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BADGERS

Hannah Darnell considers whether the Protection of Badgers Act 1992 is fit for purpose after 30 years

NON-HUMAN RIGHTS

Dr Joe Wills examines the recent NhRP case, *Nonhuman Rights Project, Inc. v Breheny 2022*

FISH

Jenny Canham makes the case for stronger enforcement mechanisms to protect the welfare of farmed fish in the UK

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CONTENTS

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EDITOR'S NOTE

Welcome to the Autumn 2022 edition of the journal.

Two hundred years ago the Martin's Act was signed into Law. It is thought to be the first of its kind in the West. A-law commemorated this pioneering piece of legislation by hosting the Martin's Act Bicentenary Anniversary Conference in July. The conference brought together activists, eminent lawyers and academics to look at the progress made since and issues relating to animal welfare now and in the coming years. The conference began with a talk on Martin's Act and finished with contributions from young activists around the world giving a sense of continuity over time and across nations.

The journal continues on the conference's international theme. Joe Wills provides an in-depth commentary on the *Nonhuman Rights Project, inc. v Breheny 2022* case while Ilyana Aït Ahmed and Irina Jameron discuss the Grammont Act considered to be first animal welfare related legislation in France. Meganne Natali summarises the Jane Goodall Act, reintroduced to the Canadian Senate in March 2022 that would afford greater protections to captive wild animals.

Included in this edition is an article on fish welfare, a subject that is often overlooked. Jenny Canham sets out the issues and discusses progress made and the need for stronger enforcement. Rob Espin provides an overview of the Ivory Act while Hannah Darnell considers legal protections for Badgers and the need for reform.

Thank you for your continuing support of A-law.

Jill Williams

Editor

Case Commentary: *Nonhuman Rights Project, Inc. v Breheny 2022*

By Dr Joe Wills, University of Leicester

Introduction

The law is a Janus-faced phenomenon. On the one hand, it concerns order. Law as order emphasises the legal system's role in upholding stability, predictability and, generally, maintaining an orderly society. On the other hand, law is about justice. This entails, amongst other things, the vindication of individual's rights and ensuring that disputes are resolved in a fair and reasonable manner before impartial tribunals.[1] To be sure, these two modalities of law are not mutually exclusive, but they can come apart. In a legal system that has injustice woven into its very fabric, order stands opposed to justice.

Legal orders have largely been inequitable to nonhuman animals: 'Their most basic and fundamental interests – their pains, their lives and their freedoms – are intentionally ignored, often maliciously trampled, and routinely abused.'[2] The maintenance of this order for nonhuman animals merely prolongs their denial of justice.

In Nonhuman Rights Project, Inc. v. Breheny[3] the New York Court of Appeals was faced with a choice; would they adopt a law as order position concerned with upholding the status quo for nonhuman animals or would they take a law as justice approach focused on what fairness requires. In short, the five judge majority took the former approach while the two dissenting judges embraced the latter.

Background

At the centre of this case is an aging female Asian Elephant called Happy. Happy is believed to have been captured in Thailand as a baby in the early 1970s. She was subsequently shipped to the United States and sold to the Bronx Zoo in 1977 where she has resided ever since. Throughout the 1980s Happy and the other elephants at the Zoo were coerced into giving rides and performing tricks.[4] Since 2006, she has lived alone in conditions that experts suggest significantly increase her risk of a host of physical and mental harms.[5]

In 2018, the Nonhuman Rights Project (NhRP) filed a petition for a common law writ of habeas corpus on behalf of Happy, seeking her release from the zoo and transfer to an elephant sanctuary where she can exercise her autonomous capacities. The writ of habeas corpus is a legal remedy for challenging unlawful detention. Under New York law a petition for habeas corpus can be filed by a 'person illegally imprisoned or otherwise restrained in his liberty… or one acting on his behalf'.[6]

The NhRP argue that Happy is a 'person' for the purpose of the writ of habeas corpus. By this they mean that Happy is an entity with the capacity for legal rights. The reason why Happy ought to be recognised as a person for habeas corpus they argue is because the writ exists to safeguard liberty. Liberty is an interest held by all autonomous beings, individuals whose actions

1 Edgar Bodenheimer, 'Law as Order and Justice' (1957) 6 Journal of Public Law 194.

2 Steven Wise, Rattling the Cage: Towards Legal Rights for Animals (Profile 2000) 4.

3 2022 N.Y. Slip Op. 3859 (N.Y. 2022).

4 See Jill Lepore, 'The Elephant Who Could be a Person' (The Atlantic, 16 November 2021). https://www.theatlantic.com/ideas/archive/2021/11/happy-elephant-bronx-zoo-nhrp-lawsuit/620672/

5 See Affidavit of Joyce Poole (2018) https://www.nonhumanrights.org/content/uploads/Aff.-Joyce-Poole.pdf ('Holding (elephants) captive and confined prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior. Held in isolation elephants become bored, depressed, aggressive, catatonic and fail to thrive.')

6 NY CPLR § 7002 (2012).

are self-determined and based on freedom of choice rather than mere reflexivity. Relying on evidence from elephant behavioural experts, NhRP contend that elephants like Happy are clearly autonomous. To deny her the right to liberty merely by virtue of her species membership is contrary to the common law value of equality.[7] After a three-day hearing, the Bronx Supreme Court (the trial court) issued a decision in 2020 finding that the NhRP's expert affidavits 'demonstrate' that 'Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty.'[8] The trial court further noted that the arguments for transferring Happy 'from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary' were 'extremely persuasive.'[9] Yet the court 'regrettably' declined to grant Happy habeas corpus relief on the basis of precedent from more senior courts that had rejected habeas corpus petitions on behalf of other nonhuman animals.[10]

The NhRP appealed to the First Department of the Appellate Division which affirmed that 'the writ of habeas corpus is limited to human beings' and cautioned that a judicial determination that nonhuman animals are legal 'persons' would 'lead to a labyrinth of questions that common-law processes are ill-equipped to answer'.[11] The NhRP further appealed to the New York Court of Appeals, New York State's highest court.

The Decision

In a 5-2 decision, the New York Court of Appeals affirmed the lower courts' dismissals of the peti-

7 See Brief for Petitioner-Appellant The Nonhuman Rights Project, Inc. v. Breheny (1st Dep't Case No. 2020-02581) https://www.nonhumanrights.org/content/uploads/Happy-Brief.pdf (hereafter 'Happy Brief')

8 Nonhuman Rights Project, Inc. v. Breheny No. 260441/2019, 2020 WL 1670735, at *3 (Sup. Ct. N.Y. Cty. Feb. 18, 2020).

9 ibid, at *10.

10 ibid, at *9.

11 Matter of Nonhuman Rights Project, Inc. v. Breheny 189 A.D.3d 583 at 583 (1st Dep't 2020).

tion for a writ of habeas corpus for Happy. Writing for the majority, Chief Judge DiFiore held that 'writ of habeas corpus is intended to protect the liberty right of human beings to be free of unlawful confinement'.[12] Such a right does not apply to any nonhuman animals, notwithstanding any 'impressive capabilities' they may possess.[13] The majority offer a handful of justifications for this conclusion. First, they noted that '[n]othing in our precedent or, in fact, that of any other state or federal court, provides support for the notion that the writ of habeas corpus is or should be applicable to nonhuman animals.'[14] While true, this observation seems beside the point as the Court of Appeals is not bound by the decisions of the lower courts or the courts of other States.

Second, the majority assert that 'Nonhuman animals are not, and never have been, considered "persons" with a right to "liberty" under New York law'.[15] To illustrate this they engage in a brief textual analysis of various New York Statutes. Again, though, it is hard to see what the relevance of this observation is. The petitioners did not claim Happy is a person with a right to liberty under any of the statutes cited by the majority. The petitioners claimed Happy should be recognised as having a right to liberty under the common law writ of habeas corpus. It was the job of the Court of Appeals to make that determination.

Third, the majority claims 'petitioner implicitly concedes that Happy is not guaranteed freedom from captivity' because the 'relief requested is not discharge from confinement altogether but, rather, a transfer of Happy from one confinement to another of slightly different form'.[16] This, the majority claims, demonstrates the 'incompatibility of habeas relief in the nonhuman context'.[17] There are a few problems with this. First, it's woefully inaccurate for the court to describe solitary life in a one acre enclosure as only 'slightly different' to life to a 2300-acre elephant sanctuary that closely approximates Happy's natural environment. There is clearly a difference of both degree and kind between these settings. Second, as noted in the 2018 concurring opinion of Judge Fahey,[18] the briefs filed by the NhRP[19] and its amici[20] and in the dissenting judgements of Judges Wilson and Rivera, the writ of habeas corpus can and has been used in New York and elsewhere 'to transfer a petitioner from an onerous custody to a less onerous custody'.[21] The Majority fails to address, let alone rebuke, these legal arguments and authorities.

Fourth, the majority observes that 'nonhuman animals cannot—neither individually nor collectively—be held legally accountable or required to fulfill obligations imposed by law.'[22] The majority provides no explanation for the relevance of this claim for denying Happy habeas corpus rights. It is morally odious to deny freedom to a complex autonomous being on the basis that she can't play by the rules of a human society she was forced into against her will. What's more, the claim that the ability to exercise rights is dependent on the capacity to exercise duties is patently false. As the Fahey concurrence,[23] briefs of the petitioners[24] and amici[25] and dissenting judgements[26] pointed out repeatedly, this claim would imply that infants and people with severe cognitive disabilities cannot hold legal rights either. Again, it is striking that the majority did not even consider these obvious counter-examples. Up until this point, the majority opinion reads as if it is scrambling for principles upon which to reject Happy's appeal. But the arguments offered are underdeveloped and unpersuasive, a mish-

12 Matter of Nonhuman Rights Project, Inc. v. Breheny (n3) majority op, at 2.

13 ibid, at 6.

14 ibid, at 9.

15 ibid.

16 ibid, at 10.

17 Ibid.

18 Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery 31 N.Y.3d 1054, at 1058 (2018) (Judge Fahey, Concurring) (hereafter 'Fahey Concurrence').

19 Happy Brief (n 7) at 54-56.

20 See e.g. Brief of Amici Curiae Habeas Corpus Experts for Plaintiffs-Appellants at 19. https://www.nonhumanrights.org/content/uploads/Habeas-Experts-Brief-Happy-Court-of-Appeals.pdf

21 Wilson, J., dissenting op at 36-37. See also Rivera, J., dissenting op at 18.

22 Majority op, at 11.

23 Fahey Concurrence (n 18) at 1057.

24 Happy Brief (n 7) at 44-48.

25 See e.g. Brief of Amici Curiae Joe Wills, et al., UK-Based Legal Academics, Barristers and Solicitors in Support of Petitioner-Appellant, at 4-17. https://www.nonhumanrights.org/content/uploads/Joe-Wills-et-al-amici-brief-Happy-case.pdf

26 Wilson, J., dissenting op at 12-16.

mash of half-baked ideas and quasi-principles. The real crux of the majority decision, I suggest, is not to found in legal principle, but rather in policy considerations. It is worth quoting the majority at length on this point:

A determination that Happy, an elephant, may invoke habeas corpus to challenge her confinement at the Bronx Zoo… would have an enormous destabilizing impact on modern society. It is not this Court's role to make such a determination… Granting legal personhood to a nonhuman animal in such a manner would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts.

With no clear standard for determining which species are entitled to access the writ, who has standing to bring such claims on a nonhuman animal's behalf, what parameters to apply in determining whether a confinement is "unjust," and whether "release" from a confinement otherwise authorized by law is feasible or warranted in any particular case, courts would face grave difficulty resolving the inevitable flood of petitions. Likewise, owners of numerous nonhuman animal species—farmers, pet owners, military and police forces, researchers, and zoos, to name just a few—would be forced to answer and defend those actions.[27]

At the core of the majority's opposition to recognising habeas corpus rights for a nonhuman animal is the belief that doing so could create a 'slippery slope' opening up 'the floodgates' to a proliferation of lawsuits filed on behalf of other nonhuman animals. In other words, the majority adopts a law as order framework. Having found no legal principle with any real bite to justify the indefinite detention of a complex autonomous being, they instead appeal to the 'destabilizing impact' of her release. Rather than dwell further on this rationale here, let us turn to the dissents to examine a contrasting approach.

The Dissents

The two dissents from Judges Wilson and Rivera comprise over 75% of the written judgement and represent powerful clarion calls for a new legal approach to nonhuman animals. Judge Wilson's dissent offers a wide-ranging and detailed exposition on the historic role of habeas corpus, the purpose of common law adjudication and the evolving place of nonhuman animals in ethics and law. It begins by lamenting the majority's conservative approach to jurisprudence:

The majority's argument—"this has never been done before"—is an argument against all progress, one that flies in the face of legal history. The correct approach is not to say, "this has never been done" and then quit, but to ask, "should this now be done even though it hasn't before, and why?"[28]

Instead, Judge Wilson suggests, the court should adopt an evolutionary approach to common law adjudication: Tempora mutantur et leges mutantur in illis (Times change and the laws change with them). Societal attitudes to animals develop over time in line with shifting ethical norms and increased knowledge about animal capacities, behaviours and needs. Here Judge Wilson notes the common law's adaptability to 'reflect new knowledge, changed beliefs and economic and social transformations'.[29] Indeed, the writ of habeas corpus itself has played a key historical role as a vehicle 'to challenge conventional laws and norms that have become outmoded or recognized to be of dubious or contested ethical soundness'.[30] Here Judge Wilson refers to habeas corpus being used to free enslaved persons, indigenous peoples, women, children and other oppressed groups at times when they had few or no legal rights afforded by positive law.

Judge Wilson then quickly dispatches with the Majority's claims about rights and the scope of habeas corpus. The claim that personhood rights are dependent on the ability to shoulder responsibilities cannot explain why children or profoundly disabled adults possess them: 'we can, and constantly do, grant rights to living beings who bear no responsibilities and may never be able to do so.'[31]

27 Majority op, at 12-13.

28 Wilson, J., dissenting op at 10-11.

29 ibid, at 56.

30 ibid, at 36.

31 ibid, at 15.

