

## ISLAMABAD

Analysis of Islamabad  
Wildlife Management  
Board v. Metropolitan  
Corporation Islamabad

## STEVE WISE

Guest introduction by  
the President of the  
Nonhuman Rights  
Project

## BADGERS

Can the Bern  
Convention be used to  
challenge UK policy?

## SCOTLAND

Analysis of the Animals  
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## EDITOR'S NOTE

This edition is late, what with all that has gone on recently. Hopefully, our readers along with families and friends are well. Commiserations from all at A-law to any who have lost loved ones.

Covid-19 has put the spotlight on the lives of animals. We know that the infamous wet markets are an abomination. When abattoir workers get sick the relentless production line stops awhile. To clear the unwanted backlog the mass gassing or shooting of farm animals begins, while others are left slowly suffocating in deliberately overheated, airless barracks. Companion animals are left without a safety net when their caretakers sicken and die. Zoos (whatever we might think of them the lives of the animals therein are precious) are talking of mass culls because of lost revenue. Animal charities, which already struggle against the odds in the best of times (no national lottery money for them), face closure or reduced operations because donations have dried up. As a community, we must stick together for the animals if we are to keep things going and make change happen. If we don't do this, no one else will.

Change is happening, so there is some good news to report in this edition. Libby Anderson and Iyan Offor take us through some of the exciting developments in Scottish animal welfare in recent months. On 21st May this year, recognition of legal personhood for animals was recognised by the Islamabad High Court. We are fortunate to have an article detailing the background to this ground breaking judgement by a campaigner and the lawyer involved in the case. I am also delighted that Steven Wise of the Nonhuman Rights Project agreed to write an editorial for the journal which discusses legal personhood. Enjoy.

Jill Williams  
Editor

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# Guest introduction by Steve Wise, President of the Nonhuman Rights Project

In May, 2020 the Islamabad High Court handed down an important decision in a mandamus action. It recognized that an elephant named Kaavan, and perhaps all nonhuman animals, have certain legal rights. One of the lawyers, Owais Awan, and his colleague, Lotta Teale, have now written an article entitled "Recognizing the legal rights of animals in Pakistan: a pathbreaking new judgment" for this volume.

In the Kaavan opinion life itself is the premise for the existence of a legal right. Nonhuman animals have natural rights just as humans do, those rights are derived from the Creator as understood through the prism of Islam, while inflicting unnecessary pain and suffering upon nonhuman animals not only underlines respect for the Creator, it violates the fundamental right to life guaranteed by Article 9 of the Pakistani Constitution. As there was no appeal the Kaavan opinion only formally applies to Islamabad.

I will place Kaavan's opinion in the context of some of the many, and growing, number of decisions that have been handed down in courts around the world in cases on which legal rights were demanded for a nonhuman animal over just the last six years. I will note which causes of action the various courts in the different countries accepted or rejected, where they claimed that rights for nonhuman animals, if any, came from, which nonhuman animals, if any, have rights, and if they do have rights, which ones do they have.

I will begin with the Indian case of *Animal Welfare Board v. Nagarajah*, 6 SCALE 4578 (2014). There the Indian Supreme Court held that all nonhuman animals possess a large number of statutory rights under the Prevention of Cruelty

to Animals Act. They also possess the constitutional rights to life and security, subject to the law of the land, which includes depriving them of their life out of human necessity under Article 21 of the Indian Constitution. Article 21 also protects the fundamental rights of humans to a healthy and wholesome environment in which nonhuman animals are to be treated with dignity and honor. Nonhuman animals also possess rights under Article 51A(g) of the Indian Constitution, which the Court characterized as the "magna carta of animal rights." They do not however possess fundamental rights.

These rights nonhuman animals possess are to be broadly defined and include, but are not limited to, those rights enumerated in the Prevention of Cruelty and in the guidelines of the World Health Organization of Animal Health. But they extend to all situations in which nonhuman animals are subjected to unnecessary pain and suffering. The Prevention of Cruelty to Animals Act also places duties upon humans with respect to their treatment of nonhuman animals and grants corresponding rights to nonhuman animals. The court also noted that the right to property had recently been downgraded from a fundamental right to a legal right. This allows Parliament sufficient flexibility to safeguard the rights of nonhuman animals despite their continued property status. At one morning's breakfast in Delhi with me and Kevin Schneider, Executive Director of the Nonhuman Rights Project, the judge who wrote the decision revealed that his Hindu faith had motivated the decision.

The following year the Delhi High Court decided the case of *People for Animals v. Mohazzimi*, CRL.M.C. 2051/2015. On a claim that the defendant was violating the anti-cruelty statute re-



lating to the capture of nonhuman animals, the court cited the Nagarajah case and declared that it was settled law that birds have a fundamental right to fly, cannot be caged, and must be set free in the sky. Moreover, birds have the fundamental right to live with dignity and cannot be subjected to cruelty by anyone.

In *Singh v. State of Haryana* (High Court of Punjab & Haryana at Chandigarh, CRR-533-2013, May 31, 2019), the court declared that the entire animal kingdom, including all avian and aquatic species, are legal entities who have a distinct persona with corresponding rights, duties, and liabilities of a living person and that all citizens are persons in loco parentis responsible for the welfare and protection of nonhuman animals.

In Argentina a chimpanzee named Cecilia and an orangutan named Sandra were the subjects of major habeas corpus decisions. Contradictory judicial decisions issued that involving an NGO named AFADA's habeas corpus case brought against the Buenos Aires Zoo on behalf of Sandra. Sala II of the Criminal Appeal Chamber in

Buenos Aires case no. 68831/2014 (December 18, 2014) noted that Sandra was a nonhuman rights holder and the subject of rights, but did not order her freed. Instead it transferred her to a lower court in Buenos Aires.

That court, in *Association of Officers and Lawyers for Animal Rights v. The Government and the City of Buenos Aires*, no. A. 2174-0215 (October 21, 2015) found that nonhuman animals are holders of the right of protection as set forth in the prohibitions found in Law 14,346, an anticruelty statute. It also held that Sandra was a nonhuman person who was the subject of rights and possessed the right not to be subjected to ill treatment or cruelty or abusive human conduct. However, she did not necessarily have the rights of a human person. The court did find that the manner in which she was being treated at the Buenos Aires Zoo violated Law 14,346 and entered three conclusions. First, Sandra was a subject of rights. Second, a panel of experts should make binding determinations as to what necessary actions should be taken on her behalf. Third, the City must guarantee Sandra's habitat

conditions as well as the activities necessary to preserve her cognitive skills.

On appeal the court in *Association of Officers and Lawyers for Animal Rights v. The Government and the City of Buenos Aires*, Case File No. A2174-2015/0 (June 14, 2016) recognized AFA-DA's standing and noted the conflict between the position of the two sides: was Sandra a subject of rights or did humans merely have a duty to protect nonhuman animals? However, the court did not expressly resolve the conflict. Instead it simply treated the matter as a welfare, and not a rights, case and negated the lower court's conclusions Sandra was a subject of rights and that a panel should determine what was necessary for her, while leaving its order that City guarantee Sandra's habitat conditions as well as the activities necessary to preserve her cognitive skills in place. However, Sandra was eventually voluntarily transferred to a sanctuary in Florida.

A trial court, at File No. P-72 254/15 (Mendoza, Argentina, November 3, 2016), recognized the standing of AFADA to bring a habeas corpus case challenging the legality of the chimpanzee Cecilia's imprisonment in the Mendoza Zoo. The court said that as Sandra was alive she could not be classified as a thing and that, because great apes are sentient, they possess rights and nonhuman personhood even though civil and commercial law designates them as things. The court made clear, however, that it was not granting nonhuman animals the same rights that human beings possess, but was recognizing that primates have the fundamental rights to be born, live, grow, and die in the proper environment for their species and be recognized as nonhuman legal persons who possess other fundamental rights that should be listed by the appropriate state authorities. There was no appeal and accordingly Cecilia was transferred to a sanctuary in Brazil.

In June, 2017 a habeas corpus lawsuit was brought in Colombia on behalf of Chucho, a spectacled bear held captive in the Barranquilla City Zoo, seeking to transfer her to the Rio Blanco Reserve on the City of Manizales. The Civil Family Tribunal of the Superior Court of the Judicial District of Manizales in Colombia the relief requested. In rapid succession that decision was overturned by an appellate court, which granted

relief, then both a subsequent trial and appellate court denied relief, and the case was decided by Colombia's Supreme Court Civil Cassation Chamber in the case of *Luis Domingo Maldonado contra Corporacion Autonoma Regional de Caldas Corporcaldas*, AHC 4806-2017 (Colombia Supreme Court, July 26, 2017)

The Supreme Court stated that habeas corpus was not ill-suited to protect sentient nonhuman animals and that any citizen may use it for that purpose. The court held that sentient beings are subjects of rights, though not all the same rights as human beings. Rather they are entitled to those rights that correspond to, or fitting to, or suit their species, rank, and group. In doing so the court stated that when nature is concerned the court must relax the usual principle that holds that an entity is reciprocally bound to comply with a set of duties and recognize that nonhuman sentient beings are subjects of rights despite not being able to bear duties. It ruled that nonhuman animals possess the rights that derive from the minimal animal welfare standards and designated acts of cruelty set forth in Article 3 of Law 1774 of 2016. The court made clear that nonhuman animal rights are not similar to human rights and that nonhuman animals may be used for scientific research, food and other human needs. The court then ordered Chucho's transfer to a place that better suits his habitat, preferably the Rio Blanco Natural Reserve.

This decision was reversed by Colombia's Constitutional Court in case File T-6.480.577-Sentence SU-016/20 (January 23, 2020). The court held that the use of habeas corpus was inappropriate, as it only applies to persons. One dissenter argued that nonhuman animals, as sentient beings, possess intrinsic value and are entitled to rights, and that habeas corpus is appropriate, indeed seemed to have been designed for Chucho's case and that Chucho could have been its beneficiary. This dissenting judge stated however that she was not comparing humans to nonhuman animals and that beyond the fact that they shared the quality of dignity, she did not consider the rights of nonhuman animals to be fundamental rights, she did not believe that the scope of nonhuman animal rights have the same reach as a human's right to freedom, that no interest exists for animal freedom for each member of every species, and that she would

not order Chucho's transfer if he could not survive there.

A second dissenter appeared to adopt many of the arguments of the Nonhuman Rights Project that I placed before the court by video, stating that person is not synonymous with human being, that personality is not a biological concept, that certain rights are derived from the nature of a nonhuman animal, including not being hungry, thirsty, or malnourished, not being afraid or anguished, not suffering physical pain, not being injured or subject to illness, having the freedom to express one's natural patterns or behavior, and being a judicial person. This dissenter stated that nonhuman animals have these rights because they are sentient and because nonhuman animals lie at an intermediate point between being subjects of law and objects of law. He noted that nonhuman animals don't have the same rights as humans, but they should have basic rights that are protected according to their autonomy. This dissenter agreed that habeas corpus was not the appropriate vehicle to vindicate Chucho's rights, but that a guardianship action would have been.

I note some of the most important of the seven habeas corpus lawsuits that the Nonhuman Rights Project has filed since 2013 on behalf of chimpanzees and elephants in the American states of New York and Connecticut (up to four further habeas corpus suits are scheduled to be filed in 2021 in California and Colorado).

In 2014 the New York Supreme Court, Appellate Division, Third Department in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D. 3d 148 (3<sup>rd</sup> Dept. 2014) refused to permit a common law habeas corpus action to proceed on behalf of an imprisoned chimpanzee on the ground that only those entities who can bear legal duties are entitled to legal rights. The court noted, however, that those humans who cannot bear duties still have rights because collectively humans possess the unique ability to bear legal duties.

The following year the New York Supreme Court, Appellate Division, Fourth Department in *In the Matter of the Nonhuman Rights Project, Inc. v. Kiko*, 124 A.D. 3d 1334 (4<sup>th</sup> Dept. 2015) implied that it might agree that a chimpanzee

could be a person, but dismissed the case on the ground that since the NhRP was demanding that the chimpanzee be transferred to a sanctuary and not be released outright that habeas corpus was not appropriate. In 2018, in a criminal case in which the defendant claimed that the word person was necessarily limited to human beings, the court stated that it is common knowledge that personhood can and sometime does attach to nonhuman entities such as corporations and nonhuman animals and cited to *Kiko's case*. *People v. Graves*, 163 A.D. 16 (4<sup>th</sup> Dept. 2018)

In 2017 the New York Supreme Court, Appellate Division, First Department in *People ex rel. Nonhuman Rights Project, Inc. on behalf of Tommy v. Lavery*, 152 A.D. 3d 73 (1<sup>st</sup> Dept. 2017) noted the argument that the standard for having the capacity for legal rights could not be the ability to bear duties since numerous humans who lack the capacity for duties still possess rights ignored the fact that they were human beings.

Ruling on a motion for leave to appeal to New York's highest court, the Court of Appeals refused to hear the appeal. However, a single Judge of that court, Eugene M. Fahey, the only judge of an American court of last resort to opine to date on the merits of the NhRP's arguments, said that in determining whether a chimpanzee should have the right to liberty protected by habeas corpus a court should assess the intrinsic nature of chimpanzees as a species. He wrote that to treat a chimpanzee as if she lacked the right to liberty protected by habeas corpus is to regard her as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead a court we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect. Judge Fahey concluded that while it may be arguable that a chimpanzee is not a person there is no doubt that she is not merely a thing and noting that habeas corpus was a proper remedy. In *The Matter of Nonhuman Rights Project, on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054 (2018)(Fahey, J. concurring).

Finally, in 2020, the Bronx Supreme Court in the case of *The Nonhuman Rights Project, on behalf of Happy v. Breheny*, 2020 WL1670735 (Bronx

Supr. Ct. 2020) adopted Judge Fahey's reasoning and conclusions and agreed that Happy the Asian elephant who had been imprisoned for decades on one acre of the Bronx Zoo was more than just a legal thing; she is an intelligent autonomous being who should be treated with respect and dignity and who may be entitled to liberty. However, the court state that, regrettably, she felt herself constrained by the Third Department's 2014 decision to dismiss the habeas corpus petition. This decision is under appeal.

Finally, the Connecticut Appellate Court in *Non-human Rights Project, Inc. v. R.W. Commerford*, 192 Conn. App. 36 (2019) rejected the NhRP's attempt to bring a habeas corpus case on behalf of three elephants imprisoned in a traveling . It noted New York's Third Department's requirement of the capacity for duties in order to have any rights, but relied more heavily on its concern that if it granted the right to bodily liberty to elephants for the purpose of habeas corpus the courts of Connecticut would be required to upend the state's legal system and allow every sort of nonhuman animal to bring suit in a court of law.

In sum, from the 2014 *Nagarajah* to the 2020 *Kaavan* case, we have seen courts grapple with the issues that result from the increasing demands of lawyers around the globe for courts to grant rights that protect the most important interests of members a wide variety of species. Some courts in India, Pakistan, Argentina, and New York have already moved to the forefront of this worldwide struggle. Behind them are courts in Colombia and Brazil. Other courts are lagging, with Connecticut bringing up the rear. But everywhere change is coming, just at different rates.

# Recognising the legal rights of animals in Pakistan: A pathbreaking new judgment

Lotta Teale & Owais Awan, London / Islamabad, June 2020

## Introduction

On 21<sup>st</sup> May 2020, a pathbreaking 67-page judgment was set out at the Islamabad High Court by the Honourable Chief Justice Athar Minallah recognising the legal personhood of animals and other non-human living beings: that they are not just property but have legal rights of their own. He held that non-human living beings have 'natural rights' not to be tortured or unnecessarily killed because the gift of life it possesses is precious and its disrespect undermines the respect of the Creator.<sup>1</sup> This case is precedent-setting in that this has only been held before in Argentina and in obiter in some judgments in US (although the US courts did not allow release of the animals). It seems to have been in part influenced by the dramatic experience of the coronavirus lockdowns across the world, our human experience of imprisonment like zoo animals and the concomitant sense that we need to re-evaluate our interdependent relationship with the natural environment and treat it with more respect.

The case included petitions on the transfer of an elephant and a bear from the Marghazar zoo in Islamabad and the killing of stray dogs across the city. The Judge made a range of declarations and directions that all the animals in Islamabad zoo be moved to appropriate sanctuaries, and the government has been restrained from adding new animals in the zoo until it is redesigned up to international standards.

