, including the project's possible effects on the environment and an outline of the main alternatives, which authority is responsible for decision-making, possible methods for submitting comments, and dates and times of opportunities for public participation. Authorities must consider the outcome of the public participation in their decision, which must be promptly and publicly accessible, in writing, with its reasoning.

"The public concerned" are defined by the Convention as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making". It explicitly includes NGOs promoting environmental protection if they are recognized under national law. The Convention lists in an annex the types of activities for which decisions to approve projects should always be subject to public participation. They include any activity that might have a significant impact on the environment, such as the licensing of a nuclear power station, smelter, chemical plant, waste-treatment plant or road- construction project.

### **3. The right of access to justice**

The Access to Justice elements of the Convention are the most challenging aspects. They cover both access to justice regarding the right to information and public participation as well as any violation of national law. This means if peoples right to know or right to participate are not met, or if there is a violation of national law, an appeal can be made to a court of law or another independent and impartial body, such as an ombudsman.

Concerning peoples *right to know*, anyone – including individual citizens, NGOs, government officials and companies – can bring a case to court to enforce their right of access to information.

For example, anyone who requested information and did not receive an adequate response can sue. In Scotland this is largely covered by FOI legislation.

Concerning peoples *right to participate* members of the public with a “sufficient interest” or legal standing can seek a review of environmental decision-making if he or she was barred from participating earlier. Interpretation of ‘sufficient interest’ is left to national law.

Concerning any *violation of national law* relating to the environment, members of the public can sue if the law has been violated or if the authority has failed to follow the proper procedures, even if they have not suffered personal harm.

Aarhus also requires access to a review process that is *fair, equitable, timely, and free or inexpensive*. Final decisions must be in writing and must be binding on the public authority.

### **What we need to see**

In Scotland, you currently have you jump through hoops to take an environmental justice case to court. You have to demonstrate that you have a right to bring the case to court, which is difficult if you don't own property in the affected area, and take the risk of paying your own costs, and the other side's costs – which can amount to tens of thousands of pounds. This is not access to justice as defined in the Aarhus Convention.

A recent review of civil justice by the Lord Chief Justice, Lord Gill recommended capping the costs of certain legal cases and easing the rules on who could bring a case to court, ensuring that anyone with a clear interest – including communities and campaigning organisations – could initiate legal challenges. While this is a step forward it doesn't go far enough. We are calling for the law to be changed to enable communities and campaigning organisations to take environmental justice cases to court without excessive legal costs prohibiting them from doing so.