Moreover, Judge Wilson's dissent offers a detailed historical analysis of the broad array of circumstances in which habeas corpus relief has been secured through the English common law. Contrary to the majority's claim that habeas corpus relief cannot be used to transfer an individual from one form of custody to another, Judge Wilson shows that courts in both the United States and England did just that. For example, the writ has been used to transfer custody of children from one parent to another.[32]

Concerning the majority's 'slippery slope' concerns, Judge Wilson offers several points. First, he suggests concerns about a proliferation of habeas cases in relation to farm animals and pets are misplaced. All these animals are domesticated: 'In the case of domestic animals, by definition, their habitation with their owners is something aligned with their genetic dispositions'.[33] Judge Wilson is suggesting here that liberty rights should be limited to wild animals only, a position recently adopted by the Constitutional Court of Ecuador.[34]

This limiting principle is not wholly convincing on a philosophical level. Even granting domesticated animals require some form of coexistence with humans in order to thrive, they can still possess autonomous capacities[35] and there are plainly some forms of captivity that deprive them of the ability to exercise these capacities. If, as Judge Wilson points out elsewhere in his judgement, the writ of habeas corpus can be used to relocate an individual from an onerous form of confinement to a less onerous form of confinement, there is no in principle reason why it could not be used for these purposes for domesticated animals. Despite this, there may be pragmatic grounds for animal advocates to accept Judge Wilson's limiting principle here, as doing could go some way to assuage judicial concerns about 'slippery slopes'. This does not mean abandoning domesticated animals altogether of course, rather it means attempting to vindicate their rights through other legal avenues with a greater chance of success.

In addition to limiting habeas corpus to wild animals, Judge Wilson notes that 'common-law courts are especially good at developing doctrines to deal with slippery slopes'.[36] What's more, the common law determines the scope of habeas corpus incrementally, on a case-by-case basis. Allowing Happy to have a habeas corpus hearing would not automatically lead to any other animals being freed. Judge Wilson points out that the use of habeas corpus to liberate enslaved persons, women and children did not bring about the end of their second or third class statuses.[37] To draw a more direct parallel, we could point out that jurisdictions where courts have recognised the liberty rights of some nonhuman animals – for example Argentina,[38] Pakistan,[39] India[40] and Ecuador[41] - have not

32 ibid, at 17.

33 ibid, at 63. Judge Rivera agreed on this point in her separate dissent: 'Happy, as with all elephants, has not evolved to dwell alongside humans as some domesticated animals have.' Rivera, J., dissenting op at 19.

34 Re: Estrellita, Final Judgement No. 253-20-JH/22, para.137(ii) (recognising that wild animals have a right to 'freedom of movement').

35 Ironically this point was made in an amicus curie brief filed in support of the Bronx Zoo by New York Farm Bureau, The New York Dairy Producers Association, and The Northeast Agribusiness and Feed Alliance. They argue that the scientific evidence suggests that farm animals - including pigs, chickens and horses – possess self-awareness and autonomy. These amici do not think this entitles such animals to freedom of course, rather it means that animals like Happy also shouldn't be allowed freedom. See Brief Amicus Curiae of New York Farm Bureau, Et al., In Support of Respondents and Affirmance, at 12-14. https://www.nonhumanrights.org/content/uploads/NY-Farm-Bureau-amicus-brief.pdf

36 Wilson, J., dissenting op at 64.

37 ibid, at 35.

38 In re Cecilia, File No. P-72.254/15 32 (Argentina Nov. 3, 2016) (recognising a chimpanzee as a "nonhuman legal person" entitled to habeas corpus).

39 Islamabad Wildlife Mgmt. Bd. through its Chairman v. Metropolitan Corp. Islamabad through its Mayor & 4 others (W.P. No.1155/2019), 25 (Islamabad High Court Judicial Dep't, Apr. 25, 2020). (writ of mandamus to relocate an Asian elephant and other 'inmates' from the Islamabad zoo to a sanctuary on the basis that it "is a right of each animal… to live in an environment that meets [their] behavioral, social and physiological needs.")

40 People for Animals v. MD Mohazzim & Anr Crl.M.C. 2051/2015 & Crl.M.A. No. 7294/2015 (recognizing that caged birds have "a fundamental right to fly and cannot be caged" and ordered they "be set free in the sky")

41 In re Estrellita, Final Judgement No. 253-20-JH/22 (recognising an array of rights, including liberty rights, for wild animals under the Ecuadorian Constitution).

witnessed the 'parade of horribles' whose spectre haunts the majority. Nonetheless, as Judge Wilson astutely notes:

those cases did spark dialogue and change on a broader scale… The writ is a tool for society to challenge confinement, construed broadly, and can document and raise awareness of injustices that may warrant legislative, policy, or social solutions.[42]

This seems exactly correct. Whilst habeas corpus can't be used to wholly dismantle unjust social practices, it can provide relief to particular individuals who suffer as a result of them and more broadly catalyses social, legal and ethical debate about practices that sit in the grey area of a society's moral norms.

In respect of how to proceed, Judge Wilson would have recognised Happy's right to petition for her liberty before a factfinding court. That court would have first determined the merits of Happy's claim by evaluating the strength of the competing evidence offered by both the Bronx Zoo and the Petitioner about whether transferring Happy to sanctuary would be in her interests. Following this merits stage the court would then engage in:

a normative analysis that weighs the value of keeping the petitioner confined with the value of releasing the petitioner from confinement. The value of the confinement would include not just the value of the confinement to Happy (e.g., superior medical care), but also the value of the confinement to the captor and society.[43]

Here Judge Wilson echoes the ethical analysis offered in an amici curie brief submitted by Peter Singer and two other utilitarian philosophers.[44] Singer et al wrote:

According to consequentialism, the permissibility of transferring Happy to a sanctuary depends on the moral value of the outcome where Happy is confined indefinitely, compared to the moral value of the outcome where Happy is transferred to a sanctuary. The moral value of each of these outcomes is equal to the total value of the benefits to everyone who is benefited in that outcome minus the total disvalue of the harms to everyone who is harmed in that outcome. The right action is the one whose outcome has the greatest moral value.[45]

Again, some in the animal protection movement will no doubt baulk at this type of cost-benefit analysis as the basis for determining the scope of nonhuman animal entitlement. A more deontological rights-based framework would not assign any moral weight to the ill-gotten gains of exploiting or confining an innocent nonhuman animal.[46] In addition to principle-based concerns, a more practical one – shared by some utilitarians[47] – is the historic tendency of the judiciary to assign vastly greater weight to human interests in such balancing exercises.[48] Animal law is already replete with prohibitions on 'unnecessary suffering' (and cognate formulations) that require weighing the strength of human benefits against the magnitude of animal harms. Against the backdrop of a deeply speciesist social structure: 'the utilitarian balancing test at the heart of the animal welfare model always gives undue weight to human needs, no matter their purpose' and 'our privileged position invariably governs.'[49]

Despite these worries, there may yet again be a pragmatic benefit in accepting courts assuming a certain degree of flexibility in weighing competing interests in habeas corpus petitions for nonhuman animals. As the Singer brief indicates, a fair weighing of the competing interests in cases such as Happy's will likely favour the animal's

42 Wilson, J., dissenting op at 35-36.

43 ibid, 68.

44 Indeed, Judge Wilson expressly alluded to this brief in oral argument.

45 Amici Curiae Brief for Peter Singer, Gary Comstock and Adam Lerner in Support of the Appellant at 14. https://www.nonhumanrights.org/content/uploads/Peter-Singer-Gary-Comstock-and-Adam-Lerner-Amici-Brief-Filed-in-Support-of-Happy-Petition.pdf.

46 See e.g. Tom Regan, The Case for Animal Rights (California University Press 2004), 200-235.

47 See Tyler M. John and Jeff Sebo, 'Consequentialism and Nonhuman Animals' in Douglas W. Portmore (ed) The Oxford Handbook of Consequentialism (OUP 2020) 564 (defending rights-based practice in relation to animals on consequentialist grounds).

48 See Saskia Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40(3) Oxford Journal of Legal Studies 533, 550.

49 Reece v Edmonton (City), 2011 ABCA 238, [61] (Chief Justice Fraser (dissenting)).

liberty interest. Moreover, this weighing exercise occurring under the rubric of a prestigious legal remedy (it isn't called the Great Writ for nothing) of ancient pedigree would hopefully invite judges to take the interests at stake more seriously than they often have done in the application of animal welfare laws.

Judge Rivera's dissent is significantly shorter but packs an equally powerful punch. Whilst agreeing with Judge Wilson's dissent, Judge Rivera in one respect goes further: she pours scorn on the Zoo's claims that detention is in Happy's interests:

Any myth that Happy is content in this environment is laid bare by the cruel reality of her existence. Day in and day out, Happy is anything but happy. There lies the rub—Happy is an autonomous, if not physically free, being. The law has a mechanism to challenge this inherently harmful confinement, and Happy should not be denied the opportunity to pursue and obtain appropriate relief by writ of habeas corpus…[50]

She further opines that 'Captivity is anathema to Happy because of her cognitive abilities and behavioral modalities'[51] and the 'sanctuary provides the best opportunity for humans to mitigate the harm caused by Happy's captivity by allowing her to live out the remaining years of her life in a place suited to her specific needs'.[52] Based on the factual determinations of the trial court, it appears that Judge Rivera thinks the merits of Happy's case for habeas relief were already met.

Concluding Remarks

I began this comment by suggesting that the difference between the majority decision and the dissents in Nonhuman Rights Project, Inc. v. Breheny can be best understood as two counterposed frameworks: law as order and law as

50 Rivera, J., dissenting op at 3.

51 ibid at 21.

52 ibid.

justice. These two framings are in turn linked to two views of animals: as objects for human use and subjects with value of their own.

The view of animals as objects is largely reflected in the amicus curie briefs filed in support of the Bronx Zoo. These briefs were filed almost exclusively industry lobby organisations for the animal exploitation industries.[53] As a brief filed jointly by Protect the Harvest, the Alliance of Marine Mammal Parks and Aquariums, the Animal Agriculture Alliance, and the Feline Conservation Foundation put it bluntly, 'animals like Happy are personal property'.[54] Accordingly, they argue, courts may not may not create 'fresh common law' to allow for the confiscation of such property.[55] To do so would 'disrupt the legal, social and economic order'.[56] Ultimately this view prevailed in the majority opinion.

The contrasting view of animals as subjects is found in the amicus briefs filed in support of the Nonhuman Rights Project. These briefs were filed by philosophers, ethicists, civil rights lawyers, academics, theologians, retired judges and animal behaviour experts. They typically emphasise the moral salience of animal interests and the role of law in upholding justice and fairness.

In cases involving animals, the Law as Order and Animals as Objects framings are closely related. In a society based on widespread animal ownership, order favours preserving the 'property', 'object' or 'thing' status of nonhuman animals. In seeking to make incursions into this paradigm, animal lawyers have two options. The first is to emphasis Law as Justice over Law as Order as the basis for extending fundamental rights to nonhuman animals. As the dissents from Judges Wilson and Rivera show, for deeply ethically-minded and independent judges, this strategy may prove successful.

But what of judges more cautious about rocking the boat, as the majority clearly were? Can there be ways of reconciling Law as Order with Animals as Subjects? Judge Wilson's dissent offers a number of limiting principles on the use of habeas corpus for nonhuman animals. Whilst these limiting principles were not enough to assuage the majority's concerns, they ought to be seriously considered by animal advocates moving forward.

Whilst limiting principles will restrict the scope of habeas corpus's emancipatory potential for nonhuman animals this is not necessarily a reason for animal advocates to reject them out of hand. There are two reasons for this. First, habeas corpus is not the only vehicle for the protection of animals. At present it seems highly unlikely that habeas could successfully be used in relation to farmed animals for example.[57] Other legal and non-legal avenues with greater chances of success ought to be deployed to address or reduce their plight. Second, in any event, limiting principles in common law adjudication are only limiting principles as long as the courts accept them as such. As Judge Wilson highlights, the common law evolves with the times, or at least ought to. What is unimaginable today, may well be possible tomorrow. For the time being, animal advocates being able to win habeas corpus for any nonhuman animal would be an incredible step in the right direction. The Nonhuman Rights Project's slow but steady accrual of judicial acceptance suggests that day may come sooner than we think.

53 The only exception was one brief filed by Richard L Cupp, a law professor at Pepperdine University. Since 2009 – when he received a research grant from the pro-animal experiment lobby group the National Association of Biomedical Research – he has written a series of articles critiquing animal rights and animal personhood.

54 Brief of Protect the Harvest, Alliance of Marine Mammal Parks and Aquariums, Animal Agriculture Alliance, and the Feline Conservation Foundation as Amici Curiae in Support of the Respondents-Respondents at 6. https://www.nonhumanrights.org/content/uploads/Protect-the-Harvest-et-al-amici-brief-Happy-case-CoA.pdf

55 ibid at 8.

56 ibid, Index No. 45164/2018 at 3.

57 Not for any legal reason I should add, but largely due to social and economic realities.

Ivory Act 2018 (c.30) - A fresh start or the elephant in the room?

By Rob Espin, UK Centre for Animal Law

The United Kingdom's Ivory Act 2018 (the "Ivory Act") completed its entry into force on 6 June 2022. This was after three and a half years of delay since the Act received Royal Assent. Despite the delay, the introduction of the Ivory Act has been praised by conservationists and wildlife welfare advocates. Lord Zac Goldsmith (then Animal Welfare minister) even went as far as trumpeting the Ivory Act as being "world leading"[1].

Whilst no doubt positive in its intentions, the Ivory Act has already come under legal challenge and questions have arisen as to whether it will, in practice, be capable of eliminating the ivory trade in the UK.

Summary

This article will provide an overview of the substantive provisions of the Act, before analysing and explaining how robustly the legislation combats the trade of ivory in the UK.

This article:

- reviews the unsatisfactory position of UK law prior to the introduction of the Ivory Act 2018;
- explains how the Ivory Act restricts the commercial trade of elephant ivory within the UK, whilst questioning the exemptions introduced; and
- highlights problems created by the restriction of the provisions to elephant ivory only, instead of all ivory, and encourages the government to resolve these by expanding the definition of ivory to cover ivory taken from any species.

Background of the Act and Provisions

Prior to the introduction of the Ivory Act, the United Kingdom's regulation of the international trade in ivory was principally achieved through its implementation of the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (more widely known as "CITES")[2]. CITES lists elephants as "Appendix I" species, meaning all state signatories to CITES (including the UK) are obliged to effectively ban the commercial international trade of elephant ivory, with any international movement of ivory being subject to strict limitations.

These CITES restrictions did not absolutely ban the ivory trade however. Under CITES the UK did not restrict the domestic trade of ivory once it had been introduced into the country. This created a cognitive dissonance, as whilst commercial importation and exportation of ivory was prohibited, internal trade was permitted. CITES also remains subject to an exemption for hunting trophies as "personal effects" meaning persons could reimport ivory taken from Asian and African forest elephants they had killed as part of game hunting trips[3]. These shortcomings undermined the principled basis of the ban and were worsened by the decision of the states who were parties to CITES to allow certain African countries to undertake limited international trade of raw and refined ivory products in 1997 and again in 2002, resulting in new ivory entering into commercial markets.