This article, written jointly by the lawyer taking the case and another involved in the campaign, will (1) look at the context of animal law and welfare in Pakistan; (2) provide an insight into how

the judgment came about; (3) discuss the focus of the litigation, providing a discussion of the findings including particular reference made to Islam; and (4) comment on the likely impact of the judgment in Pakistan and elsewhere.

## Context of animal law and welfare in Pakistan

Pakistan is an unexpected locus for pathbreaking animal law reforms. A culture which prides itself on being meat eating, in opposition to vegetarian India, and the only country in the region where Asian Elephants have gone extinct, it has thus far stood apart from other countries in the region such as Sri Lanka and India that have made some headway into recognising the need to protect non-human rights. The Indian Constitution recognises animal sentience by putting an obligation of its citizen to show 'compassion towards all living creatures,'<sup>2</sup> the Indian Government updated their prevention of cruelty laws in 1960 and created the 'Animal Welfare Board of India' to advance the same, and a range of case law has been developed advancing the welfare of animals and the environment.<sup>3</sup>

Pakistan's Constitution makes no such provisions, and Pakistani governments have made extremely little in the way of legal reforms on the welfare of animals since the departure of the British. Under colonialism, several pieces of leg-

1 Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad (2020) p.60

2 Article 51 of the Indian Constitution

3 For example, Kerala High Court in the case titled 'N. R. Nair and others etc, v. Union of India and others' [AIR 2000 Kerala 340]; 'Animal Welfare Board of India v. A. Nagaraja and others' [(2014) 7 Supreme Court Cases 547]; 'Dr Manilal V. Valliyate, The Constituted Attorney of people for Ethical treatment of animals v. The State of Maharashtra through Chief Wildlife Warden, etc.' (Writ Petition No.2662/2013)



islation were introduced protecting non-human animals which were crucial to this recent litigation, in particular the Prevention of Cruelty to Animals Act 1890, the Pakistan Penal Code 1860 and the Glanders and Farcy Act 1899 which involve fines and imprisonment for mistreatment of animals. Since the establishment of Pakistan as a State, the main legislation introduced recognising animal sentience involves procedures around slaughtering which, while prohibiting torture, also prohibits stunning.<sup>4</sup> Pakistan is a signatory to the World Organization for Animal Health but OIE standards have not been transposed into legislation. Responsibility for animal welfare is spread across Ministries with no one Ministry taking a lead. As the Pakistan State has decentralised, control is delegated to regional governments and while some regions have made efforts to protect wildlife and curb illegal trade in the same<sup>5</sup>, others have made less. Overall, the limited updating of legislation and lack of government policies protecting the welfare of animals demonstrates a lack of attention by the government to animal welfare.

Very poor treatment of animals is common across the country. Working animals are worked and beaten until they drop dead, despite the 1890 Act prohibiting the overload of draught animals or employment of sick or injured animals. Strays are tortured by members of the public and killed en masse by local authorities.<sup>6</sup> Bear baiting and dog fighting is common. Animals are generally seen as commodities even by people considered animal enthusiasts, leading to a booming trade in illegal exotic animals and a common practice of establishing private zoos. Even vets regularly kill animals negligently with impunity<sup>7</sup>. As such, the protective laws that there are are very rarely enforced. Conservation in general is

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4 Halal Authority Act 2015

5 Azad Jammu and Kashmir Wildlife (Protection, Preservation, Conservation and Management Act (2014) cruelty to animals is defined as 'an act towards and animal, which is against the natural instinct and behaviour of the animals and has a negative effect on the health of an animal including overdriving, beating, mutilation, starvation, thirst and overcrowding or otherwise ill treatment to the animal.'

6 Documented by ACF Animal Rescue, Karachi

7 . Interview with Sundas Hoorain, June 2020, who brought a case against a vet in Islamabad after her cat was allegedly deliberately misdiagnosed for the purposes of extorting money to undertake an operation, during which operation the cat was killed through mistreatment and neglect. She is in touch with many others who have similar experiences.

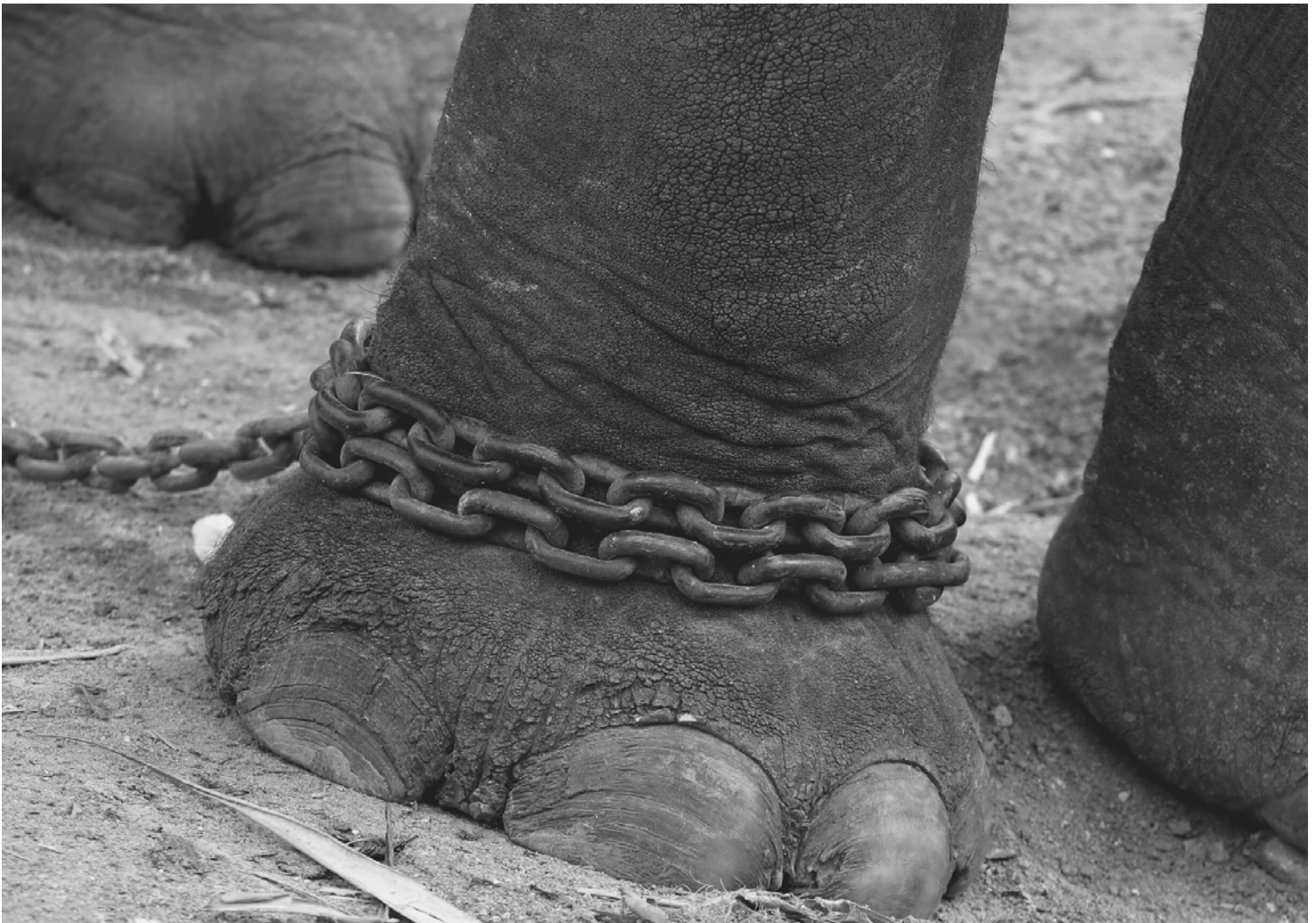
not a priority and little is done to preserve local wildlife. Notably, in neighbouring countries in Asia even though laws may be better, cruelty to animals is still a prevalent problem, with for example recent cases of firecrackers being fed to Elephants in Kerala: public attitudes and enforcement remain a problem across the region. There are a few outstanding animal welfare efforts (eg. ACF Animal Rescue Karachi, Pakistan Animal Welfare Society, WWF, Balkasar Bear Sanctuary, Friends of Islamabad Zoo) driven by dedicated citizens, but these are small in scale and highly personality driven. Readers may be interested to follow ACF Animal Rescue on Instagram where it documents its daily efforts to improve conditions for animals and build empathy among the population, against extremely difficult conditions.

## How the case came about

The hearing brought together three separate petitions: on an elephant at the zoo, a mistreated bear, and the killing of street dogs.

The focus on the elephant (named Kaavan) had its origins decades ago when citizens began protesting the poor treatment of elephants at the zoo. In 2012 when his fellow elephant Saheli died young under unclear circumstances, Kaavan was showing signs of aggression and was placed in chains, which gave rise to further protest. In 2015, international NGO Free the Wild started a campaign to have Kaavan relocated to a sanctuary. They sought agreement from the Government to relocate him abroad, in return for which Free the Wild would pay to have the zoo upgraded to international standards but, despite promises by various government agencies, after it was clear negotiations were getting nowhere, in March 2019 they filed a petition in court seeking relocation. A key issue in the case was which government agency should be responsible for the zoo, with different agencies claiming control, purportedly for nefarious purposes (the zoo's income being substantial).

Alongside this focus on the elephant, other concerned citizens were campaigning for improved conditions for all the zoo animals. In May 2019, a dancing bear was confiscated from the streets of Islamabad and taken to the zoo, and another concerned citizen brought a case that it need-



ed to be transferred to an appropriate sanctuary within Pakistan, which transfer was made pending final judgment. This case also sought to transfer management of the zoo to the wildlife management board, run by an individual more demonstrably committed to the welfare of the animals. The case was in the papers and garnered some high profile support for example, the First Lady, Imran Khan's wife (Bushra Maneeka), who was wondering what to do with the birds she had inherited from her predecessor that she wanted to put somewhere but found the conditions at the zoo too poor. Hundreds of volunteers did surveys, three times a day for months tracking the condition of the animals, as well as providing enrichments for the animals and training for staff. This demonstrated public attention to and concern for the welfare of animals at the zoo.

When these petitioners were brought together for final hearing, an additional petition was added on the culling of dogs, as local authorities had recently undertaken a cull despite efforts by campaigners to introduce vaccination. All of

these were heard together.

### **Summary of findings of the court, with a focus on particularly interesting reasoning**

While the case could have been argued on the basis of the 1890 Act, it was decided to test whether the law could be expanded by introducing a focus on legal rights of animals under the Constitution into the submissions.

The legal rights of animals was the main focus of the Judge in his deliberations, and he looked at (a) whether animals have independent rights, (b) whether there is a duty on the state to protect, preserve and conserve them, and (c) whether the cruel treatment of animals in question amounts to a breach of the right to life under the Pakistan constitution.

#### (a) Whether animals have independent rights

After a thorough review of jurisprudence from

international case law, Pakistani legislation, International commitments and Islamic teachings, the Judge concluded that animals do indeed have independent legal rights on the basis of their characteristic of being alive:

'After surveying the jurisprudence developed in various jurisdictions it has become obvious that there is consensus that an 'animal' is not merely a 'thing' or 'property'... Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative... The human rights are inherent because they stem from the attribute of being 'alive'. Life, therefore, is the premise of the existence of a right. Whether human rights or rights guaranteed expressly under the Constitution, they all have a nexus with 'life'. An object or thing without 'life' has no right. A living being on the other hand has rights because of the gift of 'life'. An animal undoubtedly is a sentient being. It is a natural right of an animal not to be tortured or unnecessarily killed because the gift of life it possesses is precious and its disrespect undermines the respect of the Creator.<sup>8</sup>

As such he saw 'natural rights' of animals as derived on a religious basis from God much as human rights were originally. Extending such God given rights to animals is a logical progression abandoning the speciesism inherent in the concept of human rights. The Judge considered Islamic principles extensively and after looking at a number of Islamic verses, he noted 'The sacredness of 'life' in the form of animal species and the respect it deserves is explicit from the above verses.' Islam was thus crucial in this finding that animals have independent rights, and the precedent may thus be of particular relevance to States founded on religious principle.

#### (b) Whether there is a duty on the state to protect, preserve and conserve animals

In his reasoning as to whether these natural rights extend to an obligation on humans or the State to protect those rights, the Judge was clear that the Constitution is 'framed by humans

for regulating themselves' and as such the various rights guaranteed under the Constitution are only in the context of humans.<sup>9</sup> However, he went on to look at whether the Constitution imposes any duty on the State and humans regarding the welfare of other species, and in doing so he drew on religion and the context of the global pandemic and the degradation of the environment.

First, in terms of religion, the Judge reasoned the Constitution of Pakistan must be interpreted so as to protect non-human animals because the State is under an obligation to enable its citizens to pursue good Muslim practice, and treating animals badly is inconsistent with such practice. He noted in particular the respect of the prophet towards all animals and stated that in Islam 'killing or harming an animal unnecessarily or inflicting unnecessary pain and suffering is forbidden.' He went on to say that 'it is inconceivable that, in a society where the majority follow the religion of Islam, that an animal could be harmed or treated in a cruel manner.'<sup>10</sup> In this way, despite acknowledging natural and legal rights of animals, he took a somewhat anthropocentric utilitarian approach to the reasonableness of pain and suffering, subordinating non-human animals to humans, but nevertheless requiring State protection.

Second, he reasoned that the State has a duty to protect non-human animals on the basis that humans would not be able to exist without the environment and specifically animals, and thus that such protection is an inherent obligation under the human right to life protected by the Constitution.

He started by drawing on existing jurisprudence as the right to life under article 9 of the Constitution had already been interpreted widely. In 1994, the Supreme Court of Pakistan interpreted right to life in a liberal manner holding that the right to a healthy and clean environment is a fundamental right and "life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally."<sup>11</sup> This became known as the "Shehla Zia principle" and two cases fol-

<sup>8</sup> Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad (2020) p.60

<sup>9</sup> Ibid. p.5

<sup>10</sup> Ibid p.51

<sup>11</sup> PLD 1994 SC 693

lowed suggesting threats to the environment were a threat to life: one related to the construction of the Lahore metro-line<sup>12</sup>, and the other, the hunting of migratory birds Houbara Bustards<sup>13</sup>. Even though both cases were overturned, observations in the judgments were welcomed by environmentalists and contributed towards environmental jurisprudence.

The Judge in our zoo case went on from consideration of the jurisprudence to look at the current environmental context:

'The United Nations has warned that if the wildlife is not protected then its extinction would expose the human race to the risk of facing extinction.... The threat of climate change and its ensuing devastating consequences for the human race can only be avoided if environmental degradation and damage to ecosystems and biodiversity could be stopped...The welfare, wellbeing and survival of the animal species is the foundational principle for the survival of the human race on this planet... Protecting, preserving and conserving the animal species and preventing it from harm is a constitutional obligation of the State and the authorities.'... 'the relationship of the treatment of animals and the right to life of humans makes it an obligation of the State and its authorities to jealously guard against cruel and illegal treatment of animals'<sup>14</sup>

Such forthright reasoning on the centrality of non-humans to the existence of humans should be seen in the context of the coronavirus pandemic. The judge himself noted at the start of the judgment,

'The petitions in hand, besides raising questions of public importance, have a nexus with the threat to human existence highlighted by the current pandemic crisis. It has highlighted the interdependence of living beings on each other, the desperate need to restore the balance created in nature and, above all, it has conspicuously brought the essence, meaning and signifi-

cance of 'life' into the spotlight,'<sup>15</sup>

It seems unlikely that such a forceful judgment would have been given without the self-awareness and reflection that the pandemic has inspired. It can only be hoped that other law and policy makers across the world are making similarly powerful reflections.

(c) Whether the cruel treatment of animals amounts to a breach of the right to life under the Pakistan constitution.

The next step was to look at whether the cruelty to animals in question could amount to a breach to the right to life under the Constitution. He observed that, 'any treatment in violation of the provisions of the Act of 1890, or subjecting an animal to unnecessary pain or suffering, is an infringement of the right to life guaranteed under Article 9 of the Constitution.'

The parameters as to what would constitute unnecessary pain and suffering were not spelled out, although in court, the petitioner had cited a case from the High Court of Sindh which held that the traditional sport of donkey- and bull- cart racing fell within the definition of cruelty under the Prevention of Cruelty to Animals Act 1890, and that, far from being necessary such events actually have an adverse effect on the youth.<sup>16</sup> Without going into comparisons as to what counted as unnecessary, the Judge deemed that on the facts of the case, taken from a study by an amicus curiae and observations of citizens tracking animal's treatment, they were not met.

