ALAW
The Association of Lawyers for Animal Welfare

Summer/Autumn 2010

Journal of Animal Welfare Law

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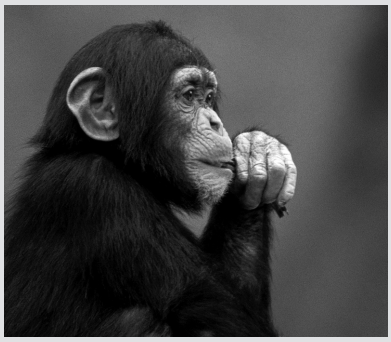

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The Association of Lawyers for Animal Welfare

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A note from ALAW

Welcome to the Summer/Autumn 2010 edition of the Journal of Animal Welfare law.

The main theme is wildlife: ranging from swans to whales. Bridget Martin explores our treatment of swans. Chris Draper, from the Born Free Foundation, brings a scientific researcher's eye to the law's interface with science and politics in relation to a ban on the use of wild animals in circuses. Since this article was written a new Coalition government has formed; how this issue develops remains open to speculation. Jason Lowther dicusses the missed opportunities in terms of securing primate welfare and the Dangerous Wild Animals Act 1976. Michael Bowman considers future directions of the Internation Whaling Commission at an important crossroads in its history.

As ever, ALAW welcomes contributions, including articles and case reports, which should be sent to me at editior@alaw.org.uk

Jill Williams
Editor

The Protection Of Swans Down The Ages

Bridget Martin, Senior Lecturer in Law, University of Central Lancashire

Swans are exotic birds and are regarded as such by many different cultures. They are the stuff of myths and legends. In Greece, Zeus, the King of the Gods turned himself into a swan in order to seduce Leda, a beautiful maiden. The Swan of Tuonela[1] can be found in the Kalevala epic of Finnish mythology. The hero of the epic must kill this sacred bird which swims round the Island of the Dead, but, before he can do so, he himself is shot with a poisoned arrow.[2] In Germany, the Swan Knight travelled in a boat drawn by a swan, which was attached to it by a chain fastened to a collar round its neck. Swans have inspired musicians, for example, Tchaikovsky composed music for the ballet "Swan Lake", while Saint Saens included a swan in his "Carnival of Animals". This became a cello solo and also, as "The Dying Swan" initially danced by the great Russian prima ballerina Anna Pavlov, a favourite ballet solo. Swans have also played an important role in history. When Henry V led his troops into the battle of Agincourt a swan was pictured on his pennon,[3] and indeed, swans still feature on some coats of arms.[4]

Four species of swan, three of which have all-white plumage, can be found in Britain, the mute swan *(Cygnus olor)* which lives here all the year round, the whooper and Bewick swans, two migratory birds that only visit in winter and the non - native black swan *(Cygnus atratus)*, imported from Australia as an ornamental bird. Swans are record breakers. The mute swan, which often weighs over 13 kilograms,[5] needs "a long clear runway across water to get airborne",[6] then it flies beautifully and gracefully using its wingspan of over 2 metres across. It is the heaviest bird in Britain and also lays the largest egg.[7] The whooper swans that migrate to Britain come mainly from Iceland; they are the highest fliers and have been seen from aeroplanes flying at heights of 8,100 metres,[8] where the air is extremely cold.[9]

Because mute swans are Royal birds they have an additional strand of protection, so it is essential to be able to distinguish them from the other white swans. This can be done in a number of ways. Most mute swans are to be found "on shallow lakes, slow rivers, marshes, wet meadows, and shallow coasts"[10] all the year round, unlike the migratory species, the wild swans[11] which "generally favour regular wintering grounds".[12]

Early Protection

Mute swans occupy a unique place in English law and have been protected since Norman times. Indeed, the custom of keeping swans goes back to before 1186[13] and by the end of the fifteenth century they were very common on the Thames in London, to the extent that "The secretary to the Venetian Ambassador wrote in 1496 – 1497 "it is a truly beautiful thing to behold one or two thousand tame swans upon the river Thames, as I, and also your Magnificence have seen".[14] In other words, some wild swans had become "domesticated".