The UK decided it wanted to go further than the limitations of CITES. When introducing the bill of what would become the Ivory Act to its second

1 "UK's world-leading ivory ban moves step closer" DEFRA and Rt Hon Lord Goldsmith, 9 March 2021

2 Post Brexit, CITES is implemented through the retention in UK law of the EU Wildlife Trade Regulation (Regulation 338/97)1 (the "WTR"). The UK has also enacted the Control of Trade in Endangered Species (Enforcement) Regulations 2018 ("COTES") which makes certain contraventions of the WTR subject to criminal penalties.

3 Article 57 Commission Regulation No 865/2006

reading in Parliament, Michael Gove MP (then the Secretary of State for Environment, Food and Rural Affairs) stated "Unless action is taken to interdict the poachers and reduce the demand for ivory, it is possible that, on our watch—on the watch of our generation—the African elephant will meet extinction… the Bill gives us in the United Kingdom an opportunity to play our part and to show leadership" [4]. 6 months later the Ivory Act received royal assent yet would only enter into legal force in the summer of 2022.

The fault for such delay was attributed by the government to several factors. The first was a failed judicial review bought by the Friends of Antique Cultural Treasures ("FACT"), a body formed to represent the interests of antique dealers and collectors[5]. Through this judicial review, FACT protested the legality of the Ivory Act on the grounds that it was contrary to the way UK implemented CITES, which permitted the trade in ivory, and that it would amount to a severe interference with fundamental rights and freedoms of those FACT represented.

The Court of Appeal eventually upheld the Ivory Act and dismissed the challenge, clearing the way for the Ivory Act to come into force. The Court of Appeal's decision was handed down in May of 2020, explaining 18 months of the delay behind the legislation coming into effect. This article will not discuss the judicial case further, given the challenge's failure and the focus on the current effectiveness of the legislation, however those who wish to read a more depth analysis are advised to read Cox's superb analysis of the decision[6].

The second reason for the delay before the Ivory Act came into force was time taken by the Department for Environment, Food and Rural Affairs ("DEFRA") to consult on and resolve a manner of implementation and impact issues. These included: (1) seeking responses from antique dealers and collectors who work with ivory as to the registration and certification system established to permit some items containing ivory to continue to be traded; (2) resolving technical issues with this system; and (3) allowing dealers and collectors a four-month grace period during which to register and certificate their permitted items.

It is understandable that the proper implementation of a blanket trading ban requires a degree of time, and that DEFRA did not wish to not capriciously criminalise those ignorant of the change. It is nevertheless regrettable that it took over three years for the Ivory Act to come into force, as during that time the UK continued as a stakeholder in the trade of a product taken from a severely persecuted species. The International Fund for Animal Welfare ("IFAW") estimates that approximately 20,000 elephants of all kinds of species are poached for ivory each year[7]. Whilst it is impossible to quantify how much of such ivory enters the UK market, it is unsatisfactory that the UK continued to play a role in an industry dependant on the hunting of such a majestic yet threatened species for so long.

Substance of the Act

The main substantial provision of the Ivory Act is relatively straight forward and section 1 provides that "dealing in ivory is prohibited"[8]. What amounts to "dealing" is given a wide definition and includes where a person: (a) buys; (b) sells; (c) hires; (d) brokers; (e) keeps for sale; (f) exports; or (g) imports ivory[9]. It is later clarified that advertising ivory also amounts to "dealing' which is prohibited[10]. Where a person breaches the prohibition or causes or facilitates someone else to breach this, the maximum penalty they can face is up to five years in prison or a fine of up to £250,000[11].

The starting breadth of the prohibition is positive in that it covers the principal ways in which ivory could enter the market into the UK. Includ-

4 Ivory Bill, Hansard, Volume 642, debated Monday 4 June 2018,

5 Friends of Antique Cultural Treasures Ltd v DEFRA [2020] EWCA Civ 649

6 The Elephant in the Courtroom: An Analysis of the United Kingdom's Ivory Act 2018, Its Path to Enactment, and Its Potential Impact on the Illegal Trade in Ivory" C. Cox, Journal of International Wildlife Law & Policy, Volume 24, 2021, Issue 2

7 "More delays to the Ivory Act 2018 cost elephants' lives" 1 February 2022, IFAW

8 S.1(1) Ivory Act

9 S.1(2) Ivory Act

10 S.1(3)(c) Ivory Act

11 Section 12(4) Ivory Act

ing advertising and brokering of ivory deals is another positive, as occasionally legislation focused on improving animal welfare does not go as so far as to prohibit the advertisement of articles which cause animal suffering [12].

Even if the prohibition is wide, it does not restrict all activity regarding ivory. One lacuna in the prohibition results from s.1(4)(a) of the Ivory act which means that persons operating from the United Kingdom who broker the purchase of ivory for sales which are entirely outside of the United Kingdom are not caught by the prohibition. This seems bizarre and frustrates the stated purpose of the ban to reduce the trade and therefore demand in ivory in order to protect elephants as an endangered species because it permits ivory trading businesses to operate within the United Kingdom as long as they only broker deals internationally. The Explanatory Notes to the Ivory Act does not explain why this exception has been made.

A further carve out from the prohibition is that it does not cover people receiving or parting with ivory as part of a gift or under a will[13]. Even if the motivation of not wanting to criminalise non-commercial activity that could see persons inadvertently commit a criminal offence by receiving ivory in cases through inheritance and other family situations is understandable, the exclusion still presents issues. It is regrettable that the government are not proposing to make a scheme available for people coming into possession of ivory to give this up for destruction as this would allow ivory to be securely taken off the market despite organisations such as IFAW demonstrating there is demand for this[14]. Moreover allowing for gifts of ivory potentially provides a smokescreen behind which commercial operators could disguise trade. It is therefore important that such risk is properly nullified by proper monitoring and enforcement of the legislation.

Exemptions

The Ivory Act then makes several important exemptions from the broad prohibition against trading to create situations in which ivory can be traded and forms of ivory which can be traded, when certain conditions are met, without risk of penalty.

Pre-1918 items of outstanding artistic value and importance

Section 2 of the Ivory Act means that the Animal and Plant Health Agency ("APHA")[15] can issue "exemption certifications" for items made of ivory if the item: (a) is pre-1918; and (b) is of "outstandingly high artistic, cultural or historical value"[16].

These exemption certifications are not automatically issued and persons holding ivory have to apply for a certificate by sending off an application to APHA containing detailed information as to why the item should be exempt and paying a fee of £250[17]. APHA then decides whether the item should receive an exemption certification, considering factors including the rarity of the item and whether it is an "important example" of a type of artefacts or antiques[18]. If an exemption certificate is granted for an item, the ivory item and the certificate should be traded together.

Pre-1918 portrait miniatures

Section 6 provides that "portrait miniatures" which meet certain requirements can be traded without penalty. The portrait miniature needs to be made before 1918 and have a surface area of no more than 320cm2.

Whilst even the government recognises that there is not a universal definition of a "portrait miniature"[19] these are most commonly tiny portraits painted on a thin sheet of ivory in the 18th and 19th centuries. Readers of this article can search online to find examples of such miniatures.

12 Cf. Glue Traps (Offences) Act 2022.

13 S1(3)(a)-(b) Ivory Act confirms that buying and selling means acquiring and disposing for valuable consideration, which would not capture gifts.

14 Above n.7

15 As the delegated national authority on behalf of the Secretary of State.

16 S.2(2) Ivory Act

17 Section 3(1) Ivory Act. The information includes the details of the owner, description and photos of the item and declarations and explanations why it is pre-1918 and of outstandingly high value.

18 Section 2(3) Ivory Act.

19 Ivory Bill, Explanatory Note, 23 May 2018, page 14, paragraphs 53-56

Pre-1947 items with low ivory content

Under Section 7 there is a wider trading exemption for items with "low ivory content", which again must satisfy certain conditions. These items must have been made before 1947 and have a volume of ivory which is less than 10% of the entire item's material and this ivory needs to be integral to the item. Integral means that the ivory could not be removed without difficulty or damaging that item[20].

Pre-1975 musical instruments

Section 8 means that some musical instruments including ivory can be traded[21]. The instruments need to have been crafted before 1975, have a volume of less than 20% ivory and to be properly registered. Qualifying instruments can also include bows for violins and plectrums for guitars[22].

Acquisitions by museums

Section 9 is the final major exemption and allows for museums to acquire ivory and to transfer ivory between museums [23]. The museums need to be recognised as accredited by the relevant governing body in the four nations of the United Kingdom and the items need to be properly registered.

Registration

For any items containing ivory to be traded under the exemptions discussed above they need to be properly registered with APHA. Persons desiring to register their items need to provide information to APHA, including certifying that it complies with the intended exemption along with paying a fee of £20[24]. If APHA agrees then the item will be registered.

Analysis of the exemptions

Any exemption to a prohibition of trading of any item, including ivory, makes it more difficult for the relevant authorities to enforce the ban. A blanket prohibition removes the need for enforcing authorities to consider whether items satisfy the requirements of any exemptions, which requires training and both time and cost resources. The Wildlife and Countryside Link ("WCL") have been consistent in highlighting that lack of specialist police training, resource and procedure is harming the detection of wildlife trade crime through contravention of CITES[25], and this is almost certain to also be the case under the Ivory Act and is worsened by the fact that many items are "covertly" sold online. Covert selling means describing ivory items without using the word ivory, instead describing them falsely under the guise of being made from legitimate material. Work by Born Free has shown that around 15% of online sales of Ivory are covert meaning a significant amount of ivory is already not being detected by online sales platforms[26].

For the exemptions specific to the Ivory Act, practical questions quickly come to mind. How should a person prove that an item was definitely made pre-1918 or that a musical instrument was crafted before 1974, for example? Certification of provenance or a date stamp may not always be available, in which case DEFRA and APHA guidance suggests verification from an expert[27].

The Ivory Act contains no required qualifications to be an "expert" however and the guidance worryingly suggests that this might include "... antiques specialists, museum curators or arts specialists...". Such persons operate with the professions who may want the trade in ivory to continue and who formed FACT to challenge the legality of the ban. There is also nothing explicit preventing such persons designating themselves as their own experts, removing another layer of independent scrutiny. It is therefore concerning that part of the approval of exemptions to the ban is entrusted to professions who are

20 Section 7(2) Ivory Act

21 Section 7(2) Ivory Act

22 Section 8(2)(b) Ivory Act

23 Section 8(2)(b) Ivory Act

24 Other information provided includes a description and photo of the item and the owner's personal details.

25 "Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales", WCL, November 2021, pages 26-29

26 "Are Ivory Sellers Lying through Their Teeth?" Born Free, 5 June 2022, page 9, paragraph 3.4

27 https://www.gov.uk/guidance/dealing-in-items-containing-ivory-or-made-of-ivory

themselves potentially self-interested in proliferating the trade.

Other parts of the exemption also rely on subjective assessments, for example whether an item is of "outstanding artistic value and importance". Whilst DEFRA and APHA have produced guidance on the criteria used for assessment[28] including referral to accredited museums, only time will prove how many of such items are granted exempted certificates and can therefore be traded, however if this is more than a low number than the impact of the ban will be watered down.

Considering that the exemptions to the ivory ban threaten the achievement of the stated goal of the legislation to combat and hopefully eliminate the ivory trade, such exemptions require strong justification. The rationale provided by the Government is that these exemptions "[do] not contribute directly or indirectly to the ongoing poaching of elephants"[29]. The Government further elaborates that this is the case where "sales of certain categories of items would not contribute either directly or indirectly to ivory poaching, and the intrinsic value of that item is not due to its ivory content"[30]. The government intends to secure this by the date restrictions of items preventing more modern ivory from being traded. Whether or not this reflects reality, it is questionable why the trade, instead of just the possession, of such items needs to be legitimised. Exemptions tied to item age implicitly legitimise the previous trade in ivory, which is a leading factor in why elephants around the world were persecuted to the extent that they are so endangered today.

Limitation to elephant ivory

Currently the Ivory Act defines Ivory as coming

28 https://www.gov.uk/guidance/ivory-apply-for-an-exemption-certificate-to-deal-in-pre-1918-outstandingly-high-artistic-cultural-or-historical-value-items

29 Above n.19 paragraph 16, page 5

30 Ibid

from the "tusk or tooth of an elephant"[31]. This is despite ivory also coming from other wildlife including hippopotamus, warthogs, orcas and narwhals. It is uncertain why the Government restricted the definition of ivory to that coming from elephants only, especially when the Explanatory Notes to the Ivory Act's expressly acknowledge not only that ivory can come from other species, but that certain of these species (namely hippopotamus, walrus, killer whale, sperm whale and narwhal) are at risk of exploitation through commercial trade[32].

Failing to include these species within the definition also implicitly legitimises the trade of ivory from such species and therefore the persecution required to take ivory from them. This is concerning considering many of these species are listed are vulnerable on the IUCN Red list. It also contradicts the government's more recent commitment to have regard to all animals as sentient beings when formulating policy through the Animal Welfare (Sentience) Act 2022[33] by permitting persons to continue to trade parts of such species killed as part of blood sports.

Even with this restriction, the Ivory Act includes provisions allowing the Secretary of State for the Environment to make additional regulations to widen the definition of what counts as ivory[34]. Exploring the option to expand the definition, DEFRA launched two initiatives, the first being a call for evidence in 2019 for experts in conservation, the ivory trade and antiques industry on the trade of "non-elephant ivory"[35]. The second was a public consultation in 2021 seeking wider views on expanding the Ivory Act to cover certain non-elephant species[36].

As of the date of this article, DEFRA are disappointingly yet to publish the results of either the call for evidence or the public consultation, over three years and one year after these initiatives closed respectively. The result of such delay means that the Ivory Act still only applies to elephant ivory. This creates an issue of enforcement agencies determining whether ivory items come from elephants and therefore whether they are prohibited or not. This presents a major issue as detailed reports from Born Free shows that of 66.9% ivory items listed for sale could not be confidently attributed to a particular species of origin and therefore could not be said to come from an elephant[37]. For the remaining 33.1% of discernible items, 19% of these came from non-elephant species[38].

The above demonstrates that there is a significant trade in non-elephant ivory that can be determined and the inability of experts to clearly identify the species from which any ivory originates presents a real risk of elephant ivory being illicitly traded in contravention of the prohibition whilst being described as coming from another species. DEFRA's call for evidence presented respondents with three options in addressing this issue, namely to (1) retain the status quo; (2) expand the definition to cover ivory from hippopotamus; or (3) expand the term to cover ivory from hippopotamus along with narwhals, killer and sperm whales and walruses. It is disappointing that DEFRA did not include an option to expand the ban to ivory from any species, as options (2) and (3) still create the problem of enforcement agencies determining between prohibited and permitted ivory, as well as failing to reflect the recognition of all animal's sentience. Such options also create the risk that species not covered by the ban suffer more poaching for their ivory because ivory from other species is banned, hence only shifting the problems between species.