'The Zoo, ... merely serves the purpose of displaying or exhibiting its animals to the visitors. The animals are held in captivity in such enclosures and conditions which, instead of providing an opportunity to study the animals, must be adversely affecting the visitors. There does not appear to be much awareness in society, judging by the conduct of the visitors. The Zoo does not make any positive contribution whatsoever to the society. With the advancement of technology there are far better and more informative opportunities to observe and gain knowledge about the animal spe-

12 PLD 2015 Lahore 522

13 PLD 2016 SC 48

14 Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad (2020) p.57

15 Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad (2020) p.3

16 PLD 2018 Sindh 169

cies.<sup>17</sup>

As such, he decided, given the deplorable conditions in which the animals find themselves at the zoo the court had 'no hesitation in declaring that the animals in the Zoo have been subjected to unnecessary pain and suffering.'<sup>18</sup>

In view of this the Judge made a range of directions that the elephant be sent to a sanctuary; the bear remain in the sanctuary to which it had been moved; the relocation of all remaining suffering zoo animals; that no new animals be brought to the zoo until it has been certified by an international agency; various directions relating to institutional responsibility for the zoo; a direction that responsibility for stray dogs be transferred to the wildlife board who should develop a suitable policy in compliance with international best practices and Islam; and a recommendation that the Federal government consider including animal welfare in Islamic studies and that the media educates the public about how God's creatures should be treated.

### What will be the impact of the judgment? (National and global)

The case was from the High Court of Islamabad, so it is only binding in Islamabad. The limitation period for appeal has passed. However, it is not certain the judgment will be enforced: there could be endless hurdles to implementation. Given the escalating pandemic, the petitioner is seeking an extension of the 30 day period in which they are to transfer the animals, and have commissioned a committee to examine whether a sanctuary can be established locally, where the various animals should be relocated to until conditions are improved and what would be an appropriate timeline. There is a risk that energy dissipates and the animals are never moved, and it will take diligent oversight to ensure it is actually enforced.

The government has not shown its thinking to be aligned with the Judge. Despite earlier promises by certain people in government to transfer the elephant to a sanctuary, progress was never made until this Court judgment, and the Paki-

stan government has not to date demonstrated any reluctance to hold elephants in its zoos. As late as November 2019, the Pakistan government submitted a request to the Namibian government for ten elephants, after a petition by a member of the public that the Lahore zoo should have elephants to amuse children and raise funds.<sup>19</sup> These would likely come from the wild in Zimbabwe contrary to the CITES ban on elephant transportation from Africa. Will there be attitudinal change within the government after this judgment? It is theoretically possible that, following this judgment, the Federal Government may decide to legislate on the trade of wildlife and treatment of non-human animals but given the current health and economic crisis, it would likely be of low priority.

In some ways, it is positive that legal precedent is often not followed in Pakistan, and that laws are often not implemented. A pathbreaking decision such as this can sit there on paper and be called on by those who want to use it. It could likely be used by other animal welfare entities active in Karachi and Lahore, who could file similar petitions in their respective provincial high courts. The Judgment will have symbolic value, not only in Pakistan but across South Asia and elsewhere. Sri Lanka has been active in litigation in this area, and it is likely the Islamabad case could be called on by activists. Beyond that, the Non Human Rights project in the United States are planning to raise it in their submissions in cases currently before the courts in the US<sup>20</sup>.

Legal changes often come before popular changes. While the vegan movement hasn't taken off in Pakistan yet, a number of small scale companies have cropped up among elite circles specialising in vegan produce, and privatised efforts are being made to introduce local recycling, while the government itself has embarked on substantial campaigns to reduce plastic waste and plant new trees. This judgment will form part of that trend towards greater consciousness of the environment and will hopefully help backstop and encourage further efforts to improve the welfare of animals in particular.

<sup>17</sup> Islamabad Wildlife Management Board v. Metropolitan Corporation Islamabad (2020) p.53

<sup>18</sup> Ibid p.53

<sup>19</sup> <http://pawspakistan.org/2019/11/11/plight-of-the-pachyderm/>

<sup>20</sup> Email from NHRP updating followers about their work, 22 May 2020

# The ethics of animal circuses

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Animal protection advocates have been unanimous in their celebration of recently passed legislation banning the use of wild animals in circuses, and with good reason. Even if, as the media reported, only 19 wild animals were still left in circuses when the Wild Animals in Circuses (No 2) Act 2019 was given Royal Assent, this law is a symbolic culmination of decades of hard work by animal advocacy groups to bring an end to the cruelties beneath the big top.

But should we regard the law as having gone far enough? Should we push to extend the ban to the use of domestic animals as well?

The answer to these questions depends in part on animal protection advocates' reasons for supporting the ban. Broadly speaking, three primary ethical motivations for opposing animal circuses can be identified: they cause unnecessary animal suffering, they exploit animals, and they are contrary to animal dignity. Let's consider each of these reasons in turn.

## Suffering

The first, and perhaps most intuitive, concern relates to the suffering inflicted on animals by using them as circus performers. The starkest illustrations of animal suffering in circuses are captured in undercover exposés documenting vicious brutality meted out by trainers to unwilling performers.<sup>1</sup>

Whilst maybe not all circuses are responsible for these sorts of heinous cruelty, even under the best of circumstances the realities of travelling

circus life are at odds with the health and welfare needs of wild animals. Frequent travelling, limited space, restricted social interactions, maternal separation and the requirements of training and performance preclude, for all intents and purposes, the possibility of wild animals living lives conducive to their wellbeing.<sup>2</sup> Attempting to meet the welfare needs of wild animals in travelling circuses is - to borrow a phrase from Bernie Rollin - like trying to put square pegs into round holes.<sup>3</sup>

The welfarist concern with unnecessary suffering seems to provide a pretty strong basis for a ban on the use of wild animals in circuses. But what about domestic animals?

Whilst domestic animals are not susceptible to all the harms of their wild counterparts, animal protection groups have nonetheless highlighted similar concerns. For example, Animal Defenders International and OneKind both stress that domestic animals also suffer. The training methods they are subject too may involve cruelty and the tricks they perform may be detrimental to their health. For example, horses trained to stand on their hind legs and walk can risk injury.<sup>4</sup> Moreover, the conditions that animals are kept in are also often unacceptable. For example, Animal Defenders International found dogs used by Jolly's Circus kept in pens that were approximately 1.5 x 1.5 meters in size.<sup>5</sup>

<sup>1</sup> See e.g. 'Circus Trainer Guilty of Cruelty to Chimpanzee' (The Guardian, 28 January 1999); 'Anne the Elephant Circus Abuse: Bobby Roberts Guilty' (BBC News, 23 November 2012).

<sup>2</sup> See e.g. Stephen Harris et al, 'A Review of the Welfare of Wild Animals in Circuses' (2006); Eurogroup for Animals, 'Wild Animals in EU Circuses: Problems, Risks, Solutions' (2015).

<sup>3</sup> Bernard Rollin, 'An Ethicist's Commentary on Equated Productivity and Welfare' (2002).

<sup>4</sup> Corrine Henn, 'Why Circuses That Use Domestic Animals are Still Abusive Attractions' (One Green Planet, 2014).

<sup>5</sup> OneKind, 'Domestic Animals in Circuses' (2019).



It is clear that welfare concerns are associated with domestic circus animals too, but a welfarist framework alone does not provide a categorical reason to ban their use. If effective laws could in theory be put in place to adequately protect the welfare of domestic animal circus performers, then individuals solely concerned with the question of animal suffering would have no obvious basis to object to the practice.

### Exploitation

The fact that circus animals suffer is not the only reason one might object to their use. A second type of objection is that such use is inherently exploitative. Paradigm examples of exploitation in the human context include sweatshop labour, price gouging, sex trafficking and loan-sharking. What all of the practices have in common is that they involve taking advantage of another individual's vulnerability to unfairly derive benefits from them.

To determine whether we can regard using animal circus performers as inherently exploitative

we have to consider whether (1) circus animals are vulnerable; (2) humans take advantage of that vulnerability and (3) humans unfairly derive benefits from them.

It seems undeniable that animals are vulnerable in relation to humans. Animals who are either born or abducted into captivity are entirely at the mercy of their captors, whom they depend on for food, water, medical care and shelter. Compounding this vulnerability is the very limited legal protections animals currently possess. It also seems hard to deny that circuses take advantage of animal vulnerability. It is precisely because of the animals' dependency on their human captors that they can either be compelled to perform circus tricks through threats and violence or can otherwise be coaxed to do so through more subtle methods.

Whether or not humans unfairly derive benefits from circus animals requires a little more unpacking. Clearly the circuses benefit economically from animal performers but they may claim that their animals are fairly compensated through

good quality care and decent living conditions. As discussed above, undercover investigations and animal welfare science seriously call these claims into question, but even granting that they are true in some instances, the unfairness to the animals can be argued to stem from the fact that they are being compelled to live the sorts of lives that ultimately are not in their best interests, for the sake of increasing circuses profits.

Circuses may claim that animals wilfully take part in and enjoy performing circus tricks. Again, even if true, there may be reason to think that it is still exploitative to use them in such ways. The political and legal philosopher Martha Nussbaum draws our attention to 'adaptive preferences' – preferences that an individual forms against background conditions of injustice. Nussbaum points out that animals can learn submissive or fear-induced preferences that arise out of 'diseased' relationships of exploitation with human beings.<sup>6</sup> It is superfluous to spell out how the relationship between trainers and circus animals fits in to Nussbaum's schema here.

The above analysis gives us reason to think that requiring these animals to perform circus tricks is a form of exploitation, even if it does not involve any animal suffering.

## Dignity

In the Indian case of *Nair v. Union of India* the Kerala High Court found that circuses subject animals to an 'undignified way of life'.<sup>7</sup> What does the idea of dignity refer to here?

Invocation of dignity is widespread in ethical, political and legal debates but the precise meaning of the term is often unclear. An influential account of animal dignity comes from Martha Nussbaum. For Nussbaum the notion of dignity is related to the idea of 'flourishing'. A dignified life is the type of life that a being of a particular sort ought to lead, full of real opportunities to do and be what they value.

Nussbaum goes further than conventional welfare narratives and suggests that the good life consists of more than positive hedonic experi-

ences: 'Animals, like humans, pursue a plurality of distinct goods.'<sup>8</sup> She continues:

It seems plausible to think that there may be goods (animals) pursue that are not felt as pain and frustration when they are absent: for example, free movement and physical achievement, and also altruistic sacrifice for kin and group.<sup>9</sup>

Depriving animals of these important goods may thus also be regarded as incompatible with their dignity.

If Nussbaum's arguments are correct they give us further reason to object to circuses: they deprive animals of the possibilities to lead flourishing lives. This is most obvious in relation to wild animals. Circus life precludes them from roaming freely, raising families, forming relationships with other animals, playing, gathering food, finding shelter and so forth. This view itself was endorsed by the Parliamentary Under-Secretary of State for DEFRA, David Rutley MP during the second reading of the Wild Animals in Circuses Bill:

Wild animals in a circus are trained for our entertainment and amusement. That sends the wrong message to audiences about the intrinsic value of those animals. We should appreciate wild animals behaving naturally, not in a comic or superficial setting.<sup>10</sup>

Nussbaum notes that even though domesticated animals cannot thrive in the wild, such creatures 'should surely not be treated as mere objects for humans' use and control: their flourishing and their own ends should be constantly held in view'.<sup>11</sup> It seems doubtful that this is possible in the artificial and exploitative setting of the circus.

## Conclusion

Three different related bases for objecting to the use of animals in circuses are identified above: it

8 Nussbaum (n6) 344.

9 Ibid, 345.

10 David Rutley MP, HC Hansard, 7th May 2019, cols 501-502.

11 Nussbaum (n6) 376.

6 Martha Nussbaum, *Frontiers of Justice* (Harvard University Press 2006) 344-345.a

7 *Nair v. Union of India*, Kerala High Court, no. 155/1999, June 2000.



causes unnecessary suffering, exploits animals and is incompatible with animal dignity. Together they form the basis for a powerful overlapping consensus on the need to abolish animal circuses for both wild and domesticated animals. Of course they also provide bases for opposition to other types of animal use for entertainment as well, including zoos, aquariums and horse-racing. These are surely amongst the most frivolous forms of animal exploitation at present and animal advocates should do everything in our power to hasten their demise.

# Case Study - Badgers and the Bern Convention: Challenging UK Policy via an International Convention

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## Abstract

The Convention on the Conservation of European Wildlife and Natural Habitats, otherwise known as the 'Bern Convention', is an international agreement requiring contracting parties to protect listed wildlife species to include the European badger. In 2019 I worked with Advocates for Animals, the Born Free Foundation, the Badger Trust, and Eurogroup for Animals in submitting a joint complaint to the Convention's Secretariat. We cited a number of breaches of the Convention surrounding badger culling as a significant part of bTB policy in England. It is hoped that this complaint (when it progresses later this year) will support a change in policy by applying pressure on the UK Government to effectively pursue alternative bTB policy measures. This article summarises the legislative framework in this context, and some of the grounds pursued.

## Introduction

Badger culling as part of the UK strategy to tackle bovine tuberculosis ('bTB') has sparked controversy and debate since the 70s. This is due to a misplaced view that the species is a significant host of bTB and thereby poses a threat of transmission to farmed cattle.

More recently in 2011 the UK Government announced the introduction of wide scale culling of badgers in England.<sup>1</sup> The number of cull licences has been increasing since 2013. Licences have also been expanded in scope and geographic location, particularly in 2017 where a

supplementary licence policy was introduced. Policy requires that the (estimated) badger population of each licenced cull area is reduced by at least 70% through each cull, which is not an insignificant figure.<sup>2</sup>

Many wildlife protection and animal welfare organisations oppose the policy, on the basis that badger culling is unscientific, ineffective and inhumane. They instead advocate for the implementation of humane, evidence based policies to effectively reduce bTB in cattle.<sup>3</sup>

In recent developments, the 'Godfray Review' of 2018, a report commissioned by the Government and intended to review England's current strategy for control of bTB, concluded that the threat of badgers infecting cattle with TB is "modest," and suggested policy focus on alternative approaches such as biosecurity measures on farms and improved cattle testing.<sup>4</sup>

In this connection, the Government published a response in March 2020, entitled "Next steps for the strategy for achieving bovine tuberculosis free status for England."<sup>5</sup> This report indicates a positive change in direction, in suggesting a gradual phase out of badger culling and

1 The Government's policy on Bovine TB and badger control in England 2011, available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69463/pb13691-bovinetb-policy-statement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69463/pb13691-bovinetb-policy-statement.pdf)

2 Guidance to Natural England on licensed badger control... (available at: [https://consult.defra.gov.uk/bovine-tb/supplementary-badger-disease-control/supporting\\_documents/Consultation%20Document.pdf](https://consult.defra.gov.uk/bovine-tb/supplementary-badger-disease-control/supporting_documents/Consultation%20Document.pdf))

3 Such as Born Free: <https://www.bornfree.org.uk/badger-culling> and the Badger Trust: <https://www.badgertrust.org.uk/cull> (last accessed 14.05.20)

4 Bovine TB Strategy Review October 2018, 'Godfray Review', available at: <https://www.gov.uk/government/news/review-of-governments-bovine-tb-strategy-published>

5 Available at: <https://www.gov.uk/government/publications/a-strategy-for-achieving-bovine-tuberculosis-free-status-for-england-2018-review-government-response>

proposing measures to licence a cattle vaccine against bTB within 5 years, along with proposals for stricter risk-based trading and biosecurity measures, to reduce the spread of infection.

However, this report does not rule out badger culling entirely. In fact, it provides for culling to be extended in some areas, and indeed to continue in 'High Risk' and 'Edge' areas "where needed over the next few years." The report further emphasises the idea that badger culling has been effective in controlling bTB, a claim that remains to be substantiated according to organisations such as Born Free and the Badger Trust. UK policy has therefore not substantially changed.

For these reasons the challenge grounds set out in our 2019 Bern complaint, as summarised below, still stand.

It is also briefly noted from a broader animal welfare perspective, that whilst the Government focuses on the development of a badger vaccination alongside a cattle vaccination, this would be expected to inflict further suffering on animals in laboratories in search of a vaccine. A focus on cattle biosecurity and risk-based trading measures, or rather eliminating beef and dairy farming (if such action were even possible in the current environment) for example may seek to avoid this.