[1] Which Sibelius set to music in his 1895 tone poem "Four Legends from the Kalevala".

[2] See http://en.wikipedia.org/wiki/The Swan of Tuonela accessed 31/03/2010.

[3] Henry's mother was a Bohun, whose ancestors, the Bouillons from Normandy, claimed descent from the Knight of the Swan and whose badge was a white swan.

[4] A cob and pen, both nicked in the beak, stand as supporters on the arms of the Company of Vintners.

[5] Some 30 pounds weight.

[6] AA, RSPB The Complete Book of British Birds,1995 edition, pp. 14 – 15.

[7] Ibid, p. 18.

[8] 27,000 feet.

[9] Ibid, p. 10.

[10] Ibid, p. 96.

[11] Bill Oddie's Birds of Britain and Ireland, New Holland 1998, p. 25.

[12] Ibid. The whooper swans prefer the north and west of Britain while the main flocks of Bewicks are to be found on the Ouse Washes and at Slimbridge and Martin Mere.

[13] Ticehurst Norman The Mute Swan on the River Thames; see http://www.theswansanctuary.org.uk/images/mute%20swan%20on%20river%20thames%20pl.jpg Accessed 04/03/2010.

[14] http://www.theswansanctuary.org.uk/images/medieval%20london%20pl.jpg Accessed 04/03/2010.

By the thirteenth century, swans had become an important item of diet, bought and sold in the open markets in London, and records from the reign of Edward III show that "the price of a swan was 4 or 5 shillings, nearly ten times that of a goose or mallard, and three or four times that of a pheasant".[15] Swans were a very valuable commodity.

Most of the records relating to the keeping of swans are linked to the river Thames and London. A mandate issued by Henry III to the Sergeant of Kennington refers to swans belonging to the King and to the Knights Hospitallers of Hampton, Middlesex, and also to the custom of dividing a brood of cygnets equally between the owners of the parent birds.[16] This was unique to swans, as with all other domestic animals the person owning the mother would keep all the offspring. So was the practice of marking the swans' beaks so that their owners could be identified.

The swan was first given Royal status in the twelth century and, since then, whenever a privately owned swan escaped, it became the property of the Crown. By 1378, the office of "Keeper of the King's Swans" had been created, an office that exists to this day.[17] An early piece of legislation[18] stated that "all swans owned by those who pay less than 5 marks a year Freehold were forfeit to the King" because cygnets in particular were straying and being found by "yeomen and husbandmen and other persons of little reputation" who were then putting their own marks on the birds.[19] The ancient custom of swan upping is still carried out once a year on the river Thames, as its purpose is to mark all cygnets with the same mark as their parents. Each owner had his/her own mark. Between 1450 and 1600 there were known to be as many as 630 different marks used,[20] but now the only owners are the Queen, the Worshipful Company of Dyers and the Worshipful Company of Vintners, and Royal swans are no longer marked.[21]

By the thirteenth century, swans had become an important item of diet, bought and sold in the open markets in London

The amount of legal protection given to swans in Elizabethan times is illuminating. For example: "Anyone driving away swans at breeding time, or stealing eggs, was liable to one year's imprisonment plus a fine, at the pleasure of the Crown" and "any person carrying a swan hook, by which swans might be taken from the river, if not a swan herd nor accompanied by two swan herds was liable to a fine of two thirds of one pound".[22] The Royal Exchequer also benefitted, as the right of marking was subject to a fine paid into its coffers. Because swans were property, all actions were in trespass and the penalties could be severe. A statute from the reign of Henry VII determined that "he who steals the eggs of swans out of the nest shall be imprisoned for a year and a day and fined at the will of the King", half the fine going to the King and half to the owner of the land where the eggs were taken.[23] The Case of Swans[24] gives details of another punishment although it is vague about the source.[25] However, where a lawfully marked swan was stolen from an open or common river, the same, or a different swan if that was not possible "should be hung in a house by the beak, and he who stole it should in recompense thereof be obliged to give the owner as much wheat as would cover all the swan, by putting and turning the wheat on the head of the swan, until the head of the swan be covered with the wheat".