31 S.37(1) Ivory Act

32 Above n.19, page 31, paragraph 135

33 Section 2(2) Animal Welfare Sentience Act 2022

34 S. 37(2) Ivory Act

35 "Call for evidence: Non-elephant ivory trade" DEFRA, May 2019

36 "Consultation on extending the Ivory Act to other species" DEFRA, July 2021

37 Above n.26, page 8 paragraph 3.3

38 Ibid

Cases, Updates & Materials

Hunting updates

Appeal

Mark Hankinson's conviction was overturned at appeal in July 2022. Hankinson, former Director of the Masters of Fox Hounds Association, was charged with intentionally encouraging or assisting others to commit an offence under the Hunting Act 2004 contrary to Section 44 of the Serious Crimes Act 2007. He was found guilty following a trial at Westminster Magistrates' Court in October 2021.

This followed a leaked training webinar produced by the Hunting Office which included Hankinson saying:

> "It's a lot easier to create a smokescreen if you've got more than one trail layer operating and that is what it is all about, trying to portray to the people watching that you're going about your legitimate business."

At the appeal hearing, Hankinson claimed he was referring to the practice of laying dummy trails to deter hunt saboteurs. Judge Gregory Perrins ruled that Hankinson's words are capable of more than one interpretation

"The respondent has argued for one particular interpretation. However, the appellant has given evidence of a different interpretation. His interpretation, namely he was referring to different ways of deterring saboteurs, is not one that lacks all credibility nor is it an interpretation we feel able to dismiss out of hand. In those circumstances, we cannot be sure to the criminal standard that the appellant intended to encourage the commission of a criminal offence. For those reasons the appeal against conviction is allowed."

Judge Perrins said: "We accept his role within the Hunting Office was to ensure compliance with the law and the Hunting Office itself is committed to lawful hunting."

He added: "In those circumstances it would be unusual if they now took the decision to host a series of webinars which included advice on how to work around the ban."[1]

Paul O' Shea

Covert footage showed O' Shea stabbing a fox multiple times with a pitchfork in December 2021. Experts said that the fox's suffering was likely to have been prolonged. In June O'Shea was sentenced for hunting a wild mammal with dogs, under the Hunting Act and causing unnecessary suffering to a protected animal under the Animal Welfare Act to an 18 week sentence suspended for 12 months at Chelmsford Magistrates Court. He was also ordered to do 200 hours of community service, banned from keeping dogs for 5 years, and pay £105 in costs. A 16 year old girl filmed with O'Shea was also charged with hunting a wild animal with dogs in relation to the filmed incident, but later the charges were discontinued.

O' Shea is thought to have had a long association with the East Essex Fox Hunt including working as one of the hunt's terrier men.

Cornish huntsman

John Lanyon Sampson hunt master of the Western Fox Hounds was in charge of hounds when they killed a pet cat on a Cornish housing estate last year. After the incident Sampson's son Edward was filmed looking throwing the dead cat over a fence into a garden.

John Sampson was found guilty of being in charge of a dog dangerously out of control in a public or private place. He was the person responsible for the hounds when they were being exercised. (A criminal damage charge was with-

1 Mark Hankinson: Top huntsman did not encourage illegal fox hunting - BBC News accessed on 05/08/2022

drawn.) Sampson was ordered to pay costs of £1,653. In April of this year Sampson challenged his conviction by appeal at Truro Crown Court. Sampson's lawyer argued that the dogs were not dangerously out of control because they did not pose a threat to humans and that humans who approached them did not fear for their safety. However, the appeal panel found that the dogs were dangerously out of control because any reasonable person would think they were due to the specific facts of the case including the distance the hounds had moved from those who had control over them and the killing of the cat. The appeal was refused. Sampson was ordered to pay £340 prosecution costs.

"The Jane Goodall Act": a multidimensional hope

By Meganne Natali

The reintroduction by the Canadian Senate of the law known as "The Jane Goodall Act"1 brings significant hope for wild animals.

Indeed, this law is articulated around a central objective, namely that of gradually prohibiting the captivity of wild animals such as elephants, primates or wild cats on Canadian territory (except in cases of superior interest of the animal). In this, it notably complements the first step taken by the Canadian Parliament in 2019, which notably prohibited any new introduction of cetaceans into the country's zoos2.

The law, named in honor of the famous naturalist who devoted her life to raising public awareness of the sentient capacities of animals, thus recognizes from its Preamble that "science, empathy and justice require us to respect the biological and ecological characteristics and needs of animals" and that, consequently, wild animals "ought not to be kept in captivity".

Hence, the law is structured according to two amendments. On the one hand, it amends the Canadian Criminal Code by prohibiting the possession and reproduction of wild animals (445.2(2)). In addition, the law prohibits all unlicensed persons from organizing shows for entertainment purposes using wild animals, going so far as to sanction persons promoting or attending such events (445.2 (4)). On the other hand, the law amends the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act by promoting a permit system intended to restrict the possibilities of reproduction of wild species held by zoos and the importation of new individuals.

In addition to these provisions, the law has also a second dimension, in that it defines an approach aimed at increasing Canada's steps to reduce the illegal trade in elephants. As such, the law provides for a total ban on the import of ivory products and elephant trophies from canned hunting organized in Africa. This provision aims strengthened international efforts to protect the last remaining wild elephant populations. The very existence of this ban illustrates the acknowledgement that such imports, exceptions to the CITES' prohibition of trade in elephants, contribute to the threat weighing on these populations and undermine the effectiveness of the norms in force.

Finally, this new law has a final dimension: that of facilitating access to justice for animal protection associations as well as for ordinary individuals (Criminal Code, 447.03). The law distinguishes in this respect the animal advocate from the defender of animals. This considering by the law of the need to ensure representation for wild animals, and to facilitate the terms and conditions thereof, greatly contributes to the improvement of the implementation of animal protection on Canadian territory. Moreover, this opening up of possibilities for representing elements of biodiversity and the environment is echoed in what is gradually being observed around the world today, particularly with regard to climate litigation. In all of its dimensions, "The Jane Goodall Act" represents a great hope for wild animals as it in line with a global legislative evolution aimed at recognizing animals and nature rights and allowing concerned citizens to defend them in justice.

Dr. Meganne Natali's PhD focused on "International Law facing Illegal Biodiversity Trade". She is deeply passionate about the need to protect the environment, improve animal welfare and promote human rights. Dr Natali is a Case Manager at the Doctoral Clinic of Interna-

tional Human Rights Law of Aix-en-Provence where she manages groups of LLM students working on cases for NGOs and institutions like the Office for the High Commissioner for Human Rights.

Legislation

Police Crime Sentencing and Courts Act 2022

The Police Crime Sentencing and Courts Act 2022 includes new measures (s.62-70) to tackle illegal hare coursing.

Hare coursing is currently prohibited under the Hunting Act 2005 along with other forms of hunting with hounds. Hare coursing, allegedly linked to other dangerous crime such as theft and criminal damage, is the practice of using dogs to chase and eventually kill hares.

This new legislation strengthens protection of hares from hare coursing by:

- Increasing the maximum penalty for trespassing in pursuit of game to maximum of six months' imprisonment and/or an unlimited fine.
- Introducing new powers to (a) award the reimbursement of kennelling costs for dogs seized in connection with hare coursing offences and (b) disqualify offenders from owning or keeping dogs.

Creating new offences of trespassing or being equipped to trespass with the intention of using a dog to search for or pursue a hare.

Animal Welfare (Sentience) Act 2022

The Animal Welfare (Sentience) Act 2022 has received Royal Asset, but will not come into force until the Secretary of State brings in regulations by statutory instrument.

Once the legislation comes into force, it will extend to England and Wales, Scotland and Northern Ireland and will require the Secretary of State to establish and maintain an Animal Sentience

Committee (ASC), which will have the power to produce a report about any government policy that is being formulated or implemented, to ensure that 'the government has all due regard to the ways in which the policy might have an adverse effect on the welfare of animals as sentient beings.' (s.2(4)).

During the course of the bill's passage, the definition of 'animal' was extended from vertebrates to also include decapod crustaceans and cephalopod molluscs.

Notwithstanding that there is still no legal duty to establish and maintain a committee, Defra is taking steps to set this up and Michael Seals has been confirmed as first chair of the ASC. Mr Seals is a former chair of the Animal Health and Welfare Board of England and the current Chairman of the Animal Medicines Training Regulatory Authority.

Glue traps (Offences) Act 2022

The Glue Traps (Offences) Act 2022 is another act that has received Royal Asset, but will not come into force until the Secretary of State brings in regulations by statutory instrument.

Once in force, the legislation will make it unlawful to set a glue trap in England for the purpose of catching a rodent or in a manner which gives rise to a risk that a rodent will be caught in a glue trap. However, no offence will be created 'if the glue trap is set under, and in accordance with the terms of, a glue trap licence.' (s.1(3)).

The legislation makes provision for the Secretary of State to grant a glue trap licence, however the nature of the licensing regime remains to be determined by secondary legislation.

Animals caught in glue traps can have horrific injuries or can tragically die due to stress, dehydration or exhaustion.

Animals (Penalty Notices) Act 2022

The Animals Penalty Notices Act 2022 received royal assent on 28 April 2022. It makes provision for penalty notices to be issued for certain offences to animals and animal products under certain legislation, including European Communities Act 1972, Dangerous Wild Animals Act 1976, Dangerous Dogs Act 1991, Zoo Licensing Act 1981, Animal Health Act 1981, Animal Welfare Act 2006 and Wild Animals in Circuses Act 2019. The legislation provides a new power to issue a fixed on-the-spot penalty notice for up to £5,000. It was discussed in the initial stages that the Animal Penalty Notices Bill was to ensure offences of non-compliance of farming and agriculture standards, some of which end in 2024 now we have left the EU did not slip through the net. The penalties were extended to include all kept animals including companion and zoo animals, as well as animal products.

It was also made clear in the discussion stages that these penalties are not appropriate for severe offences where prosecution is more appropriate. It is also recommended that advice and guidance should be given first to give an opportunity to put right the issue before penalties are issued.

Animals Abroad Bill

Heralded in DEFRA's Action Plan for Animal Welfare, the Animals Abroad Bill has not been published.

The proposed bill targeted activities in the UK driving cruel practices involving animals abroad including trophy hunting, low welfare tourist attractions involving animals and the production of fur froie gras. The action plan proposed banning the sale and advertising of low welfare animal experiences abroad and would have banned the import of foie gras, fur and certain exhibits from trophy hunts.

In November 2021 the EFRA Committee held an inquiry into the proposals.

The proposals were popular with the public with 85% of the public supporting a total ban on all species in trophy hunting, not just a ban on trophy hunting of endangered species. Bans on the import of fur and foie gras also received significant support from the public.

A ban on the sale and marketing of elephant rides from commercial outfits abroad exploiting elephants for tourism, also received high levels of public support.

Media reports suggest the bill has been dropped due to concerns that the proposals collide with personal freedom, albeit the freedom to engage in what are widely regarded as exploitative practices that would be unlawful in the UK.

Animal Welfare (Kept Animals) Bill

The Animal Welfare (Kept Animals) Bill is a government bill that brings together a number of provisions to strengthen the welfare of kept animals. This includes a ban on the keeping of primates as pets without a licence, an update to the Zoo Licensing Act 1981, the introduction of a new offence of taking a dog without lawful authority, and ending the export (subject to certain exceptions) of live animals for fattening and slaughter abroad. The legislation also contains powers to limit the import of dogs on welfare grounds to tackle puppy farming and, for example, the import of dogs with mutilated ears for commercial sale in the UK.

The Kept Animals Bill was introduced in the last parliamentary session and was carried over to the current Session, where it is due to progress to Report stage in the Commons. In order to complete its journey through parliament, the government will need to ensure that sufficient parliamentary time is allocated. A parliamentary petition (Find the time to take the Kept Animals Bill through Parliament and make it law - Petitions) urging the government to make this bill law has attracted over 75,000 signatures at the time of writing.

Games Birds (Cage Breeding) Bill

The Games Birds (Cage Breeding) Bill started in the House of Lords as a Private Members' Bill sponsored by Lord Randall of Uxbridge and received its second reading on 25 March 2022.

The bill aims to prohibit keeping pheasants or partridges in "raised laying cages" or "battery cages" for the purpose of producing eggs and introduces minimum sizes for encloses (with a requirement for a minimum of two square metres of floor space per bird).

This bill had not received Royal Assent by the

end of a session and therefore will need to be re-introduced in the next parliamentary session to stand a chance to become law.

Shark Fins Bill

The Shark Fins Bill was introduced as a Private Members' Bill in June 2022 to ban the import and export of detached shark fins, aiming to 'protect sharks against unsustainable fishing practices, with shark finning having been banned in UK waters for nearly 20 years' according to the Explanatory Memorandum Shark Fins Bill (parliament.uk).

The principles behind the bill had the support of 115,383 signatures in a petition on Parliament's website to ban British shark fin trade - The UK should ban the importation of Shark Fins. - Petitions (parliament.uk).

This bill had not received Royal Assent by the end of a session and therefore will need to be re-introduced in the next parliamentary session to stand a chance to become law.

Hen Caging (Prohibition) Bill

A Bill to prohibit the caging of commercially reared, egg-laying hens and pullets, this was introduced as a Private Members' Bill by Henry Smith MP.

This bill had not received Royal Assent by the end of a session and therefore will need to be re-introduced in the next parliamentary session to stand a chance to become law.

Genetic Technology (Precision Breeding) Bill

The Genetic Technology (Precision Breeding) Bill proposes new regulatory powers for the gene editing of plants, animals and derived products. The inclusion of animals as a subject of this proposed legislation has been met with great concern by animal advocacy groups, including Compassion in World farming (CIWF), who write: "We are deeply concerned that the Genetic Technology (Precision Breeding) Bill will give a green light to the gene editing of farmed animals to the detriment of their welfare," says Peter Stevenson OBE, our Chief Policy Advisor.
"Selective breeding has already pushed farm animals to such fast growth and high yields that many suffer from painful health problems and this new Bill is poised to make such problems much worse and will pave the way for animals to be kept in even more crowded, stressful conditions than at present.

"It is vital that the Government do not allow gene editing to be used to support an antiquated, inhumane farming system – factory farming."

Humane League granted permission for judicial review of DEFRA's fast growing broiler policy

The Humane League (represented by law firm, Advocates for Animals) has been granted permission for a judicial review of DEFRA over its failure to prevent farmers from breeding fast growing broiler chickens.