## Legal Framework

Badgers are protected from persecution in the UK. The Protection of Badgers Act 1992 (the Badgers Act)<sup>6</sup> which extends to England, Scotland and Wales, prohibits the deliberate killing, injuring or capturing of a wild badger (or attempt to do so), and interfering with badger setts. Section 1 in particular makes it an offence to willfully kill a badger without licence, attaching criminal penalties (of up to 6 months or a fine).

Such actions can however be permitted by licence granted under Section 10 of the Act. Relevant to culling activities for example, licences can be granted for the purpose of preventing the spread of disease within an area specified. These licences are granted by Natural England

(the designated body)<sup>7</sup>, and they require that certain conditions are attached. A designated area for the cull must be specified (the 'control area'); permitted cull methods must be stipulated, such as cage trapping and/or specified fire-arm type; along with a list of authorised persons to carry out the cull.<sup>8</sup> Where cull licences are breached, Natural England, as the authorising body, has discretion as to whether to modify or revoke said licence. Further, where police have reasonable suspicion that culling is taking place without a licence, there may be a prosecutable offence under the Badgers Act.

Badgers are provided similar protections under the Wildlife and Countryside Act 1981<sup>9</sup> which implements the 1992 EU Habitats Directive.<sup>10</sup> The 1981 Act provides protections from certain killing methods such as the use of snares. However, penalties are higher under the Badgers Act.

Whilst badgers, as wild species, fall outside of the Animal Welfare Act 2006, they are also provided protection from acts of cruelty or deliberate harm under the Badgers Act<sup>11</sup> as well as the Wild Mammals (Protection) Act 1996.<sup>12</sup>

## Previous national challenges

A number of judicial review actions have been brought against the Secretary of State for Environment Food and Rural Affairs (and Natural England). Each challenge requested that the High

7 Natural England is authorised to grant licences by the secretary of State under s.78 of the Natural Environment and Rural Communities Act 2006, available at: <https://www.legislation.gov.uk/ukpga/2006/16/section/78>

8 Guidance to natural england:licences to kill or take badgers for the purpose of spread of bovine TB under section 10(2)(a) of the protection of badgers Act(May 2018), available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/710537/tb-licensing-guidance-ne.pdf?fbclid=IwAR2ipl7tqf\\_E-gM1MgQzAEQJbP-p2r6hzoh8JyFcNkWvj3tVXnpocyrfygGl](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/710537/tb-licensing-guidance-ne.pdf?fbclid=IwAR2ipl7tqf_E-gM1MgQzAEQJbP-p2r6hzoh8JyFcNkWvj3tVXnpocyrfygGl)

9 s11(1) and Schedule 6, available at <https://www.legislation.gov.uk/ukpga/1981/69/contents> (Extends to England, Scotland and Wales), and as amended by Schedule 6ZA, the Humane Trapping Standards Regulations 2019 available at: <http://www.legislation.gov.uk/uksi/2019/22/schedule/made>

10 Directive 92/43/EEC, available at [https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index\\_en.htm](https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm)

11 s2, available at: <https://www.legislation.gov.uk/ukpga/1992/51/contents>

12 Available at: <https://www.legislation.gov.uk/ukpga/1996/3/contents>

6 Available at: <https://www.legislation.gov.uk/ukpga/1992/51/contents>

Court review the legality of a decision surrounding the badger cull policy.

For example, in 2012 the Badger Trust challenged Government policy to issue licences to farmers and landowners without geographic limits,<sup>13</sup> and in 2014 challenged the absence of independent monitoring throughout the culling process by Natural England.<sup>14</sup>

More recently, scientist Tom Langton argued that the public consultation process leading to supplementary badger culling in 2017 was inadequate. Langton also challenged Natural England for breaching species assessment requirements under the Conservation of Habitats and Species Regulations 2010, thereby resulting in potential adverse ecological impacts of the cull on other species.<sup>15</sup>

These challenges failed. This was largely due to the reluctance of the Court to arbitrate between conflicting scientific arguments, even where the credibility of the science relied upon is called into question. There is also a high threshold to meet. There needs to be an irrational, illegal, or procedural error finding for courts to interfere with a decision on a judicial review challenge. Where judicial review is successful however, it has the potential to substantially overhaul the current Government policy.

In Wales, in *Badger Trust v Welsh Ministers*,<sup>16</sup> the Court of Appeal ruled that a cull capable of achieving no more than a trivial reduction in bTB was not lawful under Section 21 of the Animal Health Act 1981. Whilst this finding is not clearly linked to the current Welsh bTB policy not to cull badgers, it might have had some influence.

## International obligations

<sup>13</sup> R (on the application of Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 1904 (Admin)

<sup>14</sup> The Queen (on the application of Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs and Natural England [2014] EWHC 2909 (Admin) <https://www.judiciary.uk/wp-content/uploads/2014/08/badger-trust-judgment-29-8-2014.pdf>

<sup>15</sup> R (on the application of Langton) v Secretary of State for the Environment, Food and Rural Affairs and Natural England [2018] EWHC 2190 (Admin), [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2190.html&query=\(CO/4848/2017\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/2190.html&query=(CO/4848/2017))

<sup>16</sup> *Badger Trust v Welsh Ministers*, EWCA Civ 807 [2010], <http://www.bailii.org/ew/cases/EWCA/Civ/2010/807.html> (13 July 2010)

The UK has made commitments to protect wildlife and habitats under a number of international agreements. For example, the 1992 UN Convention on Biological Diversity, which broadly requires that species conservation measures are integrated into policy where possible.<sup>17</sup>

Of specific application to the UK badger, are protections provided under the Convention on the Conservation of European Wildlife and Natural Habitats,<sup>18</sup> also known as 'the Bern Convention.'

The Bern Convention aims to protect wildlife and their natural habitats, particularly endangered and vulnerable wild animal species. The agreement was adopted by the Council of Europe (the 'COE') and has 51 members, including countries outside of the European Union.<sup>19</sup>

Article 2 of the Convention requires that contracting parties:

...take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.' [emphasis added]

This suggests that economic requirements are balanced against policies to maintain the population of species. Whilst further explanation is not provided in the Convention (or any of the guidance), an article assessing Norway's wolf policy<sup>20</sup> stated the following:

The formulation of Article 2 also indicates that conservation interests will outweigh economic and recreational interests in case of conflict (although ecological re-

<sup>17</sup> Article 6, available at: <https://www.cbd.int/convention/text/>

<sup>18</sup> Available at: [https://www.naturaitalia.it/static/temp/allegati\\_natura\\_italia/biodiversita/accordi/Convenzione\\_di\\_Berna\\_EN.pdf](https://www.naturaitalia.it/static/temp/allegati_natura_italia/biodiversita/accordi/Convenzione_di_Berna_EN.pdf)

<sup>19</sup> [https://www.coe.int/en/web/conventions/recent-changes-for-treaties/-/conventions/treaty/104/signatures?p\\_auth=MODcPj4b](https://www.coe.int/en/web/conventions/recent-changes-for-treaties/-/conventions/treaty/104/signatures?p_auth=MODcPj4b) (last accessed 14.05.20)

<sup>20</sup> Arie Trouwborst, Floor M. Fleurke & John D.C. Linnell 2017. Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd". 20(2) *Journal of International Wildlife Law & Policy*. Forthcoming – accepted for publication 7 February 2017



quirements are put on a par with “cultural requirements”). This is also in line with the Convention’s aims, which are limited to the conservation of wild flora and fauna and their habitats. Generally, the “object and purpose” of the Bern Convention would thus seem to dictate interpretations in favor of wildlife conservation rather than the contracting parties’ room for balancing conservation with other interests. To put it plainly, it appears to favor wild wolves over domestic sheep. Significantly, the population standard laid down in Article 2 constitutes an absolute minimum, as the Convention does not allow for exceptions in respect of Article 2.

As a contracting party to the Bern Convention since 1982, the UK agrees to take appropriate legislative and administrative measures to ensure the protection of Appendix listed species, and to regulate any exploitation in order to keep listed populations out of danger. In other words, exploitation of Bern Appendix listed species is

only permitted if the population level permits.<sup>21</sup>

Species are provided varying degrees of protection by way of Appendix. The European badger (scientific name: *Meles meles*) is currently listed under Appendix III of the Convention. This provides the species with various protections under Article 7. In authorising badger culling, Article 7 requires that the UK Government has regard to badger population numbers, as well as other impacted local species that are also Appendix listed species; and that supervising measures are in place (among other considerations).<sup>22</sup>

The Bern Convention contains clear provision for organisations (and individuals) to bring complaints against a contracting party concerning

<sup>21</sup> Paragraph 80, Explanatory Report (to the Bern Convention) (available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca431>)

<sup>22</sup> Paragraph 35, Explanatory Report (to the Bern Convention) (available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca431>)

possible breaches of the Convention.<sup>23</sup> Complaints are addressed by the Convention's Secretariat, Standing Committee, and Bureau (where there is merit based on the submitted evidence), and provide opportunity for reply by the relevant contradicting party against whom the complaint relates.

A number of complaints have been made in relation to the UK's changing badger culling policy over the years, particularly in 2013 and 2014 relating to England, all of which have been rejected (at the time of writing).

In an attempt to reduce the number of complaints being rejected, the Secretariat produced guidance on interpretation, most recently in 2014.<sup>24</sup> This guidance sets out criteria that complainants must meet in order to be admitted for review.

## 2019 Bern Convention challenge

In July 2019 the Born Free Foundation, the Badger Trust, and Eurogroup for Animals, submitted a complaint to the Secretariat of the Bern Convention, citing a number of breaches of the Convention by the UK Government (specifically England). At the time of writing we await the Government's reply.

The complaint challenged the UK for failing to take appropriate legislative and administrative measures to ensure the protection of badgers (as Appendix listed species) and to regulate any exploitation of badgers in order to keep listed populations out of danger. We challenged the UK Government on a number of specific Grounds, based on duties under the Convention (and as supported by the 2014 guidance referenced above in particular).

The complaint focused on breaches of Articles 7 (and 8) of the Convention (as relevant to Appendix III species), and we argued that the UK's pol-

icy does not benefit from any exemptions under Article 9, as set out below. It also addressed the conclusions of the 2018 'Godfray Review' (addressed above).

We will briefly consider some of the complaint grounds.

## Ground: The Population of badgers is jeopardised by the culling policy

We argued that the measures undertaken by the Government for the exploitation of badgers jeopardises the population concerned, being a breach of Article 7 of the Bern Convention.<sup>25</sup> At the time of the complaint, over 67,000 badgers had been culled under licence since 2013, with an estimate of at least 40,600 additional badgers set to be killed each subsequent year.<sup>26</sup>

Alongside culling, badgers face additional, and continuous, threats across the UK. These include persecution (such as badger baiting), property development, road deaths and climate change. For example, badger road deaths total approximately 50,000 per year in the UK<sup>27</sup>, and illegal persecution totals approximately 10,000 deaths per year.<sup>28</sup> This creates a culmination of population pressures and illustrates that culling impacts cannot be viewed in isolation. Further, badger presence alone is not enough to keep the population out of jeopardy, and maintenance of their complex social groups is understood to be key to continued breeding. The untargeted 70% reduction policy fails to take these social groupings into account.

<sup>25</sup> In accordance with: p3-4, 2014 Guidance (available at: <https://rm.coe.int/1680746b6b>)

<sup>26</sup> As stipulated by the Government commissioned 2018 Bovine TB Strategy Review ('The Godfray Review'), on the basis that the current policy continues with (a minimum of) 10 new cull licences per year over the next 4 years (in accordance with current policy), p65, paragraph 6.31, available at: <https://www.gov.uk/government/news/review-of-governments-bovine-tb-strategy-published>

<sup>27</sup> Road Deaths Survey 2000-2001, The Mammal Society (available at: <https://www.mammal.org.uk/science-research/surveys/>); Note: the badger is reported to be the most common wild mammal killed on UK roads in 2019: <https://www.bbc.co.uk/news/science-environment-48886673> (last accessed 14.05.20)

<sup>28</sup> Point 9, Wildlife Crime report submitted to the UK Parliament by the International Fund for Animal Welfare, 2004: <https://publications.parliament.uk/pa/cm200304/cmselect/cmenvaud/605/605weo7.htm>

<sup>23</sup> Also known as the case file system: <https://www.coe.int/en/web/bern-convention/monitoring> (last accessed 14.05.20)

<sup>24</sup> Guidance for Complainants; Admissibility of Complaints Related to Species Listed in Appendix III: the Badger (*Meles meles*) as a Model (2014), available at: <https://rm.coe.int/1680746b6b> and the Revised Standing Committee Resolution on the scope of Articles 8 and 9 of the Bern Convention (2011), available at: <https://rm.coe.int/16807461dd>

These concerns are in accordance with the Council of Europe's 2012 statement that "the (even if remote) possibility of local disappearance could definitely be in contrast with the philosophy of a convention which aims to conserve wild fauna."<sup>29</sup>

Yet, at the time of the complaint, the issuance of cull licences were expected to continue through 2019 and beyond, in accordance with current policy.<sup>30,31</sup>

As anticipated the Government has since confirmed that over 35,000 badgers were killed under culling licences in 2019, bringing the total number of badgers killed since 2013 to 102,349,<sup>32</sup> and licences continue to be granted through 2020.

### Ground: Failure to Monitor

In order to 'exploit' a protected species such as the badger, this must be monitored in accordance with Article 7 of the Convention.<sup>33</sup> We argued that the Government failed to put in place appropriate administrative and regulatory measures to ensure that the badger population is not in danger.

Only a very small proportion of badger culling activities have been monitored according to Government records. For example, the published cull numbers for 2018 showed that of the 20,637 badgers killed by 'controlled shooting,' only 89 incidents were monitored for compliance by Natural England (the responsible body),<sup>34</sup> totaling less than 0.5%. As well as evi-

dence of culling activity monitoring failings, the evaluation of culls as a monitoring tool has also been evidenced as inadequate. For example, post-mortem testing on badgers has not been a key part of the culling policy.

### Ground: Impact on other protected species

We also argued that the Government failed to address the impacts of badger culling on other protected species in forming its policy; a further breach of Article 7 of the Convention.<sup>35</sup> This is despite increasing evidence that a range of species and habitats listed in both Appendix I and II of the Bern Convention may be directly or indirectly impacted by badger culling. For example, badger culling is found to increase fox numbers, which in turn threaten ground nesting birds and hares.<sup>36</sup>

On the basis that the Government has breached Articles 7 (and 8), it must invoke an exception under Article 9. Where parties deviate from Article 7, they must be able to rely on certain circumstances, as set out in Article 9 of the Convention. This includes a permitted exception in order to "prevent serious damage to livestock", albeit only when there is no other satisfactory solution and where the action will not be detrimental to the survival of the population.

We argued that the Government failed to meet these exceptions.

### Ground: Failure to Satisfy Article 9 (General Condition): No Other Satisfactory Alternative

Further, in deciding to pursue badger culling as a measure to tackle bTB, the UK Government failed to choose, among possible alternatives, the most appropriate action, which would have the least adverse effects on the species while

<sup>29</sup> Meeting of the Bureau, 23 April 2012 (available at: <https://rm.coe.int/09000016807468c8>)

<sup>30</sup> See licenses authorised during 2019: <https://www.gov.uk/government/publications/bovine-tb-authorisation-for-supplementary-badger-control-in-2019> and the 32 licences granted through 2018: <https://www.gov.uk/government/publications/bovine-tb-authorisation-for-badger-control-in-2018> (last accessed 14.05.20)

<sup>31</sup> For policy details see 2018 Guidance to Natural England: <https://www.gov.uk/government/publications/guidance-to-natural-england-preventing-spread-of-bovine-tb>

<sup>32</sup> <https://www.brockbase.com/post/badger-trust-condemns-the-largest-destruction-of-a-protected-species-in-living-memory> (last accessed 14.05.20)

<sup>33</sup> In accordance with: p3-4, 2014 Guidance (available at: <https://rm.coe.int/1680746b6b>)

<sup>34</sup> p3, Summary of badger control operations during 2018, December 2018 (available at: <https://assets.publishing.service>

[gov.uk/government/uploads/system/uploads/attachment\\_data/file/765439/badger-control-monitoring-2018.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/765439/badger-control-monitoring-2018.pdf))

<sup>35</sup> In accordance with: paragraph 35, Explanatory Report (to the Bern Convention) (available at: <https://rm.coe.int/CoER-MPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca431>)

<sup>36</sup> For example, see: Trewby et al, 2008, available at: <https://royalsocietypublishing.org/doi/10.1098/rsbl.2007.0516> (last accessed 14.05.20)

solving the problem, thereby breaching Article 9 of the Convention.<sup>37</sup>

This argument summarised scientific discussion questioning the efficiency of badger culling on bTB, and addressed the more viable and satisfactory alternatives to include measures focused on reducing cattle-to-cattle transmission. Of key concern was a survey which revealed that only 30% of farms in 'High Risk Areas' had taken any basic biosecurity steps to prevent bTB;<sup>38</sup> a reflection of Government failings to engage and support farmers with satisfactory action.