The Case of Swans

The Case of Swans was decided in 1592 and although it was a very early case, it is still important today. It discussed property in living wild animals (ferae naturae), which it defined as not necessarily animals that are "savage by nature" but also included animals that "cannot be classed as domestic or tame". Any person can claim property in any animal fera if they take, tame or reclaim them, "until they regain their natural liberty. Animals such as deer, swans and doves are the subjects of this qualified property,

[15] Ibid.

[16] See later.

[17] Although it is now known as the Keeper of the Royal Swans.

[18] "The Lawes, Orders and Customs for Swans", dated 1482/3: see The Annual Taking Up and Marking of Thames Swans",Shttp://www.thamesweb.co.uk/swans/upping2.hmtl Accessed 04/03/2010. This Act was repealed by the Game Act 1831.

[19] Anno vicesimo secundo Edward IV, CAP. VI. An act concerning swans, see n. 14.

[20] Ibid. Each mark was granted by the King's Swan Master and entered into a Registration book.

[21] Ibid. Queen Alexandra requested the marks be reduced as she was worried the birds would find the process painful, but it is not known when the practice ceased.

[22] Ibid.

[23] 11 Hen. 7, c. 17 - Customs Act, 1495, repealed by statute 3 Geo. 4, c. 41 (1822).

[24] (1592) 7 Co. Rep. 15b; 77 E.R. 435; ALL ENGLAND LAW REPORTS REPRINT [1538 – 1774].

[25] "It had been said of old time...".

The amount of legal protection given to swans in Elizabethan times is illuminating.

which is lost if they regain their natural liberty, and have not the intention to return". So if any person took marked swans or swans in private waters, the owner could bring an action for trespass or conversion.[26]

The second part of the judgement set out the ownership of swans, including cygnets. "A swan is a royal fowl, and all swans the owner of which is not known belong to the Crown". Furthermore, all lawfully marked swans swimming in an open or common river belonged to the owners of the marks, provided they were lawfully obtained by Royal grant or prescription. Where the swans were to be found on private water, they belonged to the owner of that water, and he could take them back if they escaped into an open river. However, if a swan fully regained its freedom, the officers of the Crown could seize it. Where there were cygnets and the parents belonged to different owners, their cygnets belonged to both owners in common.[27]

The case itself was an action in trespass brought by the Queen against two defendants who were accused of taking her swans. It makes fascinating reading as although the discussion is written in English, the pleadings are in Latin. The abbot of a monastery near Abbotsbury in Dorset[28] surrendered the premises to King Henry VIII who, in 1543, granted them to Giles Strangways Esq. When he died, his cousin, another Giles Strangways, inherited them and he demised the disputed game of swans to the defendants for a year. The Court of Exchequer, by writ, directed the sheriff of Dorset "to seize all the white swans not marked" – he seized 400 by force.

In reaching their judgement, the Court relied on two earlier cases, both of which demonstrate the difficulties associated with determining ownership in the property of a valuable commodity such as swans when these birds are only semi-domesticated, more wild than tame. In the first of these cases,[29] the plaintiff sought the return of his swans which were swimming on his neighbour's stretch of river. Although the defendant claimed he thought they were "strays", he did return them. Four important points regarding the ownership of swans came out of this judgement, namely i) Everyone who has swans within his manor, his private waters, has a property in them ii) One may prescribe to have a game of swans within his manor iii) He who has such a game of swans may prescribe that his swans may swim within the manor of another and finally iv) A swan, unlike any other fowl, may be an Estray.