The challenge is brought on animal welfare grounds and argues that the practice of breeding fast growing genotypes contravenes the Welfare of Farmed Animals (England) Regulations 2007, which requires that "Animals may only be kept for farming purposes if it can reasonably be expected, on the basis of their genotype or phenotype, that they can be kept without any detrimental effect on their health or welfare."

The Humane League was twice denied permission to bring the judicial review, but appealed successfully to the Court of Appeal.

Landmark progress towards stronger legal protections for fish

By Jenny Canham, Campaigns & Public Affairs Specialist at Animal Equality UK

Introduction

2022 has so far seen groundbreaking progress in the journey towards better protection of fish under UK animal welfare law. We learned that the Government is considering new welfare requirements to apply to fish at the time of slaughter, in response to Animal Equality UK's investigation released in February 2021[1], which uncovered extreme and prolonged suffering of Scottish salmon due to a lack of stunning before slaughter.

Since then, Animal Equality and other animal protection organisations, including Compassion in World Farming, OneKind and The Humane League UK, have been working to ensure that new welfare requirements will be as strong as possible, and in turn, have successful achieved landmark progress for these often forgotten animals.

In February 2022, Animal Equality UK published a report with the Conservative Animal Welfare Foundation and animal protection law firm, Advocates for Animals, which makes a number of recommendations, including the case for regular inspections and mandatory CCTV in fish slaughterhouses.

Through further meetings with Government officials, Animal Equality UK secured legal progress for fish when the Scottish Government introduced mandatory inspections in fish slaughterhouses, with one visit for each major salmon company carrying out onshore processing for the first year, a move that was confirmed via a Freedom of Information request.

In July 2022, fish welfare was debated by Parliament for the first time at a unique roundtable event. The event was coordinated by the All-Party Parliamentary Group on Animal Welfare and chaired by leading veterinary expert Lord Trees, and saw Animal Equality UK, among other animal protection organisations, present the case for stronger legal protections to be made a priority to attendees including the Animal Welfare Committee; the Scottish Government; the Department for Environment, Food and Rural Affairs; and MPs.[2]

This progress for fish is a critical step for animal welfare, and could pave the way for the rest of the world to follow suit. Animal Equality UK argues that it is now critical for this progress to continue, at this vital opportunity to ensure stronger legal protection for aquatic animals.

The issue

Trillions of aquatic animals are slaughtered globally each year for human consumption. In the UK, up to 77 million fish[3] are farmed and killed each year; that's approximately 210,959 per day, 8,790 per hour.

There is an abundance of scientific evidence demonstrating that farmed fish and other aquatic animals have an ability to feel pain.

However, the UK is currently falling behind its European counterparts, with Germany, Norway, the Netherlands and others having already adopted increased legal protections for fish that

1 Animal Equality UK, 'Investigation: Scottish Salmon' <https://animalequality.org.uk/act/scottish-salmon> accessed 4 July 2022

2 The Grocer, 'Fish welfare debated by UK parliament for the first time' <https://www.thegrocer.co.uk/fish/fish-welfare-debated-by-uk-parliament-for-first-time/669594.article> accessed 1 August 2022

3 Fish Count, 'Estimated numbers of individuals in aquaculture production (FAO) of fish species (2017)' <http://fishcount.org.uk/studydatascreens2/2017/numbers-of-farmed-fish-B0-2017.php?countrysort=United%252BKingdom%252Fsort2> accessed 4 July 2022

far surpass the UK's very limited laws.

Combined with a lack of regulatory oversight of farmed fish abattoirs, the aquaculture industry is currently being left to monitor itself in the eyes of the law.

Farmed land animals have specific protections at the time of killing. Frequent inspections are a requirement in UK farms and CCTV is mandatory in slaughterhouses located in England and Scotland, and will also soon be in Wales as part of the Welsh Government's five year plan to improve animal welfare. While these laws are not without issues, legislation remains critical to ensure that animal abusers are held accountable for their crimes, and that the animals currently bred and killed by the animal agriculture industry are better protected during their short lives.

Given that aquatic animals are feeling beings - it follows that they deserve the same level of legal protections as any farmed animal on land. Without stronger animal welfare legislation protecting fish, they are likely to continue to endure extreme suffering.

Fish sentience

There is strong and growing recognition within the global scientific community that in addition to fish, cephalopods and decapods are able to experience pleasure and pain, in a manner which is directly comparable to cows, pigs, chickens and other farmed land animals who receive detailed welfare protections at the time of killing.

The Government's scientific advisory body on farmed animals, the Farm Animal Welfare Committee (now the Animal Welfare Committee) recognised in its 2014 'Opinion on the Welfare of Farmed Fish at the Time of Killing', that 'at least some species, including trout, have a sensory experience of pain' as well as 'a degree of sentience'.[4]

This is also evidenced in the European Food

4 Farm Animal Welfare Committee 'Opinion on the Welfare of Farmed Fish at the Time of Killing' (2004) 10 (33)

Safety Authority (EFSA)'s journal which acknowledges that fish have the capacity to suffer, citing a study carried out by Dr Lynne Sneddon which investigated the behavioural response in rainbow trout to nociception (the detection of painful stimuli). The study found that the behaviour of the rainbow trout 'appear to represent changes in behaviour over a prolonged period as a result of nociception.'[5]

Research in this area is continuing to grow. For example, studies have been carried out on cleaner wrasse (Labroides dimidiatus), commonly referred to as 'cleaner fish' as they pick and eat parasites off the scales and gills of other fish. While these studies are preliminary, cleaner wrasse, approximately 60 million of whom are used each year in the salmon farming industry alone[6], have been found to outperform primates in a task designed to test optimal foraging determination[7]. Cleaner wrasse are also one of only a handful of animals proven able to identify themselves in a mirror[8]. This information suggests that fish are high cognitive functioning species.

Current fish slaughter methods across the UK would be legally unacceptable under existing slaughter standards for any other species of animal killed for human consumption in the UK. Given the scientific consensus that fish are sentient and can suffer - anxiety, pain, and distress should be eliminated at every possible opportunity. By extending these same legal considerations to farmed aquatic animals, the UK can spare millions of animals from extreme and prolonged suffering at slaughter.

Current protections for fish under UK animal welfare legislation

The Animal Welfare Act (2006)[9] does apply to farmed fish, affording them some general protection against 'unnecessary suffering' (s.4) and requiring farmers to ensure their 'needs are met' (s.9).

Although this may at first appear as though UK legislation is working to protect aquatic animals, the Welfare of Farmed Animals (England) Regulations 2007[10] and equivalent legislation in Scotland[11], Wales[12] and Northern Ireland[13] provide specific obligations for those farming animals on land, yet the legislation across the UK expressly excludes fish when defining 'farmed animal' (reg.3).

Fish are included within the general protections under The Welfare of Farmed Animals at the Time of Killing (WATOK) Regulations. This means that they should be spared any avoidable pain, distress or suffering during their killing and related operations. However, fish are not included in the definition of 'animal' for the purpose of the more detailed provisions in WATOK. This means there are no specific requirements as to how they should be transported, held, stunned or killed.

In its aforementioned 'Opinion on the Welfare of Farmed Fish at the Time of Killing', FAWC advised that stunning is necessary in order to minimise the extreme suffering of fish during slaughter, by stating that 'stunning of farmed fish is necessary to remove fear, pain and distress at the time of killing.'[14]

5 European Food Safety Authority. 'General approach to fish welfare and to the concept of sentience in fish' (2009) 14 (2) <https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2009.954> accessed 15 June 2022

6 Marine Conservation Society, 'Use of Cleaner Fish in UK aquaculture: Current use, concerns and recommendations' (2021) 3 (4) <https://media.mcsuk.org/documents/Use_Of_Cleaner_Fish_in_UK_Aquaculture-_2021.pdf> accessed 1 May 2022

7 Salwiczek, L.H., Prétôt, L. & Demarta, L (2012). 'Adult cleaner wrasse outperform capuchin monkeys, chimpanzees and orang-utans in a complex foraging task derived from cleaner–client reef fish cooperation' PLoS One, 7.11: e49068

8 Kohda, M., Hotta, T., Takeyama, T., Awata, S., Tanaka, H., Asai, J. & Jordan A,L (2018) 'Cleaner wrasse pass the mark test. What are the implications for consciousness and self-awareness testing in animals?' BioRxiv: 397067

9 Animal Welfare Act 2006, s4

10 The Welfare of Animals at the Time of Killing (England) Regulations 2015, SI 2015 /1782

11 The Welfare of Farmed Animals (Scotland) Regulations 2010, s1

12 The Welfare of Farmed Animals (Wales) Regulations 2007, s1

13 Welfare of Farmed Animals (Northern Ireland) Regulations 2012, s1

14 Farm Animal Welfare Committee 'Opinion on the Welfare of Farmed Fish at the Time of Killing' (2004) 15 (67) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/

This recommendation regarding fish welfare at slaughter is important, as there are currently no legal requirements for slaughtering fish. While stunning methods are currently widely available, Animal Equality's investigation clearly shows the stunning equipment not being correctly used, leading to even more animal suffering.

FAWC's 2014 overview did not, at the time, lead to legal change. However, 2022 brings a new opportunity to ensure that the latest evidence is addressed in the form of stronger legal protections for fish, who are all too often forgotten.

How is a lack of legal guidance and enforcement currently causing fish to suffer?

Despite the lack of specific legal requirements about the method of slaughter for fish, Animal Equality's findings suggest that there is also a serious issue with enforcement as stunning is not taking place in all cases and even where it is taking place, it is not being done adequately in some instances, as identified in undercover investigative footage. Further, even though they are required, inspections are not taking place to ensure compliance with the law.

In February 2021, Animal Equality released footage captured during a covert investigation into a salmon slaughterhouse operated by The Scottish Salmon Company1. In the footage, a Baader stun-kill device is in place in the facility, which is claimed to perform 'accurate stunning and bleeding that results in immediately and irreversibly stunned fish'.[15] However despite this, the investigation revealed significant numbers of salmon showing signs of consciousness at the time of killing, as verified by world-leading aquatic animal scientists and veterinarians.

Some fish had their gills cut while still conscious, and many had to be manually clubbed to ensure adequate stunning – in one case as many as seven times. Other live fish were shown being violently thrown to the ground by workers and left to asphyxiate.

Coinciding with the release of Animal Equality's investigation, 70 world-leading aquatic animal experts, animal welfare advocates and advocacy organisations presented an open letter[16] to representatives from the Department of the Environment, Food and Rural Affairs (Defra), as well as Ministers from each of the devolved governments in Scotland, Wales and Northern Ireland. The collective urged that specific and meaningful protections be put in place for farmed fish at the time of killing (in the form of WATOK regulation). Signatories included leading academics Dr Jonathan Balcombe, Professor Culum Brown, Dr Becca Franks, Dr Lynne Sneddon and Dr John Webster, among others.

The overall consensus voices firmly that the current legal regime requires substantial improvement in order to provide adequate protection to aquatic animals.

The need for stronger enforcement

Inspections

Despite a requirement for official welfare controls, evidence shows that there are no routine welfare checks taking place within onshore fish slaughterhouses at present[17].

Without such audits, there is a clear and undeniable lack of enforcement of existing welfare regulations. This is in direct contravention of the already minimal legal requirements that exist at present.

While we would expect that welfare-oriented inspections would be overseen by the Animal Plant and Health Agency (APHA), we understand that this happens only when legal breaches or concerns are raised to APHA by the Fish Health Inspectorate (FHI), animal advocacy organisations, or other such whistleblowers. This is merely a reactionary approach. Until Animal Equality's investigative materials and this proven lack of oversight recently came to light there

file/319331/Opinion_on_the_welfare_of_farmed_fish_at_the_time_of_killing.pdf> accessed 4 May 2022

15 Baader, 'Baader 101: Harvesting solution - stunning and bleeding of salmon' <https://fish.baader.com/products/baader-101> accessed 4 May 2022

16 Animal Equality UK, 'Animal-Equality-UK-Aquatic-Animals-Open-Letter' <https://animalequality.org.uk/app/uploads/2021/02/Animal-Equality-UK-Aquatic-Animals-Open-Letter.pdf> accessed on 4 May 2022

17 Helena Horton, 'No routine checkups on welfare of fish slaughter, officials admit' The Guardian (London, 23 November 2021) 1

were seemingly no plans in place to conduct routine welfare inspections.

However, legal change has recently begun in this area. Following the launch of its investigation, Animal Equality had a series of meetings with Government officials, who later confirmed that inspections are now a legal requirement under Scottish law, from 1st February 2022.[18]

This is indeed landmark progress for fish, and has potential to spearhead progress throughout the rest of the UK, and worldwide. Animal Equality now urges the rest of the UK to follow suit by introducing regular inspections and implementing CCTV in fish slaughterhouses as a matter of urgency. This is a critical step - one of many - to ensure that the welfare of fish is held at the same level of legal priority as that of other farmed animals in legislation.

CCTV in fish slaughterhouses

In 2018, the Mandatory Use of Closed Circuit Television (CCTV) in Slaughterhouses (England) Regulations came into effect. The equivalent Scottish regulations came into play in 2021. These regulations require a duty to install and operate a CCTV system that provides a complete and clear image of killing and related operations in all areas of the slaughterhouse where live animals are present. This footage must be kept for 90 days, during which time it can be seized and inspected by the relevant authority.

In November 2021, the Welsh Government announced that it will also be implementing rules to introduce mandatory CCTV in farmed land animal slaughterhouses. Yet, there is currently no equivalent requirement for fish slaughterhouses to have this same monitoring process in place.

CCTV is not a fix-all solution, but it's an important step in the right direction that would recognise that this multi-billion-pound industry needs increased scrutiny. In the absence of investigations like Animal Equality's, it is highly unlikely that the non-compliance and severe animal suffering documented would have come to light. The UK is currently relying on animal protection groups to compensate for this oversight, when it should be the responsibility of the Government to implement adequate and critical monitoring.

Detailed requirements

The fact that there are no official detailed requirements, either in regulations or guidance, that outline the obligations of a slaughter operator at the time of killing, the industry is effectively free to carry out widespread unlawfulness as it sees fit.

If the majority of the UK aquaculture industry has already put in place the 'latest and best technology at slaughter', as industry representatives claim[19], the implementation of stunning as a legal requirement in tandem with slaughter is a necessary and obvious next step.

Animal Equality's undercover investigation shows that even where stunning is taking place, there is still a lack of skill and precision throughout the process. Detailed requirements are the very least these animals deserve, given the current extremities of their suffering.