As well as choosing the most appropriate alternative in tackling bTB, the Government must be found to be objective and reasonable in reaching its policy decision, in accordance with the Bern Convention.<sup>39</sup> We took steps to challenge this, including addressing the lack of credible statistical analysis purporting to support the badger culling policy, and failure to provide a scientific basis for the supplementary culling other than the false position of keeping badger numbers down to a perceived level of control.

## Reporting requirements under Article 9 of the Convention

Further, whilst reports must be submitted by the contracting parties of Bern every two years in connection with exceptions made under Articles 7 of the Convention, a freedom of information request revealed that this requirement had not clearly been met. Whilst the UK may have met its reporting obligations under this Convention through the separate reporting duty under the Habitats and Birds Directive Derogation System,<sup>40</sup> we put it to the Government to explain this in our complaint.<sup>41</sup>

<sup>37</sup> In accordance with: p3, point 7, Revised 2011 Resolution (available at: <https://rm.coe.int/16807461dd>)

<sup>38</sup> <https://www.fginsight.com/news/news/failure-to-improve-biosecurity-as-british-farmers-ignore-bovine-tb-advice-88895> and <https://www.fwi.co.uk/livestock/health-welfare/livestock-diseases/bovine-tb/5-ways-to-improve-tb-control-in-the-uk> (last accessed 14.05.20)

<sup>39</sup> In accordance with: p3, point 7, Revised 2011 Resolution (available at: <https://rm.coe.int/16807461dd>)

<sup>40</sup> [https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index\\_en.htm](https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm)

<sup>41</sup> See para 3, Revised 2011 Resolution (available at: <https://rm.coe.int/16807461dd>)

The above is a brief summary of some of the grounds pursued in this complaint, which took into account the perspective of farmers as well as scientists and animal welfare NGOs, addressing the Government's failing to effectively tackle bTB in its policy.

## Next steps

Our complaint was due to be considered at the last Bureau meeting in Strasbourg in April 2020. However, this has since been deferred to September on the basis that although the UK authorities have acknowledged the complaint, they have asked for a longer deadline in order to 'respond in a comprehensive manner.' As the complainant we are also permitted to submit additional evidence prior to this meeting.

In connected developments, despite calls by the Badger Trust and others to halt the badger cull in 2020 due to concerns surrounding Covid-19, including concern of an expected reduction in the monitoring of the culls, these culls are reportedly going ahead at the time of writing.

It is difficult to predict the outcome of the Complaint. As the agreement was formulated by the Council of Europe, the UK's duties arising under it will remain as they are (while a signatory) following our formal exit from the EU, removing this time pressure. We are hopeful of a positive outcome particularly on the basis of anticipated support from MEPs and their relevant Environment Ministries.



# Cases and Materials

Sharan Chohan & Imogen Mellor

## Case No 00230/2020 REg.PROV.CAU. No. 10215/2019 REG.RIC.

Lega Anti Vivisezione Ente Morale Onlus ("LAV"), (Appellant) represented and defended by lawyer Monica Squintu v Ministry of Health, the University of Studies of Parma, & the University of Studies of Turin, represented and defended by the Attorney General of the State

On 23<sup>rd</sup> January 2020, the Consiglio di Stato (Italian Supreme Court for administrative law) upheld an appeal by LAV to suspend experimentation on six macaque monkeys, overturning a decree by the Regional Administrative Court of Lazio (Section Three) (No. 07130/2019).

The planned primate experiments are funded by the European Research Council to develop treatments for human patients with vision loss due to brain damage (e.g. following a stroke). (Anatomical-physiological mechanisms underlying the recovery of visual awareness in the monkey with cortical blindness" issued by the Ministry of Health, no. 803/2018-PR on 15.10.2018). The experiment involves making lesions in the visual cortex of the macaques' brains to generate blindness, and the electrical signals around the lesion studied. The macaques would subsequently be euthanised.

The experiment was approved by the ethics committees of the ERC, the University of Parma and the Ministry of Health. LAV's request for documentation relating to the approvals (to assess the experiment's compliance with European and Italian regulations) was initially rejected in part. Following a resubmission by LAV, the documents were released.

It is notable that an online petition opposing the experiment, organised by LAV, received more than 425,000 signatures.

According to the judgment, (and following a

laboratory inspection prior to the hearing), the interests of the animals "at the time of comparison" were not outweighed by the scientific need, since the competent authorities failed to prove that an experiment of this nature is unavoidable. The court ordered that the Ministry of Health must urgently provide evidence of the impossibility of an alternative to invasive animal testing, as well as a detailed report on the provision of sufficient food and liquids to the animals (to be provided in such a way that does not "enslave the will of sensitive animals such as primates".)

Following this report, a hearing on the merits (including an assessment of the documentation), is set by the Lazio Regional Court for 21 April 2020.

The court also ordered the Ministry and the Universities to pay LAV 3000 Euros in legal fees.

## Denmark: recognising all animals as sentient beings

The Danish Parliament will be adopting a proposal for a new, simplified animal welfare law which will merge 11 existing animal welfare laws into one and cut the number of current regulations by half. This new legislation is being demanded by three major Danish political parties and will include a provision to state that all animals must be protected from pain, suffering, anxiety, permanent injury and significant disadvantage and that they should be respected as living and sentient beings with behavioural needs.

The Parliamentary committee commented that by including the word 'sentience' within the new legislation, the law is recognising that all animals are capable of sensing and interacting with their surroundings such as responding to sensory impressions such as light, sound, pressure, temperature and chemicals. The committee agreed that the addition of the word 'sentience' is required as it has a broader meaning and extends further than the word 'living', as 'living' refers to

animals being able to feel and sense pain and suffering.

Anders Kronborg, from the political party 'Social Democrats', has stated: "When we write that animals are sentient beings, we send a stronger signal that animals should be treated properly". He goes on to say "I must also acknowledge that the arguments are strong and I also think it sends a good signal that we are in 2020. Animals are sentient beings that can feel and we must treat them properly".

Søren Egge Rasmus, an animal welfare spokesman, also commented "they [animals] are sentient beings, saying anything else is completely grotesque discussion".

The UK Government is currently working on ways in which to enshrine animal sentience in law and it will be interesting to see how Denmark achieves this when the new Animal Welfare Act comes into effect after 1<sup>st</sup> January 2021 and if the UK will adopt similar changes to its current legislation.

**Sharan Chohan**

## **Christopher Connolly v Bord na gCon and Irish Coursing Club**

### Facts

The case concerned a dog handler, Connolly (C), from Ireland, who had used a live piglet as bait to train greyhounds whilst he was living in Australia in 2014. As a result, on 12 June 2015, the Greyhound Racing Appeals and Discipline Board ('the Disciplinary Board') had found him guilty of breaches of the Greyhound Racing Victoria ('GRV') Local Racing Rule 18.5 and Greyhounds Australasia Rule 86(af) and consequently, C was subject to a lifetime ban from racetracks and coursing events. However, on appeal to the Victorian Civil and Administrative Tribunal ('VCAT') the ban was reduced to ten years. Five of those years were suspended on condition that C remained of good behaviour. It was recorded that C had pleaded guilty to the offences.

The GRV applied to the Board in Ireland (Bord na gCon) seeking approval to conduct an investigation into the implications of the outcome of

the VCAT proceedings on the Irish Greyhound Industry. It sought approval for three named individuals to conduct the investigation.

Meanwhile, C had returned to Ireland in 2015. In 2016, he applied to the Bord na gCon ("the Board") in the form of a licence to work as a kennel hand. He was refused and he appealed to the Board control committee which also held that he was "not a fit and proper person to be certified". C appealed the decision and an 'independent' control committee upheld the Board's decision.

The Board carried out an investigation pursuant to s. 43 of the Greyhound Industry Act 1958 in order to decide whether to issue an exclusion order (pursuant to s. 47 of the Greyhound Industry Act 1958). The Board wrote to C as part of the investigative process, requesting him to submit his observations on the published outcome of events in Australia for consideration of the Board, but he did not respond to his correspondence. On 27 July 2017, the Board wrote to the ICC seeking consent to issue an exclusion order. On 10 May 2018, the ICC wrote to the Board consenting to the exclusion order. Whilst recognising that an exclusion order in Ireland was open ended, the ICC observed that the C's sanction in the state of Victoria would expire on 12 February 2020. As the exclusion order related directly to the incident which was the subject of the Victorian sanction, the ICC took the view that, subject to the appellant's compliance with the conditions attached to the order, favourable consideration should be given to rescinding it at the time of the expiry of the sanction, if C so requested. On 19 December 2018, the High Court rejected C's application to set aside the decision of the Board and the ICC.

### Court of Appeal decision

C appealed to the Court of Appeal. First, he argued that the investigation conducted by the Board was insufficient such as to satisfy the requirements of s. 43 before it decided to make an exclusion order under 47. Secondly, he argued that the procedure adopted by the Board did not meet the requirements of natural and constitutional justice.

The Court of Appeal confirmed the case of Mc-

Donald v Bord na gCon, in which it was held that s. 47 cannot be read in isolation or divorced from s. 43. The statute conferred onto the Board a wide latitude in determining how an investigation was to be conducted and how the results of such an investigation were published. In carrying out its investigation, the Board had to comply with the principles of natural justice. [49] – [50]

The Board's investigation pursuant to s. 43 of the Act preceded the Board's proposal to exclude C. The fact that the form which the investigation actually took did not follow, precisely, the format originally anticipated (in the form of the three party independent review) when approval was sought in July 2016 could not be said, in and of itself, to have undermined or diminished the validity of the investigation that ensued. The Board took detailed steps to investigate the matter in line with the wide latitude conferred upon it. There were no adverse consequences for C as a result of the departure from the originally anticipated format for the s. 43 investigation. [53], [58]. Despite the C's arguments that the investigation which occurred concerned the implications of the outcome of the VCAT ruling for the Irish greyhound industry and that did not constitute as an 'occurrence' pursuant to s. 43, the Court of Appeal held that it was an event which happened and therefore, was an occurrence. The background and implications of such an event were matters of interest to the Board in view of its statutory remit. [59]

C's argument that there had been a 'mixing of processes' between the s. 43 investigation and the kennel hand authorisation process was rejected. The approval for the s. 43 investigation had been sought in July 2016 upon receipt of the VCAT papers, which demonstrated that the s. 43 investigation was envisaged before the Board had received C's application for a kennel handling licence. The fact that each distinct process intersected and involved consideration of the same materials and evidence did not undermine the validity of either inquiry. Since the subject matter of both inquiries concerned the conduct and character of the appellant, it was inevitable that materials flowing from the live baiting incident would be relevant to both. Even still, the matters were considered distinctly and were not mixed together. [60] – [63]

C also argued that a report or an instrument which authenticated the outcome of the s. 43 investigation was necessary, but the Board failed to do so. Thus he argued that the Board engaged in a s. 47 procedure without completing the process under s. 43 and there was 'no outcome' to the investigation, no authentication of a decision and no reportage of the result. C claimed that this amounted to a breach of his right to natural and constitutional justice. The Court of Appeal rejected this, stating that though there was no report, a result had been reached from the investigation. The relevant law requires only that the proposal to exclude is grounded on a 'result' as opposed a report, which had been the case in these circumstances. [64] – [69]

The Court of Appeal rejected the further argument that C was deprived of fair procedures as the 'result' of the investigation was not communicated with him. One factor of relevance in reaching this conclusion included the fact that C had admitted his guilt to the criminal offence of live animal baiting, which meant that it would have been an artificial exercise for the Court to insist that C ought to have been apprised, separately, of the investigation's findings in circumstances where that finding, and his own admission of guilt were so closely connected. Another factor of importance was the Board providing C with the opportunity to make submissions on more than one occasion, and notably, when the Board proposed making an exclusion order, C was informed of his right to make submissions thereon, in compliance with s. 47(2). [70] – [79]

It was concluded that C knew the case which he had to meet in the context of the s. 43 investigation and on no occasion throughout the process did he indicate that he disputed or contested any of the findings of the VCAT at which he was represented and to which he made submissions and guilty pleas. In light of these facts, the Court was satisfied that C had had every opportunity to present his case to the Board and that he had not been deprived of his constitutionally protected right to fair procedures in the context of the s. 43 investigation. [80] – [81].

**Imogen Mellor**

# Coronavirus and animal cruelty in China: Major developments

Imogen Mellor LLB LLM, Future Pupil Barrister at One Pump Court

On 8 April 2020, the Agriculture Ministry of the Chinese government released a draft policy that forbids the consumption of cat and dog meat. The document was open to public consultation until 8 May.<sup>1</sup> Hopefully, it marks a major shift in acknowledging the fact that many Chinese people see these animals as companions and want them to be recognised and treated as such.

Ahead of the nation-wide ban, Shenzhen was the first city in mainland China to prohibit the trading and consumption of cats and dogs, with the legislation due to come into effect from 1 May 2020 (Shenzhen Special Economic Region Regulation on a Comprehensive Ban on the Consumption of Wild Animals).<sup>2</sup> The move follows the widespread temporary ban throughout China on the trading and consumption of meat from wild animals in the wake of the coronavirus pandemic. It is thought that the coronavirus outbreak could have originated from wildlife meat and live wild animals sold at market in Wuhan, which enabled pathogens, including the virus, to spread from animals to humans.

Even though the consumption of dog and cat meat is not universal throughout China, and is increasingly opposed within the country, there are still startling numbers of dogs and cats slaughtered under the practise. The exact number killed for meat is unclear, however, the animal protection charity, Animals Asia, estimated that around ten million dogs and four million cats are

slaughtered for meat in China alone. They state that:

“Dogs and cats of all shapes and sizes, many of them family pets still wearing their collars, are snatched from the streets and forced into tiny cages. Many suffer broken limbs as they are transported vast distances, without food or water.

When they finally arrive at the dog meat markets, injured, dehydrated and exhausted, they are forced to watch in terror as other dogs are bludgeoned to death or thrown still alive into boiling water to remove their skins.”<sup>3</sup>

The decision to ban dog and cat meat has not been justified by the Shenzhen government as a response to the coronavirus, rather a spokesperson for the Shenzhen government stated, that “dogs and cats as pets have established a much closer relationship with humans than all other animals, and banning the consumption of dogs and cats and other pets is a common practise in developed countries and in Hong Kong and Taiwan. This ban also responds to the demand and spirit of human civilization.”<sup>4</sup>

The decision by Shenzhen to actively introduce the ban was welcomed by animal rights groups. It was hoped that Shenzhen, as a large city in China, would inspire a “domino effect” with oth-

1 Notice of the Ministry of Agriculture and Rural Affairs on the Public Consultation of the “National Catalog of Animal Genetic Resources” <[http://www.moa.gov.cn/hd/zqyj/202004/t20200408\\_6341067.htm](http://www.moa.gov.cn/hd/zqyj/202004/t20200408_6341067.htm)>

2 Shenzhen News Net, ‘Regulations of Shenzhen Special Economic Zone on the Prohibition of Wild Animal Eating (Full Text)’ <[http://www.sznews.com/news/content/2020-04/01/content\\_23021431.htm](http://www.sznews.com/news/content/2020-04/01/content_23021431.htm)>

3 Animals Asia, ‘Facts About the Asian Dog Meat Trade & Dog Meat Festivals’

< <https://www.animalsasia.org/uk/our-work/cat-and-dog-welfare/facts-about-dog-meat-trade.html> >

4 Shenzhen News Net, ‘The official interpretation is here! Shenzhen completely prohibits the consumption of wild animals, you must know these issues’ <<https://mp.weixin.qq.com/s/JprO8aPKsZJZ-HgQwJpd5g>>



er provinces and cities enacting their own legislation to forbid the consumption of dog and cat meat. Dr Peter Li, China policy specialist for HSI praised Shenzhen's decision, saying "With Shenzhen taking the historic decision to become mainland China's first city to ban dog and cat meat consumption, this really could be a watershed moment in efforts to end this brutal trade that kills an estimated 10 million dogs and 4 million cats in China every year."<sup>5</sup> Indeed, the Shenzhen ban seems to have had the hoped-for impact, as the justification given by the Chinese government for its draft policy echoes Shenzhen's. China's Ministry of Agriculture and Rural affairs stated: "With the progress of human civilisation and the public's concern and preference for animal protection, dogs have changed from traditional domestic animals to companion animals. Dogs are generally not regarded as livestock and poultry around the world, and China

<sup>5</sup> Humane Society International, 'BREAKING: Shenzhen becomes mainland China's first city to ban eating of dogs, cats and wildlife in consumption and trade crackdown' (1 April 2020) <<https://www.hsi.org/news-media/shenzhen-chinas-first-to-ban-eating-of-dogs-cats-wildlife/>>

should also not manage them as livestock and poultry".<sup>6</sup> Moreover, the city of Zhuhai followed Shenzhen's example, and have also banned the consumption of dog and cat meat.<sup>7</sup>

However, despite the draft legislation, as of yet, the nationwide ban on cat and dog meat has not come to fruition. It might be that cities will have to enact their own legislation banning canine meat, as has been done in Shenzhen and Zhuhai.