In the second case, as in the earlier case, the problem was that the birds were inclined to stray. The two plaintiffs, Lord Strange and Sir John Charlton, alleged that three defendants had taken and carried away 40 cygnets causing them £10 damages – a fortune in the time of King Richard III. Of the two plaintiffs, one owned the cobs and the other the pens, which made them owners in common equally, and the swans swam on the river Thames in Buckingham. However, it seems from the case, that a number of pairs of these swans had nested on the defendants' land and produced cygnets. This enabled one of the defendants to argue (successfully, I think) that, time out of mind, where this happened and the land was in the county of Buckingham, the person who had property of the swans should have two of the cygnets while he who had the land should have the third cygnet, which should be of less value than the other two. This was considered to be a good custom, because the owner of the land on which the swans nested had allowed them to stay there rather than driving them off. It also appeared that a man might allege a custom or prescribe in swans and cygnets.[30]

The same case also explained why swans were held in such high regard. This was because "the cock swan was an emblem or representation of an affectionate and true husband to his wife above all other fowls; he holds himself to one female only, and for this cause nature has conferred on him a gift beyond all others, that is, to die so joyfully that he sings sweetly when he dies...".[31]

[26] See n. 24.

[27] Ibid.

[28] There is still a privately owned swan herd here, apart from her Majesty's birds and those of the Worshipful Companies of Vintners and Dyers the only remaining one in the country. See "Battered birds waddle once more", Vicky Liddell, The Daily Telegraph , Weekend, 9 January 2010.

[29] Recorded in the Year Book 7 Hen. 6. 27 8.

[30] Y.B. 2 Rich. 3, 15 n. And 16 A.

[31] Ibid. Though not in the case of a pair of Bewick swans who, in January 2010, arrived in Britain with new mates. See "Swans decided life was too short for fidelity", The Times, 25 January 2010.

Crimes against swans today

It has been shown therefore, that swans are special, and, because of this they have received a considerable amount of protection down the ages. However, despite the respect and sometimes reverence in which these birds are held, in modern times, a darker side has appeared. Swans now seem to attract vandals who see them as targets to be exploited, and although only a few people are involved, they perpetrate acts of the most appalling cruelty on these beautiful birds, cruelty that is rarely meted out to other wild birds.

> **Since it was passed in 1981, the Wildlife and Countryside Act has afforded the best protection for wild swans.**

Since it was passed in 1981, the Wildlife and Countryside Act has afforded the best protection for wild swans. Section 1 sets out a series of basic offences so that any person intentionally killing, injuring or taking any wild bird,[32] taking, damaging or destroying the nest of any wild bird,[33] or taking or destroying an egg of any wild bird[34] can be prosecuted. It is also an offence if any person has in his possession or control any live or dead wild bird[35] or an egg of a wild bird.[36] However, because it is not always easy to produce sufficient evidence to establish the requisite intention required to secure a conviction in a prosecution brought under subsection (1), subsection (2) has been made an offence of strict liability. Furthermore, because both the whooper and Bewick swans are rare, they are listed in Schedule 1 and thus receive the enhanced protection this classification affords them.[37]

Perhaps because the birds are large and thus make an easy target, many swans are shot, by young men with air rifles. In the year 2000, Judith Smith, the County Bird Recorder for Greater Manchester, recorded 29 shooting incidents in which several birds died. After many years of studying mute swans, she observes that most of the birds she deals with are carrying pellets and that "this type of vandalism seems to be on the increase".[38] She also gives details of a case that highlights the difficulties that can be experienced in obtaining sufficient evidence before a prosecution can even be considered.

There had been two similar incidents in which private property had been broken into. At one incident "13 bullets were pumped into 2 swans". At the other, a car was seen, traced and an air weapon seized, but the pellets from the gun did not match up with those found in the birds.[39]

In another appalling incident, connected to two others,[40] the post mortem on a mute swan showed that it had been shot 13 times with flat - tipped airgun pellets. The bird's wounds were so severe that not even veterinary assistance could not save its life. On examination, "nine airgun pellets were found in the bird's head, three in its neck, and another had entered through the throat and travelled into the stomach".[41]

Perhaps the most disturbing incident of this kind again resulted in an unsuccessful prosecution. This case began with a gruesome discovery and, in effect, ended in a farce. Some 29 swans, as well as a marsh harrier and a grey heron were found buried in a mass grave in Bedfordshire. The birds had all been shot in what appeared to have been a deliberate attempt to kill all the swans on a privately owned lake that was used for duck shooting. Eventually, three men were charged with shooting the birds, but the prosecution's case hinged on a key bullet linking the seized weapon to the killing, and the Police managed to lose this bullet. With the forensic evidence gone, the defendants claimed, and were awarded, £44,000 costs.[42]

Some incidents are more heinous than others. In one particularly tragic case, Penrose, the 18 year old defendant, together with an accomplice, fired an air rifle through the window of a town centre hostel where he was staying. Hours later, he attacked a family of mute swans killing the cob, which he hid in a hedge, and seriously injuring the pen who was later found with blood pouring from her head, trying to

[32] Section 1 (1) (a).