Conclusion

The UK Government is currently considering if detailed requirements for the killing of farmed fish are required. Animal Equality argues that they very much are.

The Government has a duty to ensure that compliance is maintained and to penalise those companies which fail to meet legal standards. Animal Equality is urging the UK Government to give the health and wellbeing of fish the same scrutiny and concern in law as that of other farmed animals (albeit recognising that existing laws for land animals are also in great need of improved enforcement and heightening too).

Fish must receive species-specific, meaningful provisions in the WATOK regulations, and these regulations must include mandatory stunning.

Further, the evidence clearly shows that enforcement is a critical piece of the puzzle, and the current lack of enforcement is leading to

18 Billy Briggs, 'Inspections at fish slaughterhouses now mandatory' The Ferret (Edinburgh, 8 April 2022) 1

19 Gareth Moore, 'Survey shows public backing for new fish slaughter laws' Fish Farming Expert (Jedburgh, 22 November 2021) 15

extreme and prolonged suffering. Therefore, fish slaughterhouses across Scotland, England, Wales and Northern Ireland should be held to the same legal standard as farmed land animal abattoirs, and be subject to regular announced and unannounced inspections by the Animal, Plant and Health Agency. Landmark legal progress has already begun in this area, and Animal Equality argues that this must be continued.

Animal Equality's undercover investigation, along with those released by other animal protection organisations such as Viva! And Scamon Scotland (formerly Scottish Salmon Watch), have revealed - at the very least - a clear need for mandatory CCTV in fish slaughterhouses, with monitoring from impartial public bodies. This must be implemented as a priority, to evidence that progress is being made to afford aquatic animals the same level of protections as other farmed animals.

The report, 'The Case for regular inspections and mandatory CCTV in fish slaughterhouses' contains a comprehensive list of Animal Equality's recommendations at animalequality.org.uk.

2022 has already been a crucial year in the journey towards securing stronger legal protection for fish, and the next few months will be critical. The fact that these animals are so often forgotten makes this opportunity all the more important. Animal Equality seeks to amplify their voices and share their stories. By ensuring that fish are better protected under UK legislation, we can effectively change how these animals are viewed in this country, while setting the standard for the rest of the world to follow.

The Protection of Badgers – Where are we now?

By Hannah Darnell, Solicitor

Introduction

"The Wildlife and Countryside Act 1981 ("the 1981 Act") was a fairly simple source of wildlife law in Great Britain when it was enacted [in England, Wales and Scotland] to implement the Birds Directive and Bern Convention. But the legal picture is now more complex."[1]

Whilst originally enacted to make provision for the protection of wild birds and their habitats, the 1981 Act introduced the notion of species-specific legislation as it amended several key pieces of animal welfare legislation involving certain mammals including deer, seals and badgers, and set out what it considered to be protected wild animals.

Schedule 7 of the 1981 Act as originally enacted saw a slight tightening of the protections previously set out in the Badgers Act 1973 ("the 1973 Act") together with an increase in the penalties for badger-related crime (from £100 to £1,000 for offences excluding failing to quit land on which they had been found committing an offence under the 1973 Act) and thus legal recognition to some extent that the persecution of badgers was no longer acceptable.

Following this theme, in 1992, the Protection of Badgers Act ("the 1992 Act") received Royal Assent. The 1992 Act was viewed as a key piece of legislation in terms of badger protection law as it amalgamated the 1973 Act, the Badgers Act 1991, and the Badgers (Further Protection) Act 1991 and introduced steeper fines and the option of imprisonment for offences involving badgers and their setts in England, Wales and Scotland.

Council Directive 92/43/EEC ("the Habitats Directive") was also introduced in 1992 to "ensure the conservation of a wide range of rare, threatened or endemic animal and plant species"[2] and, although badgers did not feature therein as a specifically protected species, the Directive offered a high level of protection to natural habitats and wild fauna and flora, which meant that any activities involving badger 'management' had to be carefully considered as to whether such activities might impact directly or indirectly upon habitats or species areas protected by the Directive[3].

The Habitats Regulations 1994 implemented the species protection requirements of the Habitats Directive in Scotland. Similar but not identical Regulations were introduced in England and Wales but not until 2017 under the Conservation of Habitats and Species Regulations.

The devolution of powers in Scotland and Wales in 1998 provided an opportunity for these jurisdictions to make changes to wildlife legislation as matters concerning the environment and animal welfare became devolved issues.

Scotland took this opportunity to make changes

1 NATURESCOT, 2020. The Birds Directive and Wildlife and Countryside Act. [online]. Unknown: NatureScot. Available from https://www.nature.scot/professional-advice/protected-areas-and-species/protected-species/legal-framework/birds-directive-and-wildlife-and-countryside-act-1981#:~:text=This%20Directive%20requires%20the%20classification,habitats%20within%20the%20European%20community [Accessed 17 August 2022].

2 EUROPEAN COMMISSION, Undated. The Habitats Directive. [online]. Unknown: European Commission. Available from https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm [Accessed 18 August 2022].

3 FOOD AND ENVIRONMENT RESEARCH AGENCY, 2011. Evaluation of the Potential Consequences for Wildlife of a Badger Control Policy in England. [online]. London: UK Government. Available from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/182478/badger-control-consequences.pdf [Accessed 18 August 2022].

to the 1992 Act as it applied to badgers in Scotland through the Protection of Wild Mammals (Scotland) Act 2002 ("the 2002 Act"), the Nature Conservation (Scotland) Act 2004 ("2004 Act"), the Wildlife and Natural Environmental (Scotland) Act 2011 ("the 2011 Act") and more recently the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020.

The 2002 Act was designed to protect wild mammals from being hunted with dogs (and will imminently be amended by the Hunting with Dogs (Scotland) Act following a Bill introduced this year). The Act repealed Section 8(4) to (9) of the 1992 Act to remove exceptions for offenders interfering with badger setts during the course of hunting foxes with dogs.

The 2004 Act made it an offence to 'attempt' to kill, injure or take a badger under Section 1 of the 1992 Act, and added a 'cause or permit' offence to Section 3 to capture any person who knowingly causes or permits interference of a badger sett. The 2004 Act also amended the penalties available under the 1992 Act for certain cruelty and sett interference offences together with offences relating to the sale and possession of live badgers. It introduced imprisonment for a term not exceeding six months or a fine not exceeding Level 5 (unlimited) on the standard scale on summary conviction and imprisonment for a term not exceeding three years or to a fine or both on conviction on indictment.

The 2011 Act continued this theme and introduced 'cause or permit' offences under Sections 1 (taking, injuring or killing badgers), 2 (cruelty), 4 (the sale and possession of live badgers), and 5 (marking and ringing badgers) of the 1992 Act. The Act also increased penalties for certain offences under Sections 1 – 4 of the 1992 Act from six months' imprisonment to twelve and from a Level 5 fine to the statutory maximum.

The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 ("the 2020 Act") made further changes to the penalties available for offences under the 1992 Act and will be discussed in more depth below.

Conversely, England and Wales have made relatively few changes to the 1992 Act since its introduction. The Hunting Act 2004 repealed Section 8(4) to (9), as per the changes made in Scotland (to prevent the interference of badger setts by hunting dogs), and the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") made a slight amendment to the licensing provisions under Section 10, and to the time limits for the bringing of proceedings under Section 12 of the 1992 Act, but the penalties for badger-related offences under the 1992 Act have remained the same since its enactment.

This position supports the view of the 1992 Act's critics who maintain that the Act has failed to move with the progress of wider animal welfare and protection legislation, principally in England and Wales, over the proceeding thirty years.

This argument has gained traction following the enactment of the Animal Welfare (Sentience) Act 2022 (the "2022 Act") in England, Wales, Scotland, and Northern Ireland. The 2022 Act recognises animals as sentient beings and compels the respective governments to have "all due regard" to the ways in which any future policy might have an adverse effect on the welfare of animals in this context.

The Badger Trust has emerged as a particular critic of the 1992 Act following the recent launch of its 'PBA30' campaign[4]. The charity argues that the 1992 Act exposes badgers to weak protections and inequalities, particularly in relation to penalties for offenders, and is no longer fit for purpose.

The Trust argues that the penalties available for badger-related crime in England and Wales, considering more recent animal welfare legislation relative to domestic animals, reflect the prevailing and distinct inequality between domestic and wild animals. This will be discussed further below.

Also coming in for some criticism from commentators is the absence of a specific badger baiting offence (using dogs to fight badgers) in the 1992 Act. Rather than having all badger-related protections under one umbrella of legislation, as was originally intended for the 1992 Act, basic

4 BADGER TRUST, 2022. Protection of Badgers Act 30 Years. [online]. Unknown: Badger Trust. Available from https://www.badgertrust.org.uk/protection-of-badgers-act [Accessed 12 July 2022].

badger-related offences are covered by the Act but arguably the more serious offence of badger baiting is covered under general 'animal fights' in subsequent animal welfare legislation with no link to the 1992 Act nor specifically to badgers. To assess whether this is a valid point requires consideration of the reason that sits behind the presence of a separate offence and whether the presence of a separate piece of legislation to cover general animal fights has any impact upon the protections afforded to badgers.

Of note, there appears to be a pattern emerging in recent case law in Scotland where offences involving badger baiting or related badger offences are charged under animal welfare legislation relating to the injury caused to and/or cruelty inflicted upon the domestic animals (dogs) involved in the offences rather than for any injury, cruelty or death caused to a badger. A number of recent cases will be considered to examine this point in more depth.

Furthermore, new animal welfare legislation in Scotland distinguishes between attributable penalties depending upon whether the charge(s) are to be heard on summary or solemn procedure, and there appears to be a reluctance for badger-related offences to be heard in higher courts as demonstrated by the case of Callum Muir explored below. This case indicates that badger-related crime is not deemed sufficiently serious to be heard in higher courts and this creates difficulties when it comes to the imposition of increased sentencing powers available in Scotland.

This article is not intended to be a deep dive into the 1992 Act and its purported deficiencies, but rather a glance at where badger protection now sits in the UK, a touch upon some of its main criticisms, and the identification of trends relating to badger crime in criminal practice in Scotland.

The Current Position

Consolidating the prior badger protection legislation, the 1992 Act generally creates offences in relation to the taking, injuring or killing of badgers; badger cruelty; interfering with badger setts; selling and possessing live badgers; and marking and ringing badgers without a licence. There are a number of exceptions to the offences and a licensing scheme exists to legitimise certain activities which would otherwise be illegal under the Act, such as taking or killing a badger or interfering with a sett for the purpose of preventing the spread of disease or serious damage to land, crops, poultry, or other property. There are, of course, opponents to these exceptions and the activities permitted to take place under licence, and it will be interesting to understand how these sit with the 2022 Act in terms of animal sentience moving forward.

Penalties - England & Wales

Concentrating first on penalties under the 1992 Act in England and Wales, where an offence has been committed which involves the wilful killing, injuring, or taking of a badger, or being in possession or control of a dead badger, a badger cruelty offence or interfering with a badger sett, the offender may be liable to a period of imprisonment not exceeding six months or a fine not exceeding Level 5 of the standard scale (unlimited).

Imprisonment is not an optional disposal for offences relating to the sale and possession of live badgers, marking and ringing without licence, failing to comply with conditions of a granted licence or with a dog destruction or disqualification order related to badger offences, which come with a fine not exceeding Level 5 of the standard scale only. Wilfully remaining on land when asked to leave following the commission of an offence imposes a fine not exceeding Level 3 of the standard scale (£1,000).

As noted above, the Wildlife and Countryside Act 1981 ("the 1981 Act") offered some protection for badgers with a slight tightening of penalties from the 1973 Act, however, in its current form, the offences covered by the Act are narrow and only cover certain prohibited methods of killing or taking wild animals (including badgers) with restrictions on certain types of snares and traps. An offender convicted of any of these offences may be liable to a period of imprisonment not exceeding six months or to a fine not exceeding Level 5 of the standard scale (unlimited), or to both.

The Animal Welfare (Sentencing) Act 2021 ("the 2021 Act") was enacted in England and Wales in

April 2021 to make provision about the mode of trial and maximum penalties for certain offences under the Animal Welfare Act 2006 ("the 2006 Act").

The 2021 Act increased the maximum penalties for offences under Sections 4, 5, 6(1) and (2), 7 and 8 of the 2006 Act which relate to the animal welfare offences of unnecessary suffering, mutilation, tail docking, poisoning and animal fighting.

The Act increased the maximum penalties for these offences to allow for a period of imprisonment of up to five years to be imposed. This followed a number of cases related to these offences in which judges expressed a desire to impose a higher penalty than that which the 2006 Act provided for. There was a particular desire to increase the penalties available in the case of crimes that related to deliberate, calculating and sadistic behaviour.[5]

Whilst the 2006 Act is designed to apply to all vertebrates other than man, there is a perception that Sections 4, 5, 6(1) and (2), 7 and 8 protect only domestic (companion) animals and thus the increased penalties under the 2021 Act are not designed to protect 'all animals'.

There is some truth in this argument as Section 4 (unnecessary suffering) makes provision for a 'protected animal' under Section 4(1) and for all other animals captured by the definition (vertebrates other than man) under Section 4(2), however, the wording of Section 4(2) is such that the offender must have been 'responsible' for the animal.

Sections 5 and 7 of the 2006 Act cover mutilation and poisoning, and the same scenario applies under Sections 5(2) and 7(2) respectively that the offender must have been 'responsible' for the animal which has been mutilated or poisoned. Section 6 covers tail docking and applies only to dogs. Section 8 of the 2006 Act covers animal fights and is discussed in more depth below.

It is understood that responsibility for an animal is only intended to arise where a person can be said to have assumed responsibility for its day-to-day care or for its care for a specific purpose or by virtue of owning it[6], which indicates that the animal involved will be domesticated. Whilst this will include a person who assumes responsibility for the animal temporarily, which could include a wild animal, the intention for this was to cover veterinary surgeons taking responsibility for animals kept in surgeries overnight, staff at boarding premises, staff at animal sanctuaries, for example. It may be that a wild animal trapped by an offender could be in his responsibility temporarily although it does appear that the provisions of the Act were not intended to cover this particular scenario.

It is, therefore, understandable that the Badger Trust feels that there is inequality between sentencing options available for domestic and non-domestic animals, indeed, in its 'Nature recovery green paper: protected sites and species'[7], DEFRA commented upon the differences in the penalties set out across various pieces of legislation and suggested that minimum penalties for wildlife and poaching offences should be harmonised across all wildlife provisions to ensure the protection of all species and "should be comparable to those recently introduced for animal welfare offences."

Scotland

The position in Scotland in relation to penalties varies slightly following amendment by subsequent pieces of legislation as alluded to above.