### Other cruel practises

The introduction of the Shenzhen and Zhuhai bans are both triumphs for the protection of cats and dogs from an incredibly brutal practice. However, there are other acts of cruelty which

<sup>6</sup> Human Society International, 'China's Ministry of Agriculture states that dogs are pets and not livestock, in what campaigners hope could inspire cities to end brutal dog meat trade' (9 April 2020) <<https://www.hsi.org/news-media/china-ag-ministry-states-dogs-are-pets-not-livestock/>>

<sup>7</sup> China News, 'Zhuhai will implement the "most stringent" fasting wildlife regulations' (14 April 2020) <<http://www.chinanews.com/sh/2020/04-14/9156890.shtml>>

are yet to be banned.

One example is the use of wild animals for medicinal purposes. Recently, the Chinese government recommended the use of bear bile for treating the coronavirus.<sup>8</sup> This involves being injected with the solution, which is extracted from the animal by inserting a catheter, syringe or pipe into their gallbladder. According to Animals Asia, the methods “cause severe suffering, pain and infection”.<sup>9</sup>

Bear bile has been used in traditional Chinese medicines as early as the 18<sup>th</sup> Century. The ‘remedy’ has also been used to treat respiratory infections. Despite this, there is no evidence that bear bile successfully treats coronavirus. In any case, ursodeoxycholic acid, the key ingredient in bear bile, has been available as a synthetic drug worldwide for decades. Therefore, there is no need for the cruel extraction.

It is feared that China's approval of the practise to treat coronavirus will only cause it to increase, resulting in more animal abuse. Speaking to the National Geographic, Aron White, a wildlife campaigner for the Environmental Investigation Agency (EIA) said, “There's a consistent preference among consumers for the wild product, which is often regarded as more powerful or ‘the real deal’”. So, having this legal market from captivity doesn't reduce pressure on the wild populations—it actually just maintains demand that drives poaching.”<sup>10</sup>

Finally, the updated agriculture ministry list for the Chinese draft legislation included the addition of some wildlife species which would be allowed to be farmed if the policy were not altered before 8 May 2020. Therefore, this paves the way for circumventing the temporary ban on wildlife consumption and trading by, as Peter Li told The Guardian, “rebranding wildlife as ‘spe-

cial livestock’”. Such rebranding “doesn't alter the fact that there are insurmountable challenges to keeping these species in farm environments, their welfare needs simply can't be met.”<sup>11</sup>

## A break-down of the Shenzhen ban

In terms of the Shenzhen legislation, the key provisions are as follows.

Article 2 bans the consumption of state-protected wild animals that are taken from the wild, bred in captivity and farmed.

Article 3 states that the consumption of “pet” animals, are banned. The provision lists species which are not banned, including pig, cattle, chicken, and other livestock and aquatic animals.

Article 8 bans the consumption of animals farmed for medicinal purposes. Animal rights groups have been concerned by the use of animals for medicinal purposes in China, as noted above.

Article 17 sets out the fines imposed for breaching the ban. These include a monetary fine of between 150,000 yuan and 200,000 for a value of illegal activity that is under 10,000 yuan for the sale or production of state-protected wild species and for other wild animals whose value is less than 10,000 yuan, there will be fines between 100,000 yuan and 150,000 yuan.

8 Xinhuanet, “New Coronavirus Pneumonia Diagnosis and Treatment Program (Trial Version 7)” Released with Interpretation’ (4 March 2020) <[http://www.xinhuanet.com/health/2020-03/04/c\\_1125661175.htm](http://www.xinhuanet.com/health/2020-03/04/c_1125661175.htm)>

9 Animals Asia, ‘Facts about bear bile farming’ <<https://www.animalsasia.org/intl/end-bear-bile-farming-2017.html>>

10 Rachel Fobar, National Geographic, ‘China promotes bear bile as coronavirus treatment, alarming wildlife advocates’ (25 March 2020) <<https://www.nationalgeographic.com/animals/2020/03/chinese-government-promotes-bear-bile-as-coronavirus-covid19-treatment/>>

11 Michael Standaert, The Guardian, ‘China signals end to dog meat consumption by humans’ (9 April 2020) <<https://www.theguardian.com/environment/2020/apr/09/china-signals-end-to-dog-meat-consumption-by-humans>>

# Animal welfare measures in Scotland: Penalties, protections, powers and a Commission

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## Introduction

Proposals to increase maximum penalties for cruelty to animals in England were stymied last year by the prorogation and subsequent dissolution of Parliament.<sup>1</sup> A government-supported private member's bill<sup>2</sup> has now revived these proposals and is scheduled for second reading in October. Domestic legislation to recognise the sentience of animals due to the loss of the explicit reference to sentience in article 13 of the Treaty on the Functioning of the European Union<sup>3</sup> has been postponed until after the transition period and 'when Parliamentary time allows'.<sup>4</sup> Meanwhile, the Scottish Government and the Scottish Parliament are progressing a swathe of new animal welfare measures. These include new primary and secondary legislation and the creation of a Scottish Animal Welfare Commission.

## New Animals and Wildlife Bill

The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill (the bill) was introduced to the Scottish Parliament on 30 September 2019 and completed its parliamentary progress on 17 June 2020.<sup>5</sup> The original bill amended the Animal Health and Welfare (Scotland) Act 2006 (the 2006 Act) and six wildlife-related acts and regulations,<sup>6</sup> increasing penalties for offences involving cruelty to animals and breaches of conservation regulations.<sup>7</sup> It introduced fixed penalty notices (FPN) for certain animal welfare and animal health offences,<sup>8</sup> with provision for FPN for wildlife offences added at Stage 2.<sup>9, 10</sup> The bill also removed obstacles to the conviction of offenders who harm service animals<sup>11</sup> and created essential measures for the care and disposal of seized animals without the need for a court order.<sup>12</sup>

Initially, the scope of the bill was limited. As the Minister for Rural Affairs and Environment Mairi Gougeon MSP informed the Environment, Climate Change and Land Reform (ECCLR) Com-

1 See 'Animal Welfare (Sentencing) Bill 2019-2020: Progress of the Bill ([www.parliament.uk](http://www.parliament.uk)) <<https://services.parliament.uk/bills/2019-20/animalwelfaresentencing.html>> accessed 7 July 2020.

2 Department for Environment, Food & Rural Affairs and The Right Honourable Theresa Villiers MP, 'Press release: Government announces support for Animal Welfare (Sentencing) Bill in Parliament' (UK Government, 2020) <<https://www.gov.uk/government/news/government-announces-support-for-animal-welfare-sentencing-bill-in-parliament>> accessed 7 July 2020.

3 Wildlife and Countryside Link and the UK Centre for Animal Law (A-Law), 'Brexit: Getting the best deal for animals' (ALAW, January 2018) <<https://www.alaw.org.uk/wp-content/uploads/Brexit-Getting-the-Best-Deal-for-Animals-Full-Report.pdf>> accessed 8 November 2019, 10.

4 Response by Victoria Prentis MP to Written Question 33445, 21 April 2020 <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-03-23/33445/>>

5 SP Bill 56 Animals and Wildlife (Penalties, Protections and Powers) (Scotland) SP Bill [as introduced] Session 5 (2019).

6 Animal Health and Welfare (Scotland) Act 2006 (asp 11); Wildlife and Countryside Act 1981; Protection of Badgers Act 1992; Conservation (Natural Habitats, etc) Regulations SI 2716/1994; Deer (Scotland) Act 1996; Wild Mammals (Protection) Act 1996; Protection of Wild Mammals (Scotland) Act 2002 (asp 6).

7 SP Bill as introduced (n 5), ss 1-2 and 4-10.

8 Ibid, ss 2 and 4.

9 Stage 2 of the Scottish Parliament's legislative procedure is broadly equivalent to committee stage at Westminster.

10 SP Bill 56 Animals and Wildlife (Penalties, Protections and Powers) (Scotland) SP Bill [as amended at Stage 2] Session 5 (2020) s 10A.

11 Ibid, s 3.

12 Ibid, ss 11-13.

mittee in October: '[t]he Bill will not create any new offences or responsibilities, or do things that can be more suitably taken forward by secondary legislation or by other means, such as guidance or industry initiatives.'<sup>13</sup> The primary aims of the Scottish Government were to address the most sadistic acts of animal cruelty as well as the ever-growing puppy trade and its connection with organised crime.<sup>14</sup>

However, as will be seen, major and unforeseen amendments were made during the final stages, greatly increasing the protection of wild animals in Scotland. Amendments also introduced greater consistency in the use of disqualification orders and the prospect of improved information-sharing between enforcement agencies. MSPs showed considerable interest in the possibility of alternative disposals, such as an adaptation of restorative justice programmes to help offenders develop greater empathy for animals.<sup>15</sup> As a consequence, the Scottish Government has now committed to carrying out research into such programmes.<sup>16</sup>

## Amendments to the Animal Health and Welfare (Scotland) Act 2006

The 2006 Act is the main legislation protecting

13 Letter from Mairi Gougeon MSP to Gillian Martin MSP (2 October 2019) <[https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_AWB\\_2019.10.02\\_IN\\_Min\\_M\\_Gougeon\\_Further\\_info\\_on\\_Bill.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_AWB_2019.10.02_IN_Min_M_Gougeon_Further_info_on_Bill.pdf)> accessed 8 November 2019.

14 See remarks by Andrew Voas in Scottish Parliament, 'Official Report (Draft): Environment, Climate Change and Land Reform Committee 29 October 2019' (Tuesday 29 October 2019, session 5) 1-2 <<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328&mode=pdf>> accessed 8 November 2019.

15 Scottish Parliament, 'Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill: 1<sup>st</sup> Marshalled List of Amendments for Stage 2' (2020) 14-15 (amendments 1 and 98) <<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/animals-and-wildlife-penalties-protections-and-powers-bill/stage-2/marshalled-list-of-amendments-at-stage-2.pdf>> accessed 10 July 2020; Scottish Parliament, 'Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill: Marshalled List of Amendments for Stage 3' (2020) 9 (amendment 58) <<https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/animals-and-wildlife-penalties-protections-and-powers-bill/stage-3/marshalled-list-of-amendments-at-stage-3-animals-and-wildlife-penalties-protections-and-powers.pdf>>.

16 See, for example, Eve Massie, 'Scottish Government announces plans to explore the value of empathy training for offenders against animals' (OneKind, 2020) <<https://www.onekind.scot/scottish-government-announces-plans-to-explore-the-value-of-empathy-training-for-offenders-against-animals/>> accessed 10 July 2020.

animals under human control in Scotland. In the 10 years prior to the introduction of the bill, there were 773 convictions under the act for animal cruelty or animal fighting offences.<sup>17</sup> These resulted in 41 custodial and 147 community sentences.<sup>18</sup> The remaining convictions resulted in fines.<sup>19</sup> It has been noted by the Scottish Government that all but the most serious animal welfare offences are a low priority when scheduling court cases.<sup>20</sup> Public and media criticism has also tended to question whether the length of sentence in serious cases matches the severity of the crime.<sup>21</sup> The community payback order often used by the courts for animal cases has been described by Scottish opposition parties as 'soft touch justice', although this may be a misunderstanding regarding the status of such disposals.<sup>22</sup>

Campaigners across the UK have called repeatedly in recent years for custodial sentences to be increased.<sup>23</sup> The Scottish Government consultation on its proposals in early 2019 cited a particularly horrific case where the burning to death of a dog resulted in a nine-month pris-

17 For discussion, see Scottish Parliament, 'Official Report (Draft): Environment, Climate Change and Land Reform Committee 29 October 2019' (Tuesday 29 October 2019, session 5) <<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328&mode=pdf>> accessed 8 November 2019, 1.

18 Ibid (Official Report).

19 Ibid (Official Report).

20 Scottish Government, 'Animal Health and Welfare (Scotland) Act 2006: consultation on proposed amendments' (1 February 2019) <<https://www.gov.scot/publications/consultation-amend-animal-health-welfare-scotland-act-2006/pages/4/>> accessed 8 November 2019

21 See, for example, Robert James, 'Scotland too soft on animal abuse, claim Battersea Dog Home campaigners' (Sunday Express, 27 August 2017) <<https://www.express.co.uk/news/uk/846548/animal-abuse-Scotland-Battersea-Dog-Home-campaigners-too-soft>> accessed 8 November 2019.

22 "More needs to be done" to explain sentencing' (BBC, 2 September 2019) <<https://www.bbc.co.uk/news/uk-scotland-49543662>> accessed 8 November 2019.

23 See, for example: Libby Anderson, 'Why we need tougher sentencing and prevention programmes for animal cruelty' (OneKind, 20 September 2017) <<https://www.onekind.scot/why-we-need-tougher-sentencing-and-prevention-programmes-for-animal-cruelty/>> accessed 8 November 2019; 'A-Law Joins Calls for Longer Prison Sentences for Animal Abusers' (UK Centre for Animal Law, 24 June 2019) <<https://www.alaw.org.uk/2019/06/a-law-joins-calls-for-longer-prison-sentences-for-animal-abusers/>> accessed 8 November 2019; and 'Battersea calls for five-year prison sentences for animal cruelty in Scotland' (Battersea, 27 August 2017) <<https://www.battersea.org.uk/battersea-calls-five-year-sentences-animal-cruelty-scotland>> accessed 8 November 2019.



on sentence<sup>24</sup> as emblematic of the inadequacy of the current sentencing options. The policy memorandum attached to the bill stated that the current maximum penalties available 'to punish the perpetrators of the most severe animal cruelty offences (currently a prison sentence of one year or a £20,000 fine, or both) are considered insufficient to allow the court, when sentencing, to impose a sentence that reflects the public revulsion towards the extreme nature of some of these cases'.<sup>25</sup>

Accordingly, section 1 of the bill increases the penalties for offences under section 19 (unnecessary suffering) and section 23 (animal fights) of the 2006 Act. Procurators Fiscal (Scottish public prosecutors) are given discretion as to whether to prosecute under solemn procedure, which may lead to a trial on indictment before a jury; up to now offences have been triable summarily only. Conviction on indictment will now attract imprisonment for up to five years, a fine, or both. The penalties for summary conviction remain unchanged: imprisonment for up to 12 months, a fine of up to £20,000, or both. The current six-month time bar for prosecution is also removed.

### Fixed penalties for animal welfare, animal health and wildlife offences

Sections 2, 4 and 10A of the bill as passed provide for the introduction of FPN for minor offences under the 2006 Act, the Animal Health Act 1981, parts of the Wildlife and Countryside Act 1981, the Protection of Badgers Act 1992, and the Deer (Scotland) Act 1996. Other enactments may be added where Scottish Ministers consider these relevant. The Scottish Government sees FPN as 'an effective additional enforcement tool to improve general compliance with legal requirements where this is important to safeguard animal welfare overall, but where the time and expense of taking individual court cases could be seen as disproportionate considering the likely penalties available.'<sup>26</sup>

24 2006 Act consultation (n 20).