[33] While that nest is in use or being built – section 1 (1) (b).

[34] Section 1 (1) (c).

[35] Or any part of, or anything derived from, such a bird – section 1 (2) (a).

[36] Or any part of such an egg – section 1 (2) (b).

[37] Section 1 (4) and (5), and as amended.

[38] See "Please don't shoot the mute", Legal Eagle, April 2001, No. 28.

[39] Ibid.

[40] In that all three occurred in the environs of Nottingham.

[41] "Swan shot 13 times", Legal Eagle, June 2009, No. 58. There was insufficient evidence for a prosecution.

[42] See "Swans massacred", Legal Eagle, February 2008, No. 54; and "Down the swanny", Legal Eagle, June 2009, No. 58.

take care of her 4 cygnets. She too died. Penrose pleaded guilty to killing a wild bird, injuring a wild bird, having a loaded weapon in a public place and criminal damage. Both he and his accomplice were sent to prison, but the sentences were interesting in that, in each case, the offender had to serve half his sentence in the community.[43]

Although shooting incidents account for most of the serious crimes perpetrated against swans, there are other acts of seemingly mindless, sometimes unbelievable cruelty such as the incident that occurred just before Christmas 2003, in Exeter. Barnett, the defendant, watched by a crowd of horrified Christmas shoppers, enticed a mute swan to the bank of Exeter Quay, where he grabbed it by its neck which he proceeded to wring, smashed it onto the concrete path then hurled it into the river. He too was sentenced to prison. Despite the fact that he had mental health problems and had pleaded guilty to killing the bird. The court, taking a serious view of the situation, decided to impose a custodial sentence of three and a half months, "one of the toughest sentences we have seen for a crime of this type".[44]

Other incidents perhaps stem rather more from a lack of care, although the results can be equally cruel. One such case was R v Adams 2008,[45] where the actions were similar to sheep worrying. The defendant, a dog walker, released 3 dogs into a site of special scientific interest[46] where they were seen chasing mute swans. Because this serious incident occurred in January, in a site of national importance for its overwintering wildfowl and wading birds, Natural England was able to mount a successful prosecution against Adams, for recklessly disturbing fauna (the swans) within a site of special scientific interest. Mr. Adam's irresponsible action, releasing his dogs rather than controlling them, cost him a fine of £250 together with £250 costs. This unusual prosecution, a legal first, could only be brought because the incident occurred in January, as the disturbance offence applies only to birds overwintering on the site, that is, between October and March.[47]

"shooting incidents account for most of the serious crimes perpetrated against swans"

The Public Order Act 1986 has even been used to obtain justice for swans. In yet another unusual case, Halsall, the defendant, who was jet - skiing on Conwy Marina "accelerated directly towards (a mute swan) striking it at speed and killing it".[48] The bird, a cob, had been behaving somewhat aggressively towards craft entering or leaving the marina. There was insufficient evidence to show intention on the defendant's part deliberately to kill the bird, so a prosecution under the Wildlife and Countryside Act 1981, section 1 (1) (a) would have been unlikely to succeed. However, because they could produce a sufficient number of witnesses who had been distressed by the action, the Crown Prosecution Service decided to use the Public Order Act instead. Halsall was found guilty of causing harassment, alarm or distress, fined £600 and ordered to pay £350 costs.[49]