The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 ("the 2020 Act" - enacted on 21 July 2020) amended the 1992 Act by revising the penalties for badger-related

5 LEGISLATION.GOV.UK, 2021. Animal Welfare (Sentencing) Act 2021: Policy Background. [online]. Unknown: The National Archives. Available from: www.legislation.gov.uk/ukpga/2021/21/notes/division/3/index.htm [Accessed 18 August 2022].

6 LEGISLATION.GOV.UK, Unknown. Animal Welfare Act 2006: Prevention of Harm. [online]. Unknown: The National Archives. Available from https://www.legislation.gov.uk/ukpga/2006/45/notes/division/7/2/5 [Accessed 18 August 2022].

7 DEPARTMENT OF ENVIRONMENT FOOD & RURAL AFFAIRS (DEFRA), 2022. Nature Recovery Green Paper: Protected Sites and Species. [online]. Unknown: DEFRA. Available from https://consult.defra.gov.uk/nature-recovery-green-paper/nature-recovery-green-paper/supporting_documents/Nature%20Recovery%20Green%20Paper%20Consultation%20%20Protected%20Sites%20and%20Species.pdf [Accessed 18 August 2022].

crime to give courts in Scotland more options in terms of disposal.

Penalties for the cruelty offences of using a firearm to kill or take a badger (and the associated 'cause or permit' offence introduced by the Wildlife and Natural Environment (Scotland) Act 2011 ("the 2011 Act") and sett disturbance offences on summary conviction were increased from imprisonment for a term not exceeding six months or a fine not exceeding Level 5 on the standard scale (unlimited) to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both. The effect being that the specific cruelty offences and the sett disturbance offences remain triable under summary procedure only but are subject to the higher maximum penalties.

Penalties for wilfully killing, injuring or taking a badger together with the associated 'cause or permit' offence introduced by the 2011 Act, along with certain cruelty offences (cruel ill treatment, the use of badger tongs in the course of killing, taking or attempting to kill or take a badger, and digging for a badger and the associated 'cause or permit' offence) increased (from imprisonment for a term not exceeding twelve months or a fine not exceeding the statutory maximum or both and on conviction on indictment for a term not exceeding three years or to a fine or both) to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both on summary conviction, and to imprisonment for a term not exceeding five years or to a fine or both on conviction on indictment. The effect being that such offences are triable under summary or solemn procedure and subject to the higher maximum penalties.

There is also some protection for badgers under Section 23 of the Animal Health and Welfare (Scotland) Act 2006, which is considered in more depth below, and the Hunting with Dogs (Scotland) Bill intends to further restrict the ability to hunt wild mammals (including badgers) using dogs. The Bill is currently at Stage 1 moving to Stage 2 within the Scottish Parliament.

Northern Ireland

By comparison, Northern Ireland is not covered by the 1992 Act and badgers and their setts are instead protected under the Wildlife (Northern Ireland) Order 1985 ("the 1985 Order"), as amended by the Wildlife and Natural Environment Act (Northern Ireland) 2011; the provisions of which sit on similar terms to those of the 1992 Act. Penalties for offences on summary conviction are imprisonment for a term not exceeding six months, or to a fine not exceeding Level 5 (unlimited) on the standard scale or both.

The case of DPP v Edens (Edwards) from 2014[8] is an interesting read as the Director of Public Prosecutions in Northern Ireland attempted to amend a charge laid under the 1992 Act to an offence under the 1985 Order in relation to an offence of sett interference seven months after being first proffered but it was felt that there was no direct Northern Ireland equivalent of the offences libelled under the 1992 Act and that, notwithstanding that the amendment fell outside of a statutory time limit for offences under the 1985 Order, it would be inappropriate to amend the charges to one under the 1985 Order in the interests of justice.

Animal Fighting

Turning now to the absence of a specific badger baiting offence (use of dogs to fight badgers) in the 1992 Act, which has been mooted as another criticism when considering whether the Act remains fit for purpose.

The 1992 Act makes no specific provision in England, Wales or Scotland for animal fights involving badgers, referred to as 'badger baiting', yet baiting remains a significant threat to badgers across the UK. Sett interference and baiting accounted for 70.28% of all reports made to the UK Badger Persecution Priority Delivery Group (BPPDG) in 2019/2020[9]. This was an increase from 2018 statistics.

Reports received by the Badger Trust[10] demon-

8 DPP v Edens (Edward). 2014. NICA 55.

9 NATUREWATCH FOUNDATION, 2021. What is Badger Baiting. [online]. Unknown: Naturewatch Foundation. Available from https://naturewatch.org/campaigns/wildlife-crime/what-is-badger-baiting/ [Accessed 8 August 2022].

10 WILDLIFE AND COUNTRYSIDE LINK, 2021. Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales. [online]. Unknown: Wildlife and Countryside Link. Available from https://www.wcl.

strate that there was an increase of 52% in reports of badger baiting and fighting between 2019 and 2020.

Badger crime has been a UK Wildlife Crime Priority since 2009 and featured in the NPCC Wildlife Crime Strategy 2018 – 2021. It is one of the priorities currently being considered for notifiable status by the Home Office[11]; a move which is supported by the Badger Trust to allow for the true level of associated crimes to be accurately assessed, reported and tackled.

As mentioned above, animal fights in England and Wales are covered under Section 8 of the Animal Welfare Act 2006 ("2006 Act") and in Scotland under Section 23 of the Animal Health and Welfare (Scotland) Act 2006.

In both pieces of legislation, "animal fights" are defined as "an occasion on which a protected animal is placed with an animal or with a human for the purpose of fighting, wrestling or baiting." A protected animal includes any animal under the control of man, whether on a permanent or temporary basis. As a result, it appears that a person commits an offence in relation to an animal fight even if there is no one who is responsible for the animal or animals involved within the meaning of Section 3 of the Act (responsibility for animals)[12] , and this would appear to cover the eventuality of a badger being trapped by an offender temporarily in readiness to fight.

In any case, as an animal for the purposes of the 2006 Acts is defined as a vertebrate other than man, the animal that a 'protected animal' is

org.uk/docs/WCL_Wildlife_Crime_Report_Nov_21.pdf [Accessed 18 August 2022].

11 WILDLIFE AND COUNTRYSIDE LINK, 2021. Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales. [online]. Unknown: Wildlife and Countryside Link. Available from https://www.wcl.org.uk/docs/WCL_Wildlife_Crime_Report_Nov_21.pdf [Accessed 18 August 2022].

12 LEGISLATION.GOV.UK, Unknown. Animal Welfare Act 2006: Prevention of Harm. [online]. Unknown: The National Archives. Available from https://www.legislation.gov.uk/ukpga/2006/45/notes/division/7/2/5 [Accessed 18 August 2022].

forced to fight can be any vertebrate, i.e including a badger, although this is not specified in the legislation and there is no direct link to the 1992 Act.

Both of the 2006 Acts cover the keeping or training of an animal (i.e. any vertebrate) for the purpose of animal fights and include possessing equipment designed or adapted for use at an animal fight; causing or arranging a fight; participating in making or carrying out arrangements for a fight; making or accepting a bet on the outcome of the fight; and being present at a fight without lawful authority or reasonable excuse. The Scotland Act, however, creates various offences relating to the video recording of such fights. The sections of the Act in England and Wales relating to the video recording of such fights are not currently in force.

The penalties for animal fights in Scotland under the Animal Health and Welfare (Scotland) Act 2006 were increased by the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020. Offenders can now be sentenced on summary conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding £20,000, or both, or on conviction on indictment to imprisonment for a term not exceeding five years or a fine, or both. It is interesting to note that the potential financial penalty for animal fights on summary conviction in Scotland is half of what is now available on summary conviction for most other badger-related offences under the 1992 Act.

The penalties under the Animal Welfare Act 2006 for animal fights in England and Wales are largely the same although no maximum fine upon summary conviction is given in England and Wales.

Both Welfare Acts, however, offer post-conviction deprivation and disqualification orders in respect of any animal to which the offence relates, which can be for any period as the convicting court sees fit.

On the face of it, these would appear to be useful tools in potentially preventing the reoccurrence of animal fighting offences by depriving the offender of the dog(s) used in the commission of the offences and/or disqualifying them from owning dogs for a period of time, however, case law in England, indicates practical difficulties with the enforcement of these orders, which suggests that individuals subject to disqualification orders are still able to be in close proximity to animals which may allow them to continue offending in this manner.[13] See Patterson[14] and R v Guildford Crown Court[15]

It is not known how often such orders are applied in cases under the 2006 Acts, however, it is worthy of note that the legislation states where a person is convicted of a relevant offence, the convicting court "may" make an order, thus the court has some discretion as to whether they apply such an order or not. If, however, the court decides not to make an order, it must specify its reasons for reaching this decision, which adds some accountability.

By comparison, animal fights in Northern Ireland are covered under Section 8 of the Welfare of Animals Act (Northern Ireland) 2011 which includes offences relating to video recording and the possession of other imagery of animal fights.

The Welfare of Animals Act (Northern Ireland) 2011 was amended by the Justice Act (Northern Ireland) 2016 to increase the maximum penalties in Northern Ireland in respect of animal fight offences, although excluded offences relating to recording such fights. Consequently, penalties for involvement in animal fights were increased to imprisonment for a term not exceeding twelve months or to a fine not exceeding £20,000 or both on summary conviction, and to imprisonment for a term not exceeding five years or to a fine or both on conviction on indictment.

Practical Examples

Recent cases in Scotland indicate that whilst offences involving badger baiting are being charged as animal fighting offences under the

13 HAILS, D., 2020. A Critical Analysis and Suggested Reform of Sentencing and Disqualification Orders under the Animal Welfare Act 2006. [online]. Dissertation, Northumbria University, Newcastle. Available from: 1114-Article%20Text-3479-1-10-20210304.pdf [Accessed 18 August 2022].

14 Patterson v Royal Society for the Prevention of Cruelty to Animals (RSPCA). 2013. EWHC 4531 (Admin).

15 R (on the application of RSPCA) v Guildford Crown Court. 2012. EWHC 3392 (Admin).

2006 Act, there appears to be more focus upon the injury and/or cruelty to the dogs involved in the offences rather than on the injury to, cruelty of and often death caused to the badgers.

Furthermore, as penalties in Scotland distinguish between whether the charge(s) is/are to be heard on summary or solemn procedure, it appears to be the case that there is some reluctance amongst prosecutors for badger-related offences to be heard in higher courts thus diminishing the impact of increased sentencing powers.

On 1 August 2022, a gamekeeper from the Millden Estate in Glenesk in the Angus Glens was sentenced at Forfar Sheriff Court to eight months' imprisonment in connection with a series of offences which took place between January 2018 and October 2019 (pre-enactment of the 2020 Act which offers increased penalties).

Rhys Owen Davies was charged under Section 23(1) of the Animal Health and Welfare (Scotland) Act 2006 ("the 2006 Act") with keeping five dogs for the purpose of animal fights.

Davies was also charged with causing unnecessary suffering under Section 19 of the 2006 Act by failing to obtain veterinary treatment for two dogs who had been badly injured during the fights, and with separate firearms offences relating to the improper storage of firearms and ammunition[16].

Despite badger DNA being found on a locator collar (indicative of badger baiting) following forensic examination and photo albums showing images linked to badger digging with the accused clearly identified therein, specific charges under the 1992 Act were not apparently brought, and the focus of the charges was upon the keeping of dogs for the purpose of animal fights and suffering to the dogs as a consequence thereof.

As in the Davies' case, in 2021 at Banff Sheriff Court, Liam Taylor was charged under the 2006 Act with causing unnecessary suffering to his dog and with offences relating to animal fights. The crimes pre-dated the increased penalties for badger-related offences and the offender received a Community Payback Order requiring him to be supervised for a twelve-month period, to carry out 240 hours of unpaid work and a ten-year dog disqualification order[17].

In May this year, Callum Muir was sentenced at Ayr Sheriff Court to six months' imprisonment and a disqualification order under the 2006 Act for offences relating to animal fights. Locator collars used to track dogs when underground in badger setts were seized from the offender along with nets for catching wild animals when they bolt from their den[18]. The evidence was analysed, and badger DNA (along with fox DNA) was found thereon.

The offences came to light in April 2021 and were described as some of the worst the Scottish SPCA had encountered, however, the increased penalties available as a consequence of the 2020 Act were restricted as the case was heard on summary procedure rather than on solemn. This meant that the Sheriff was only able to sentence a maximum of twelve months' imprisonment and was obliged to deduct a percentage of that sentence for a guilty plea. He was, however, disqualified from owning dogs for life. It is said that the matter was not raised to the higher court as the offences were not deemed to be sufficiently serious[19].

This is a concerning position as there is no benchmark as to what would be considered by a Procurator Fiscal (in Scotland) to be "sufficiently serious" in order to raise the matter to a higher

16 STEWART, A., 2022. Wildlife Detective: Millden Estate keeper jailed – some thoughts. [online]. Unknown: Alan Stewart. Available from: https://wildlifedetective.wordpress.com/page/2/ [Accessed 2 August 2022].

17 MCCARTNEY, S., 2022. Man banned from owning dogs after injured pet trained for animal fighting. [online]. Unknown: The Scotsman. Available from: https://www.scotsman.com/news/crime/man-banned-from-owning-dogs-after-injured-pet-trained-for-animal-fighting-3444107 [Accessed 2 August 2022].

18 SCOTTISH SPCA, 2022. Animal fighter who laughed as wild animals were torn apart jailed. [online]. Scotland: Publisher Scottish SPCA. Available from https://www.scottishspca.org/news/image-warning-animal-fighter-who-laughed-as-wild-animals-were-torn-apart-jailed [Accessed 2 August 2022].

19 MCGIVERN, M., WILLIAMS, K., 2022. Sadistic badger baiter filmed dogs ripping wild animals apart in sickening videos. [online]. Unknown: The Mirror. Available from https://www.mirror.co.uk/news/uk-news/sadistic-badger-baiter-filmed-dogs-27052964 [Accessed 2 August 2022].

court. If the Scottish SPCA believes the actions of Muir to have been some of the worst they have encountered, it is unclear what might prompt a prosecutor to view offences such as this as suitable for solemn procedure. It appears to remain the case that crimes involving human detriment continue to be prioritised over animal-related crimes, despite the well-documented link between cruelty to animals and violence towards humans[20]. It also causes issues in terms of the new sentencing powers under the 2020 Act as it means that the penalties available on solemn procedure are inaccessible.