25 Scottish Parliament, 'Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill: Policy Memorandum' (2019) <[https://www.parliament.scot/S5\\_Bills/Animals%20and%20Wildlife%20Bill/SPBill56PMS052019.pdf](https://www.parliament.scot/S5_Bills/Animals%20and%20Wildlife%20Bill/SPBill56PMS052019.pdf)> accessed 10 July 2020.

26 Ibid.

The bill provides that FPN under all three headings may be introduced through regulations and sets out the kinds of provision that may be included. It does not specify the offences in relation to which FPN could be issued, only that the offence should be one that would attract the lower level of penalties if tried in court. The intention is to ensure there is a means to address 'paperwork offences' rather than creating a weaker penalty for any offence that involves harm to an animal.<sup>27</sup> Much will depend, therefore, on the detail of the regulations.

### "Finn's Law"

Section 19(4)(c)(ii) of the 2006 Act allows an accused person to argue that an attack on an animal was motivated by self-defence (or the desire to protect another person or property) and therefore the attack does not constitute an offence. This was intended to protect people defending themselves from what the policy memorandum describes as an 'unwarranted' attack by an animal.<sup>28</sup> However, as the memorandum points out, this is at odds with the wider public view that service animals should be primarily regarded as sentient animals, rather than simply as police property.<sup>29</sup>

Public concern regarding claims of self-defence has been heightened by the English case of Finn, a police dog who was stabbed while defending his handler.<sup>30</sup> Finn's attacker was prosecuted for criminal damage rather than for causing unnecessary suffering to Finn. The campaign for Finn's Law touched many, attracted widespread media coverage<sup>31</sup> and resulted in a successful Private Member's Bill at Westminster.<sup>32</sup> In Scotland too, the campaign attracted public and political sup-

27 Ibid.

28 Ibid.

29 Ibid, 8.

30 For a full account of this story, see Dave Wardell and Lynne Barrett-Lee, *Fabulous Finn: The Brave Police Dog Who Came Back from the Brink* (Quercus 2018).

31 See, for example, Alina Polianskaya, 'Police officer describes moment dog fought to protect him despite being stabbed with "10-inch knife"' (Independent, 28 January 2018) <<https://www.independent.co.uk/news/uk/police-dog-hertfordshire-finn-pc-dave-wardell-finns-law-a8182116.html>> accessed 8 November 2019; and 'Finn's Law: Stabbed police dog law passed by Lords' (BBC, 2 April 2019) <<https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-47791214>> accessed 8 November 2019

32 Animal Welfare (Service Animals) Act 2019.

port<sup>33</sup>, even though attacks on service animals are rare. Police Scotland is cited in the policy memorandum as saying that attacks on police dogs occur approximately once a year, although there is concern that such offences might increase.<sup>34</sup> Nonetheless, the Scottish Government saw fit to follow Westminster's lead by including additional protections for service animals in the bill. Section 3 of the bill introduces sections to the 2006 Act providing that arguments for self-defence are to be disregarded in the case of service animals. Service animals are defined as those under the control of a constable or prison officer on duty at the time of the attack.

This limited definition prompted the ECCLR Committee to ask the Scottish Government whether it was aware of the defence being used in other instances of attacks on working animals, such as assistance animals.<sup>35</sup> The government responded that it was not aware of any such cases. They thought it unlikely that the issue would arise in relation to assistance animals as, 'unlike police service animals, they are not routinely used in situations where an attacker could reasonably claim to have been defending themselves.'<sup>36</sup>

## New penalties for offences against wild animals and habitats

As in other UK administrations, wild animals in Scotland are protected by several different pieces of legislation. The Scottish Government maintains: 'this allows us to meet national and international obligations to conserve rare and vulnerable species by:

- making sure they are protected and managed in a fair and humane way,
- addressing wildlife crime through co-ordinated enforcement,
- managing conflicts between mankind and

wildlife where they arise,

- protecting wildlife from cruel or inappropriate management activities.<sup>37</sup>

Animal welfare and conservation groups, including independent commentators such as the Wild Animal Welfare Committee, may question the extent to which current wildlife legislation meets these goals.<sup>38</sup> Nonetheless, most such groups agree that consistent and appropriate penalties for what can be severe insults to welfare or conservation are to be supported. Accordingly, animal welfare and conservation groups widely welcomed the introduction of equivalent maximum penalties for offences against wild and domestic animals. No other UK administration has made such provision.

The policy memorandum states: 'Crimes in recent years include those involving deliberate and sadistic behaviour such as badger baiting and hare coursing. There have been a number of instances of the deliberate targeting of birds of prey, resulting in death or serious injury. Some of these crimes have involved the use of banned pesticides which not only pose a serious health risk to wildlife but to any animals or people who come into contact with it.'<sup>39</sup>

In 2015, an independent review chaired by Professor Mark Poustie found that the current maximum penalties might not serve as a sufficient deterrent or reflect the serious nature of some of the crimes committed.<sup>40</sup> The Poustie Review recommended, among other things, that: 'an appropriate range of penalties should be available to the courts to ensure maximum deterrent impact to deal with the range of offenders, from corporate entities to individuals with few or no resources'.<sup>41</sup>

Addressing this, sections 5 to 10B provide increased maximum penalties for around 60 dif-

33 See, for example, Scottish Government press release 7 September 2019, <<https://www.gov.scot/news/animal-welfare-bill-will-protect-service-animals/#:~:text=Minister%20meets%20Finn%20the%20police,otherwise%20known%20as%20Finns%20Law.>> accessed 13 July 2020.

34 Policy Memorandum (n 25).

35 ECCLR Committee Official Report (n 17).

36 Letter from Mairi Gougeon MSP (Minister for Rural Affairs and Natural Environment) to Gillian Martin MSP (ECCLR Committee Convener) (18 March 2020) <[https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_2020.05.18\\_AWB\\_IN\\_MIN\\_Stage\\_3\\_seal\\_licensing.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_2020.05.18_AWB_IN_MIN_Stage_3_seal_licensing.pdf)> accessed 7 July 2020.

37 Policy Memorandum (n 25) s 16.

38 Wild Animal Welfare Committee, 'Activity Review 2016–2018' <[http://www.wawcommittee.org/images/resources/WAWC\\_activity\\_review\\_2018-final\\_print.pdf](http://www.wawcommittee.org/images/resources/WAWC_activity_review_2018-final_print.pdf)> accessed 10 July 2020.

39 Policy Memorandum (n 25).

40 Scottish Government, 'Wildlife Crime Penalties Review Group: report' (19 November 2015) <<https://www.gov.scot/publications/wildlife-crime-penalties-review-group-report/>> accessed 8 November 2019 (Poustie Review).

41 Ibid 65.



ferent offences.<sup>42</sup> The original bill placed offences such as killing wild birds, keeping or selling invasive species, harming protected species, killing mountain hares and brown hares in the close season, and using prohibited trapping and killing methods in the most serious category. Amendments at Stages 2 and 3 ensured that other offences, such as the possession of pesticides and disturbance of nests and shelters were moved into this category. Such offences will now be triable either on indictment or by summary procedure, with maximum penalties for conviction on indictment increasing to a prison sentence of up to five years, an unlimited fine, or both. Maximum penalties on summary conviction become a prison sentence of 12 months, a fine of up to £40,000, or both. A small number of offences relating to invasive species and species control are subject to a maximum prison sentence of two years. The time bar for sum-

<sup>42</sup> These offences are found in: Wildlife and Countryside Act 1981, sections 1, 5-11 and 14; Protection of Badgers Act 1992, ss 1-3; Conservation Regulations SI 2716/1994, ss 39 and 41; Deer (Scotland) Act 1996, ss 17, 21 and 22; Wild Mammals (Protection) Act 1996 s 1; Protection of Wild Mammals (Scotland) Act 2002 (asp 6) s 1; and Marine (Scotland) Act 2010 (asp 5) s 104.

mary offences against wild animals is amended to six months from the date on which sufficient evidence came to the knowledge of the prosecutor, but no more than three years from the date of the offence. There will be no time bar for offences capable of being tried either way.

Also of note are the new penalties and procedures for fox hunting offences. There are only ten mounted fox hunts in Scotland but their activities remain controversial. Meanwhile, defects in the Protection of Wild Mammals (Scotland) Act 2002 have rendered it almost impossible to enforce.<sup>43</sup> Maximum penalties will now increase

<sup>43</sup> For conclusion regarding difficulties with 'detection, investigation and prosecution of alleged offences', see Scottish Government, 'Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002', <<https://www.gov.scot/publications/report-review-protection-wild-mammals-scotland-act-2002/>> accessed 8 November 2019, 9 (Bonomy review). On enforcement difficulties, see 'Fox Hunting' (OneKind) < <https://www.onekind.scot/campaigns/a-real-hunting-ban/>> accessed 8 November 2019. For a summary of the Police Scotland response to the Bonomy Review, see 'Police say Scottish foxhunting review "unworkable"' (BBC, 24 October 2016) <<https://www.bbc.co.uk/news/uk-scotland-37751158>> accessed 8 November 2019.

and solemn procedure (see II.A above) becomes available for hunting a wild mammal with a dog. This is significant and signals that breaches of the 2002 Act are not seen as minor offences.

Enforcement agencies will welcome the extended time limits for hunting prosecutions, in line with other serious wildlife offences. The difficulty of bringing cases within the existing six-month time limit was highlighted by Lord Bony in his Scottish Government-commissioned review of the 2002 Act.<sup>44</sup> He noted that '[t]he time limit for completing an investigation into an alleged offence and instituting the prosecution has given rise to problems for both the police and the Crown', and that the reporting of one case, two weeks before the expiry of the time limit, had made proper investigation 'impossible'.<sup>45</sup>

### New wildlife offences: seals, mountain hares and vicarious liability

A surprising development occurred at Stage 3 of the bill. Stage 3 is broadly equivalent to third reading at Westminster, although it provides rather greater opportunity for significant late amendments. In this case, the Scottish Government introduced substantive amendments to change the seal licensing regime, effectively banning the shooting of seals. Currently, under part 6 of the Marine (Scotland) Act 2010, it is an offence to kill, take or injure a seal, unless to relieve its suffering or by virtue of a seal licence.<sup>46</sup> Grounds for granting licences include protecting the health and welfare of farmed fish and the prevention of serious damage to fisheries or fish farms.<sup>47</sup> Both of these grounds will now be repealed.

These changes were made so that Scotland can comply with the US Marine Mammal Protection Act 1972.<sup>48</sup> This act requires fish exporting countries to ensure that their regulations are comparable to US marine mammal protection standards. The deadline for a 'comparability finding' falls in March 2021 and, without this, Scotland could lose access to a lucrative market for its

salmon.<sup>49</sup> The Scottish Government argued that its amendments were lodged at such a late stage due to 'a lack of clarity from the US on the interpretation of these rules and what specific action needs to be taken by nations in order to comply'.<sup>50</sup>

Animal welfare and conservation organisations welcomed the new measures, but pointed to a recent rise in reported licensed shooting and the danger of further increases prior to implementation of the legislation.

The extension of the scope of the bill at Stage 3 opened the floodgates to a suite of new amendments on issues which had previously been considered outwith its scope. Of these, the most notable was lodged by Alison Johnstone MSP. This amendment provided full protection for mountain hares, an iconic species that is regularly culled and shot for sport on Scotland's uplands. Some MSPs took exception to the lack of prior debate on this matter but the issue prompted a strikingly effective short-term campaign and the amendment ultimately received Scottish Government support<sup>51</sup>.

By contrast, throughout the course of the bill, MSPs had been discussing vicarious liability, introduced under the Wildlife and Natural Environment (Scotland) Act 2011<sup>52</sup> for the killing or taking of wild birds.<sup>53</sup> Amendments were lodged seeking to extend this provision for offences against birds, cruelty to wild mammals and the destruction of badger setts.<sup>54</sup> The only one of

44 Ibid (Bony review), 79.

45 Ibid.

46 Marine (Scotland) Act 2010 (asp 5) ss 104-109.

47 Ibid, s 110 (f) and (g).

48 16 USC 1361 (US).

49 Rural Economy and Connectivity Committee, 'Salmon farming in Scotland' (2018) paragraph 302 <<https://digitalpublications.parliament.scot/Committees/Report/REC/2018/11/27/Salmon-farming-in-Scotland#Deterring-marine-predators>>

50 Letter from Mairi Gougeon (n 36).

51 See comments by Mairi Gougeon MSP, Stage 3 Amendment 30, Scottish Parliament, 'Official Report: Chamber Wednesday 17 June', session 5 <<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12700&i=114899>> accessed 13 July 2020

52 Wildlife and Natural Environment (Scotland) Act 2011 (asp 6) s 24.

53 For example, see question from Mark Ruskell MSP to Leila Fitzgerald, Scottish Government in ECCLR Committee Report (n 19), 6-7 and 14-15.

54 Scottish Parliament, 'Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill: Marshalled List of Amendments for Stage 3' (2020) n 15 (amendments 1, 36 to 40, 53, 54) .

these to succeed concerned vicarious liability for the illegal setting of traps and snares. Given the widespread use of these devices in the Scottish countryside, and the difficulties of enforcement, this may well be significant.

## Additional powers for taking possession of animals

Section 11 is the most complex part of the bill. It may also be the part with the greatest direct impact on animal welfare in Scotland.

The original section 32 of the 2006 Act allows inspectors (including Scottish SPCA inspectors) and constables to take possession of animals that appear to be suffering. Section 34 requires a court order before they can be re-homed, sold or destroyed. Thus, if an animal was taken into possession and the owner refused voluntarily to sign over ownership, the only way in which enforcement authorities could dispose of the animal, for example by re-homing it, was by seeking an appropriate court order.

The bill adds twelve new sections (32A to 32L) to the 2006 Act. These additions enable authorised persons to provide treatment, transfer ownership and, in limited circumstances, destroy an animal without undue delay and without the need to obtain a court order. In other words, the disposal will take effect administratively, unless the owner decides to challenge it, in which case it will go to court. Under the previous arrangement, the onus was on the enforcement agency to demonstrate why an order should be made; now the onus will be on the owner to demonstrate why the disposal should not happen.

If there is no appeal against notice of the intended measures, the relevant agency will be able to transfer the animal appropriately. Provision is made for compensation, but this is unlikely to be available if the owner is found guilty of a welfare offence.

The new powers are intended to protect animals by limiting the time they have to remain in shelters, and to reduce costs to agencies such as local authorities and the Scottish SPCA. Indeed, that charity lobbied for the proposed changes, highlighting the welfare and financial challenges posed by taking possession of large numbers

of vulnerable animals, particularly in connection with the fight against puppy trafficking.<sup>55</sup>

## Looking beyond the new Act

The initial aim of keeping the bill within tight parameters did not deter MSPs and stakeholders from raising many more animal welfare issues throughout the bill's progress. These included protection for cephalopods and crustaceans,<sup>56</sup> Scottish SPCA powers to investigate wildlife offences,<sup>57</sup> electronic training collars and pet theft,<sup>58</sup> the use of acoustic deterrence devices to discourage the presence of seals,<sup>59</sup> and the need to protect beavers from persecution.<sup>60</sup> All of these are expected to return to the parliament for consideration.

Inevitably, the pace of the legislative programme has been affected by COVID-19. Nonetheless, other commitments have been made, including new regulations under the 2006 Act to cover animal sanctuaries and re-homing activities, breeders of dogs, cats and rabbits, and pet sales.<sup>61</sup> A Scottish version of "Lucy's Law" will aim to prevent the third-party sale of young cats and dogs.<sup>62</sup> Members' Bills have also been

55 For comments by Michael Flynn of the Scottish SPCA, see 'Response 1004594659 to the Animal Health & Welfare Act Amendment Consultation 2019' (Scottish Government) <[https://consult.gov.scot/animal-welfare/animal-health-welfare-act-amendment-2019/consultation/view\\_respondent?show\\_all\\_questions=0&q\\_text=SPCA&sort=excerpt&order=descending&b\\_index=180&uuld=1004594659](https://consult.gov.scot/animal-welfare/animal-health-welfare-act-amendment-2019/consultation/view_respondent?show_all_questions=0&q_text=SPCA&sort=excerpt&order=descending&b_index=180&uuld=1004594659)> accessed 8 November 2019.

56 For example, see comments by Libby Anderson in 'Response 153112057 to Animal Health and Welfare (Scotland) Act Amendment Consultation 2019' (Scottish Government) <[https://consult.gov.scot/animal-welfare/animal-health-welfare-act-amendment-2019/consultation/view\\_respondent?show\\_all\\_questions=0&sort=excerpt&order=descending&q\\_text=OneKind&uuld=153112057](https://consult.gov.scot/animal-welfare/animal-health-welfare-act-amendment-2019/consultation/view_respondent?show_all_questions=0&sort=excerpt&order=descending&q_text=OneKind&uuld=153112057)> accessed 8 November 2019.

57 Letter from Gillian Martin MSP (ECCLR Committee convener) to Roseanna Cunningham MSP (10 October 2019) <[https://www.parliament.scot/S5\\_Environment/General%20Documents/ECCLR\\_AWB\\_2019.10.10\\_OUT\\_CS\\_Bill\\_Questions.pdf](https://www.parliament.scot/S5_Environment/General%20Documents/ECCLR_AWB_2019.10.10_OUT_CS_Bill_Questions.pdf)> accessed 8 November 2019.

58 Stage 3 amendments (n 17), amendment 59.

59 Ibid, amendment 55A.

60 Ibid, amendment 56.

61 Scottish Government, 'Protecting Scotland's Future: the Government's Programme for Scotland 2019-2020' (3 September 2019) 88-89 <<https://www.gov.scot/publications/protecting-scotland's-future-governments-programme-scotland-2019-20/>> accessed 8 November 2019.

62 Ibid. <https://beta.parliament.scot/bills/dogs-protection-of-livestock-amendment-scotland-bill>>

lodged covering the sale and transfer of dogs<sup>63</sup> and livestock worrying.<sup>64</sup> Implementation of the Bonomy recommendations on foxhunting is expected before the end of the session.<sup>65</sup> A Member's Bill offering more comprehensive protection for foxes and hares is also in the pipeline.<sup>66</sup>

## Scottish Animal Welfare Commission

The creation of the Scottish Animal Welfare Commission is potentially the most significant of all the developments currently taking place in Scotland.<sup>67</sup> This commission is an independent expert group chaired by Professor Cathy Dwyer to advise the Scottish Government on companion and wild animal welfare issues.<sup>68</sup> The commission was established under section 36 of the 2006 Act to consider and provide advice on the welfare of protected animals, defined in section 17(1)(b) as animals 'under the control of man on a permanent or temporary basis' with the function of providing advice on the protection of wildlife under section 23 of the Wildlife and Countryside Act 1981 assigned by Ministerial declaration.

A crucial role for this commission will be to act as the 'guardian'<sup>69</sup> of sentience in the years following Brexit. It will formulate some of its own work plan but it must provide an annual report on how the welfare needs of sentient animals are considered in legislation and policy development in Scotland.<sup>70</sup>

## Conclusion

This is an exciting time to be working on animal welfare policy in Scotland. Through its Scottish steering committee, A-law responded to the public consultation on the bill,<sup>71</sup> gave evidence to the ECCLR Committee and ran a successful seminar for stakeholders. The committee has plans for continued engagement with politicians and officials, as well as further awareness-raising events and initiatives.

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63 Welfare of Dogs (Scotland) Bill, Christine Grahame MSP <<https://beta.parliament.scot/bills/welfare-of-dogs-scotland-bill>>

64 Dogs (Protection of Livestock) (Amendment) (Scotland) Bill, Emma Harper MSP <<https://beta.parliament.scot/bills/dogs-protection-of-livestock-amendment-scotland-bill>>

65 Bonomy review (n 43).

66 For further information, see 'Proposed Protection and Conservation of Wild Mammals (Scotland) Bill (Scottish Parliament, 2019) <<https://www.parliament.scot/parliamentarybusiness/Bills/112079.aspx>> accessed 10 July 2020.

67 Protecting Scotland's Future (n 64) 88.

68 Scottish Government, 'Animal Welfare Commission' (24 September 2019) <<https://www.gov.scot/news/animal-welfare-commission/>> accessed 8 November 2019.

69 OneKind, 'Animal Welfare Commission for Scotland' (February 2019) <<https://www.onekind.scot/resources/animal-welfare-commission-for-scotland-february-2019/>> accessed 8 November 2019.

70 SP Deb g (n 68).

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71 The responses to the call for submissions can be found at 'Animals and Wildlife (Scotland) Bill: Published Responses' (Scottish Parliament) <<https://yourviews.parliament.scot/ecclr/animal-welfare/>> accessed 10 July 2020.

# Pets at home? Considering animal forensics in the domestic setting

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## Introduction

Traditionally, animal forensics involves the utilisation of animal-derived physical evidence to support or refute connections between people, places, animals and items. Such linkages can be critical and have proven invaluable in wildlife crime cases, where such analyses may be routinely requested by investigators (e.g. badger hair on ropes found in a vehicle, or dog DNA from bite marks on a hare carcass). In contrast, crimes against companion animals are rarely approached in this way, due in part to the legitimate access people have to their pets, or those of others. That is not to say that there are no evidential opportunities, but in either setting, animals should be considered beyond a source of material and as a complete body of evidence in their own right. Regardless of the context, animals can be witnesses, aggressors and victims, and by evaluating their presence (or absence) in an investigation (even those which are human-centric) significant information may be gained, and this approach is applicable to a range of legal investigations

The applicability of animal forensics is beyond the scope of this piece, but in short, there is vast potential. If the discipline or test of interest exists in the human realm, then it can most likely be applied to an animal case, but the ultimate potential can only be realised if a) the investigative team consider such possibilities in the first place, and b) discuss the sampling requirements with the testing laboratory. In reality, many investigators are not aware of the full range of capability or the existence of the services (e.g. forensic post-mortems, air weapon and other firearms analyses, or blood pattern analysis relating to injured animals), and such evidence is

often overlooked in both 'human' and 'animal' cases. Furthermore, when (or if) veterinary assessments are requested, these can produce essential documentary and physical evidence, relating to the condition of the animal, before and after death or injury. However, it should be noted that the majority of vets are not aware of forensic methods or their responsibilities in legal matters, as somewhat surprisingly, these topics are not key parts of their curriculum or professional development. All of these factors are troubling, not least because veterinary opinions are crucial in animal law, but because any form of animal cruelty must have occurred at the hands of a human perpetrator, and the fact that there is a growing global acknowledgement of the 'link' between animal and human crimes.

## Animal and Human Offences

The landscape of animal crime is as broad and complex as its human counterpart. Cases where forensic techniques have been applied include animal fraud, neglect, drowning, mutilation, poisoning, sexual assault and inappropriate methods of killing. Clearly these acts are perpetrated by humans and this level of cruelty rarely occurs in isolation, and a proclivity towards reoffending and an escalation in severity is often observed. Evidence for this not only exists in the anecdotal reports of animal abuse by notorious killers such as Ian Brady, Fred West, Steven Barker and Aaron Campbell, but also in the form of data collected by the Ministry of Justice. During 2009 to 2018, over 14,000 people in England and Wales who were cautioned or convicted of human offences, had also been previously cautioned or convicted of animal abuse<sup>1</sup>. Whilst this dataset

1 <https://www.gov.uk/government/publications/>

certainly includes multiple counts relating to the same offender, the figures are striking enough to warrant attention (**Table 1**).

**Table 1:** Number of people in England and Wales convicted or cautioned by offence type who previously had at least one or more convictions or cautions for cruelty to animals (Data source: Ministry of Justice, 2009-2018).

Offence Type	No. of Offenders
Violence against the person	1,637
Sexual offences	220
Robbery	176
Theft offences	5,642
Criminal damage and arson	237
Drug offences	2,797
Possession of weapons	587
Public order offences	1,090
Miscellaneous crimes against society	1,564
Fraud offences	258
<b>Total:</b>	<b>14,208</b>

Specific offences listed include murder, attempted murder, GBH/ABH, cruelty to or neglect of children and paedophilia. Therefore, crimes against animals must be taken seriously, particularly if a suspect has received multiple prior warnings. However, only rural and wildlife priorities currently fall under Policing strategies<sup>2</sup> and issues regarding animal welfare have been consolidated under separate legislation, which are enforced primarily by other agencies. Presently, if an offender is convicted under the Animal Welfare Act 2006, they can only receive a maximum of six months in prison and/or an unlimited fine<sup>3</sup>. Such penalties are unlikely to be acting as deterrents and the significant delay in hearing the Animal Welfare (Sentencing) Bill,<sup>4</sup> is no doubt costing lives.

### Prediction or Prevention?

[foi-releases-for-december-2019](https://www.nwcu.police.uk/about/npcc-rural-and-wildlife-crime-strategy) or [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/592546/foi-107043-animal-cruelty.docx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592546/foi-107043-animal-cruelty.docx)

<sup>2</sup> <https://www.nwcu.police.uk/about/npcc-rural-and-wildlife-crime-strategy>

<sup>3</sup> <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/animal-cruelty-revised-2017>

<sup>4</sup> <https://commonslibrary.parliament.uk/research-briefings/cbp-8612>

The suggestion here is not that every person who harms an animal will progress to commit violent crimes against humans, but that the behaviour of certain individuals clearly requires a deeper examination by various members of society and representatives of the judicial system. By considering persons of interest and their relationships with animals, insight may be provided into other areas of their life and this is particularly true in the contexts of domestic violence, child abuse and elder maltreatment. Here, animal and human abuse occurs concurrently, with coercion and control as all too-common themes. If attention is given to the animals in the home (and those previously present), other 'hidden crimes' may be revealed. The National Link Coalition (USA) states that animal abuse is the tip of the iceberg, and that animals often become victims and pawns in the battles of power that typically mark domestic abuse. Drawing upon a substantial body of scientific research they conclude that: *when animals are abused, people are at risk; when people are abused, animals are at risk*<sup>5</sup>.

The Links Group, a multi-agency assembly in the UK echoes these sentiments<sup>6</sup>. The group promotes the awareness of the correlations between domestic offences and animal cruelty, and they report that over 50% of domestic abuse cases in the UK have involved threats and acts of violence towards family pets<sup>7</sup>. This is of particular relevance in light of data from the Office for National Statistics, which estimates that 2 million adults (aged 16 to 59 years) would have experienced domestic abuse in the year ending March 2018<sup>8</sup>. Acknowledging the lack of detail regarding juveniles or erroneous accusations in these figures, the probability that at least 50% of these incidents may have involved animals is of significance; especially as family members are more likely to seek medical intervention for their pets, than themselves or their children.

Just as the medical community has been trained

<sup>5</sup> <http://nationallinkcoalition.org>

<sup>6</sup> <http://www.thelinksgroup.org.uk>

<sup>7</sup> <http://veterinaryrecord.bmj.com/content/175/23/579>

<sup>8</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018>





to recognise the 'battered child'<sup>9</sup>, greater awareness of the 'battered pet' is needed by the veterinary community<sup>10</sup>. Working with the Animal Welfare Foundation, the Links Group have developed guidance to support vets in safeguarding not only their patients, but the adults and children who may also be affected by domestic abuse. Building on the relationship of trust between veterinary staff and their clients, owners may disclose violence within the household and since early intervention is key, victims may be protected and further abuse prevented<sup>11</sup>.

### Why Pets? Why Vets?

It may seem something of an oxymoron that a perpetrator would deliberately injure an animal, only to later obtain veterinary care, but this be-

haviour continues the cycle of abuse and power. This type of manipulation and intimidation can take many forms, including supplying or denying financial support for treatment or food, suggesting additional threats to injure or kill 'next time' and blaming children for the cruelty, to create fractures within the family. As a result, victims will delay fleeing an abuser for fear of leaving the pet at risk of harm or death, or never being able to see them again - and these delays can cost lives. Whilst refuge services with pet fostering capabilities have increased, options are still limited<sup>12</sup>. The threat and actualisation of animal harm can have an immediate impact on the behaviour of an individual and creates long-term emotional distress, particularly when the acts are conducted in front of other victims. Children can also become desensitised to violence, displaying a lack of empathy and in some cases, a tendency to repeat learned behaviours. Conversely, they have also intervened, protecting the pet or other family members from their

9 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4623854/pdf/hkv040.pdf>

10 <https://www.ncbi.nlm.nih.gov/pubmed/11380013>

11 <https://www.animalwelfarefoundation.org.uk/animal-welfare-advice/guidance-for-vets/#recognising-abuse-in-animals-and-humans>

12 <https://www.refuge.org.uk/get-help-now/what-about-pets>

abuser<sup>13</sup>. Such actions may be of significance in behavioural assessments, suggesting the need for additional support, that the home is unsafe, and that others may also be at risk.

The importance of the human-animal bond must not be underestimated. For many, pets are extensions of the family, and they may be the only source of comfort and companionship for victims of abuse, at any age. Recently, the Domestic Abuse (Scotland) Act 2018, included references to abusive behaviour relating to pets in the Explanatory Notes<sup>14</sup> and it is hoped that the rehearing of the Domestic Abuse Bill will also include these provisions in England and Wales, as proposed in Northern Ireland<sup>15</sup>. As the sentinels of animal welfare, it is essential that veterinary staff are trained to have confidence in recognising non-accidental injuries, reporting their suspicions of animal cruelty to the appropriate authorities, and encouraging victims of domestic violence to seek help in a safe and timely fashion.

To assist, Forensic Access has developed 'The Forensic Process: Veterinary eCPD' courses for vets and veterinary nurses involved in cases of animal welfare and abuse<sup>16</sup>. By cascading the Court-compliant standards which traditional forensic scientists adhere to, alongside the advice developed by the Links Group and the diagnostic features of 'battered pets', the community will be better placed to assist such investigations. With a strong focus on contemporaneous record-keeping, the documentation of their actions and the behaviours of animals (and their owners), another form of animal evidence emerges.

## Summary

The primary aim of this piece is to raise awareness of the possibility of animal/human interactions as a potential source of information and

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13 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5904016/pdf/nihms957558.pdf>

14 <http://www.legislation.gov.uk/asp/2018/5/notes/division/3/1/3/4>

15 <https://publications.parliament.uk/pa/cm201919/cm-public/DomesticAbuse/memo/DAB07.htm>

16 <https://forensic-access.co.uk/training-and-events/cpd-for-veterinary-surgeons-and-nurses-the-forensic-process-e-learning>

evidence, which may be applicable to a range of investigations. This may take the form of considering trace material which passes between animals, humans and their environments, or requesting a clinical or post-mortem examination of animal which is suspected of having suffered at the hands of a human perpetrator (either directly or accidentally), as a result of another animal, or to determine the presence of an underlying medical condition. The more traditional forensic disciplines (e.g. biology, toxicology, entomology, ballistics, digital evidence) may be employed to support or refute claims made by defendants, witnesses and legal representatives. Previous veterinary records relating to the history of the animal may be requested, to determine prior incidents of illness or injury, if welfare needs have been met, or the extent of 'Practice shopping' (whereby serial abusers seek treatment at different veterinary centres to avoid generating suspicion). Although maltreated companion animals may be an indicator of abuse within the domestic setting, any animal a person of interest may encounter (e.g. working animals, livestock, wildlife) could warrant further investigation, which may yield additional evidence of value.

In summary, the significance of animals and their associated caregivers should not be overlooked by investigators, legal teams, magistrates, judges and so forth – regardless of whether the case is of animal or human 'origin'. The presence, treatment and subsequent absence of animals, are noteworthy aspects in family and criminal law alike. Similarly, the behaviours of humans in animal law cases should be examined. Incidents of animal cruelty and abuse are rarely isolated events and these matters should no longer be treated as such.

## Author Profile

Samantha is a Senior Lecturer in Forensic Science at the University of Bedfordshire and an Animal Forensics Consultant with Forensic Access. As an advocate of collaborative working, she is particularly dedicated to raising awareness of the links concept and determining appropriate forensic strategies, across both animal and human casework.

Forensic Access was established in 1986 by Home Office forensic scientists, initially to supply advice and guidance to defence lawyers.

Led by Professor Angela Gallop CBE (who steered the re-investigations of prominent cases such as Stephen Lawrence, Rachel Nickell and Damilola Taylor), the company evolved into an independent forensic service provider, assisting both prosecution and defence teams in almost equal measure. With a reputable heritage in human casework and an increase in requests for scientific support in animal abuse cases, the Animal Forensics Division was formed to unify forensic methodologies with veterinary medicine to develop bespoke investigative strategies.

Forensic Access hosts a number of seminars and webinars for the legal profession, including sessions on animal forensics and veterinary evidence. For more information about their services or training events, see their website at [www.forensic-access.co.uk](http://www.forensic-access.co.uk), or contact the office at: [science@forensic-access.co.uk](mailto:science@forensic-access.co.uk).

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