The 2006 Acts are the legislation of choice for animal fighting offences not simply because they are the correct pieces of legislation for animal fights as matters currently stand but also because in animal fighting cases, there tends to be injury caused to the dog(s) involved and charges relating to the unnecessary suffering of the dogs can be brought under the same Act. As already mentioned, there are also post-conviction orders which can be considered as a means of deterrent, despite the potential inadequacies surrounding enforcement as highlighted above, but some commentators argue that badger baiting should be given recognition in its own right and should be included under the 1992 Act.

If dogs were not involved and the offences related simply to badger crime, the 1992 Act would have to be used and it appears that there may be a reluctance across England, Wales and Scotland to take on badger-related crimes where domestic animals are not involved.

Considering this point further, it is understood that in England and Wales whilst some incidents of badger crime which are referred to the police for investigation are dealt with effectively, sometimes the level of investigation fails to reach an expected reasonable standard. Additionally, there appears to be difficulties with the lack of available and rapid access to competent or expert witnesses. It is said that cases involving badger crime in England are heavily contested by defence agents with duty Crown Prosecution Service lawyers having little to no knowledge of wildlife crime.[21]

In Scotland, there is a team contained within the Crown Office and Procurator Fiscal Service who concentrate solely on wildlife-related crime; however, convictions rely upon the police suitably investigating and charging offenders and, despite the evolution of specialist Wildlife Crime Liaison Officers, there are still challenges in terms of resources for investigating and reporting offenders for badger-related crimes. It is understood that there is a current focus upon wildlife crime in Scotland as a consequence of its affiliations with serious and organised crime and it is hoped that this will result in more badger-related crimes reaching court, and preferably higher courts at that.

Conclusion

At the very least, there are cross-jurisdiction irregularities in penalties available for badger-related offences under the 1992 Act and at its worst, there is something of a disconnect between the 1992 Act and subsequent animal welfare legislation, which appears to fall in favour of domestic animals.

Perhaps it is a matter of evidence as some commentators argue and it is easier to support a charge under the Welfare Acts due to the involvement of dogs, or perhaps it is a consequence of the well-documented speciesism between domestic and non-domestic animals where it is viewed by many as more shocking to see injury to a domestic animal than it is to an animal in the wild. The fact that DEFRA appears to have identified this inequality in its recent consultation (as referred to above) indicates that this is an issue which should be overturned across all animal welfare legislation, particularly in light of the Animal Welfare (Sentience) Act 2022.

Regardless of the reasoning, the facts highlight the inadequacies in badger protection legislation and the failings of the 1992 Act as the primary piece of legislation designed to offer such protection.

Having recently celebrated thirty years since its enactment, it appears that now would be a suit-

20 See https://www.hiddeninsight.org/the-link

21 WILDLIFE AND COUNTRYSIDE LINK, 2021. Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales. [online]. Unknown: Wildlife and Countryside Link. Available from https://www.wcl.org.uk/docs/WCL_Wildlife_Crime_Report_Nov_21.pdf [Accessed 18 August 2022].

able time to revisit the 1992 Act to ensure that, in light of the legal recognition of animal sentience, increased penalties for domestic animals, and no sign of declining badger-related crime, this Act can still achieve its intended purpose: the protection of badgers.

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On the history and legacy of the Grammont Act, France's first animal protection law

By Ilyana Aït Ahmed & Irina Jameron

I - Animal Law in France Before the Grammont Act

This year marks the bicentennial of the Cruel Treatment of Cattle Act of 1822, known as the Martin's Act, Britain's first animal protection law.[1] The celebration of this anniversary brings the opportunity to reflect upon the history of animal law throughout Europe, and in particular, this essay examines the French analogue of the Martin's Act, the Grammont Act (Loi Grammont).

The Grammont Act owes its name to General Jacques Delmas de Grammont (1796 - 1862), a Member of Parliament in the French Second Republic. As a soldier, de Grammont became horrified by the suffering of war horses, and later, by the abusive treatment of carriage horses in the street. This poor treatment of animals that de Grammont witnessed inspired his ground-breaking efforts against animal cruelty. And though he still presided over bullfights in Bayonne, de Grammont's views on animal protection were progressive for his time, leading to notable improvements.

The first national law on animal protection in the modern French legal system, the Grammont Act, adopted July 2, 1850, criminalised abusive treatment of domestic animals in the public sphere. Prior to this Act in France, the United Kingdom had already passed their first animal protection law, the Martin's Act of 1822, subsequently replaced by the Cruelty to Animals Act of 1849. The Martin's Act criminalised the mistreatment of domestic animals, and the practice of animal fighting, with the penalty of a fine or imprisonment. The Martin's Act prohibited the beating, mistreatment, or avoidable suffering of the following animals: horses, mares, geldings, mules, asses, oxen, cows, heifers, steers, sheep, or other cattle.

Although this Act only outlawed cruelty against animals, and did not address animals' general welfare, the Martin's Act provided a model for animal advocates in neighbouring jurisdictions to follow. In France, the Legislature was relatively behind the UK in the passage of early animal welfare laws, while still making some modest progress. As an example of such progress, an 1843 Paris city ordinance prohibited the hitting of horses with the handle of a whip.[2] Moreover, the French Animal Protection Society (La Société Protectrice des Animaux - SPA) was created two years later, in 1845. Following the enactment of the Grammont Act, de Grammont was named as the head of the SPA,[3] though the record shows he does not appear to have been very active, subsequently, in the organisation.

II - The Enactment of the Grammont Act

The next foundational moment for animal protection in France came in 1850, when the National Assembly–the equivalent of the House of Commons in the UK–took up the question of animal cruelty. The composition of the chamber, elected in May 1849, following the peasant uprisings of June 1848, was very conservative.[4] The National Assembly voted for the Grammont Act in 1850, in this political context between rural communities and the government, and with a small majority of votes. The fact that the Legislature back then was more concerned with regaining social control over rural communities

1 https://www.martinsact200.co.uk/

2 https://www.leparisien.fr/societe/spa-qui-etait-le-general-grammont-premier-defenseur-des-animaux-06-10-2019-8167017.php

3 Ibid.

4 Ibid.

than expressing empathy for animals largely explains the limitations of the Grammont Act.[5]

The reasons for the adoption of the Grammont Act were multiple. De Grammont first argued that abused animals were less productive, and that a law protecting animals could result in improved economic prospects. Secondly, de Grammont argued that the mistreatment of animals could contribute to the spread of diseases. And lastly, de Grammont argued that condemning brutality towards animals would have a positive impact on society as a whole, since it would improve morality by punishing violent behaviour.[6] Penalising cruelty towards animals was a form of social regulation, as a general opinion at the time was that compassion towards animals was synonymous with complying with social norms.[7]

De Grammont's proposal was to punish any person who abused animals in public or in private, and he provided a specific list of examples of animal abuse. However, an amendment by a Member of the National Assembly, M. Desfontaines, reduced the scope of the Act by penalising animal abuse committed in public only, which preserved the rights of owners to use and abuse their property in private,[8] while safeguarding human witnesses from the sight of such cruelty.[9]

As it was finally adopted in 1850, the text of the Grammont Act states: 'Those who have exerted public and abusive mistreatments towards domestic animals shall be punished with a fine from five to 15 francs, and violators may be subject to jail time of one to five days. The penalty of imprisonment will always be applied in cases of multiple offences. Article 483 of the Penal Code will always be applicable' (translated by the authors).

The penalties for animal abuse provided under the Grammont Act applied under three conditions. First, wrongdoing must include abusive treatment of a domestic animal. In this regard, the Grammont Act did not target the frequency of the mistreatment but only its intensity and excessiveness. Second, the mistreatment had to have been carried out in public. Finally, for the law to apply, the perpetrator of the abusive treatment had to have been the animal's owner, or a person entrusted with the custody of the animal on a permanent or temporary basis.[10] This Act had numerous shortcomings. The terms employed were too vague to enforce its application. For example, the word 'ceux', which refers to 'those' who commit public and abusive mistreatments, was not precise enough; shortly, judges considered that the Grammont Act could only penalise animals' owners or keepers.[11]

However, the passage of this act was still a milestone in the fight for animal protection in France. Even though the Grammont Act did not improve animal welfare in a significant way, the Act nevertheless established special treatment for animals, treatment different from that of mere property. Before the Grammont Act, the French criminal code punished animal abuse but only under the condition that the abuse had caused economic damage to the animal's owner, to the same extent that destruction of property was criminalised by the law. The Grammont Act recognised, for the first time, that animals are a specific class of property, by considering acts of cruelty towards domestic animals to be harmful to animals themselves, apart from considerations about the animals' economic value.

III – Enforcement Challenges

A first enforcement challenge of the Grammont Act was that animal abuse typically occurred out of the police's sight.[12] A second issue was that

5 Pierre, Éric. « Réformer les relations entre les hommes et les animaux : fonction et usages de la loi Grammont en France (1850-1914) », Déviance et Société, vol. 31, no. 1, 2007, pp. 65-76.

6 https://hal-unilim.archives-ouvertes.fr/hal-00815448/document

7 https://www.radiofrance.fr/franceculture/podcasts/la-transition/proteger-les-animaux-pour-se-proteger-soi-meme-9385716

8 https://www.leparisien.fr/societe/spa-qui-etait-le-general-grammont-premier-defenseur-des-animaux-06-10-2019-8167017.php

9 André, De la protection des animaux, 1899, Faculté de droit de l'Université de Paris Hesse, p. 90.

10 André, De la protection des animaux, 1899, Faculté de droit de l'Université de Paris Hesse, p. 118.

11 https://hal-unilim.archives-ouvertes.fr/hal-00815448/document

12 André, De la protection des animaux, 1899, Faculté de droit de l'Université de Paris Hesse, p. 121.

the police limited the enforcement of the Grammont Act mainly to Paris and other big cities of France[13]. In the three years following the enactment of the Grammont Act, 43% of the violations of the Act were recorded in Paris,[14] suggesting that the Act was under-enforced in the rest of the country.[15]

Moreover, bullfighting organisers never complied with the Grammont Act. Spanish-style bullfighting, which involves the stabbing and killing of bulls, and sometimes the killing of horses, was introduced for the first time in France at the beginning of the Second Empire (1852-1870). This type of spectacle increased in popularity in the latter half of the 19th century in France and started to expand north. Bullfights were so lucrative that fines were not a deterrent, so the bullfight organisers preferred to pay modest fines rather than cancel their events. At the end of the 1890's, when brought before the courts for violating the Grammont Act, proponents of bullfighting argued that arenas are not public spaces; that horses and bulls involved in the show did not suffer abusive mistreatment; that bulls, not humans, were responsible for the deaths of horses; and that bulls were not domestic animals. The judges sided with bullfighting organisers.

In 1894, however, the Minister of Justice challenged bullfighting before the Court of Cassation, which finally declared bullfighting illegal under Grammont Act. Despite multiple similar decisions taken by the highest court ruling on the unlawfulness of bullfighting in France, local district courts in the south of France still sided with the defendants and bullfighting continued.[16]

In practice, French courts had broad discretion in applying the Grammont Act. In several cases, judges did not punish certain actions that seemed to correspond to the definition of domestic animal abuse. For instance, on November 10, 1860, the Court of Cassation–the highest court in France–sided with a defendant who had publicly beaten and injured a horse with a pitchfork. The court found the defendant innocent, justifying their decision on the grounds that the injury the horse had sustained was minor and that the horse was disobeying when it was beaten.[17]

III - Animal Law After the Grammont Act

Over time, the animal protection movement in France won more victories. In 1881, the Secretary of Instruction, Jules Ferry, agreed to display 30,000 posters for the SPA, paid through the Ministry of Education's budget, in all public schools in France.[18]

In 1959, the Michelet Decree (le décret Michelet) repealed and replaced the Grammont Act. The Michelet Decree punishes anyone who unnecessarily mistreats, in public or private, a domestic, tame animal, or an animal kept in captivity. The text also provides that an animal seized by the authorities could be transferred to an animal protection charity. By extending the scope of the legislation to abusive treatments committed in the private sphere, and to tame animals as well as animals kept in captivity, the Michelet Decree finally takes into account the intrinsic interest of animals not to be abused. However, the Michelet Decree carves out an exemption regarding the use of bulls 'when an uninterrupted, local tradition can be invoked'.

In the continuity of this Decree, a 1963 law prohibits acts of cruelty towards domestic animals, tame animals, or animals kept in captivity. This Act increases criminal penalties, up to two to six months in prison, and fines of 2,000 to 6,000 francs, regardless of whether the abuse to animals has been committed publicly or in private.

In 1976, French farming legislation, known as the

13 https://www.leparisien.fr/societe/spa-qui-etait-le-general-grammont-premier-defenseur-des-animaux-06-10-2019-8167017.php

14 Pierre, Éric. « Réformer les relations entre les hommes et les animaux : fonction et usages de la loi Grammont en France (1850-1914) », Déviance et Société, vol. 31, no. 1, 2007, pp. 65-76.

15 André, De la protection des animaux, 1899, Faculté de droit de l'Université de Paris Hesse, p. 121.

16 Pierre, Éric. « Réformer les relations entre les hommes et les animaux : fonction et usages de la loi Grammont en France (1850-1914) », Déviance et Société, vol. 31, no. 1, 2007, pp. 65-76.

17 André, De la protection des animaux, 1899, Faculté de droit de l'Université de Paris Hesse, p. 69.

18 https://www.leparisien.fr/societe/spa-qui-etait-le-general-grammont-premier-defenseur-des-animaux-06-10-2019-8167017.php

Rural Code, by way of article L.214-1, recognises animals as 'sensitive beings'. The law states, 'Every animal is a sensitive being and must be placed by its owner in conditions compatible with the biological requirements of its species'. However, the scope of this law is limited, applying only to farm animals, whilst animals remain under the status of 'property' as per the Civil Code. Only in 2015 did the Civil Code qualify all animals as 'sensitive beings', although still regulating them under property laws.

In the present day, many animal advocates refer to the Grammont Act as a milestone in French animal law. Sadly, De Grammont's original concern remains: despite condemning public cruelty towards animals, our society still largely accepts the hidden mistreatment of privately held animals. Compared to Grammont's time, a vastly larger number of animals today are forced to endure deplorable conditions of life and death. Each year, approximately 1.4 trillion animals–80 billion farmed terrestrial animals, over 300 billion farmed aquatic animals, and 1 trillion wild fish–are slaughtered in the world.[19] In French slaughterhouses solely, 3 million animals are killed every day. Animals are also transported in disastrous conditions. Today, acts of cruelty committed in public against individual animals often arouse popular indignation, and rightly so, but society has remained largely indifferent to the mass-scale mistreatment of farm animals, committed behind closed doors, out of public view.

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19 https://www.l214.com/animaux/chiffres-cles/statistiques-nombre-animaux-abattus-monde-viande/ and FAOSTAT

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