Help can sometimes come from unexpected sources with wildfowlers acting as unofficial policeman for swans. In 1994/95, in two separate incidents on the same day in Wigtown Bay, a local farmer observed whooper swans being shot. Because he was secretary of his local wildfowling association, he reported both incidents to the police. In one of the cases, two Englishmen were each fined £1,000 because the swan they had shot had been found, partly buried. In the other case, because it was a French wildfowler who had shot the bird, he was arrested and imprisoned until he had paid the £1,000 fine. This distinction in the outcome of two almost identical cases neatly illustrates a quirk in the law at that time, in that in those days there were no powers of arrest and imprisonment under the Wildlife and Countryside Act 1981. The Frenchman was jailed, not because he had shot a swan, but because, as a foreign national, he might abscond before paying his fine.[50]

[43]See "Youths receive custody for shooting swans", Legal Eagle, April 2004, No. 40.

[44]Part of a comment by one of the presiding magistrates. See "Prison for swan killer", Legal Eagle, July 2004, No. 41.

[45]Unreported.

[46]The RSPB nature reserve at Copperhouse Pool, within the Hayle Estuary and Carrack Gladden SSSI.

[47]See "Dog walker prosecuted for bird disturbance in legal first", Legal Eagle, June 2009, No. 58. The article includes a photograph of the horrific injuries suffered by one of the swans, which had to be humanely destroyed.

[48]See "Swan killed by jet skier", Legal Eagle, May 2003, No. 36.

[49]Ibid.

[50]See "Wildfowlers police illegal shooting", Legal Eagle, Summer 1995, No. 6.

The Public Order Act 1986 has even been used to obtain justice for swans.

Apart from people, swans also have a few natural enemies, animals such as the fox *(Vulpes vulpes)* which will take both birds and their eggs, and fish such as pike *(Esox lucius)* will sometimes eat young cygnets. Until the law was changed, some died as the result of lead poisoning from the weights used by fishermen[51] and others still suffer severe injuries even death as a result of becoming entangled in abandoned fishing lines or hooks. Like barn owls, they too are prone to road traffic accidents, many of which prove fatal and they can crash into electricity pylons when the loss of life can be considerable. Indeed in one particular incident, "more than 15 swans were killed in less than two weeks ...". They had been feeding in fields and had crashed into the cables when they were taking off, because the warning deflectors had either broken or fallen off, a situation that was remedied once the power company was informed.[52]

In another, this time quite bizarre incident, involving a whooper swan that had also died after a collision with pylons, the recently appointed Master of the Queen's Music, Sir Peter Maxwell Davies, had his house searched and was questioned under caution about the possible illegal possession of a dead bird. Apparently the police had arrived on Sanday, a tiny island in the Orkneys, to look at a vandalised gate when they spotted "the plucked carcass hanging in the composer's garden". They returned with a warrant. Sir Peter, a keen environmentalist who had already reported his find to the RSPB, had been going to turn the swan's breast into "a delicious terrine".[53]

Welfare of injured swans

Injured swans, if they are lucky, end up in one of the many swan rescue and rehabilitation centres, including the national swan sanctuary in Shepperton, that are operating in Britain today. Once again the relevant legislation governing the correct operation of these centres is to be found in the Wildlife and Countryside Act 1981, where section 4 (2) permits the taking of any wild bird provided it has "been disabled otherwise than by his unlawful act "and has been taken solely "for the purpose of tending it and releasing it when no longer disabled".[54] Any wild bird can also be killed provided it is so seriously injured that there is no reasonable chance it will recover.[55] On rare occasions, where there is an injured parent bird, it may be necessary to take the whole family to the centre.[56] The Swan Sanctuary has published its own Code of Practice[57] which provides excellent guidance to anyone operating in this field.

Royal birds – the prerogative right in swans.

Although the Wild Creatures and Forest Laws Act 1971 abolished certain rights of the Crown to wild creatures, it retained for Her Majesty the prerogative rights to swans and royal fish. However, there seems to be some uncertainty as to when exactly this right will be applied. It is normally exercised on the river Thames where swan upping takes place, but legally, the right applies to all wild and unmarked swans on open water in the UK. This is important because, as property, offences against swans could be prosecuted under the Criminal Damage Act 1971 and although in practice it would rarely be used, it might offer an opportunity to get justice for a damaged swan in the occasional case where a prosecution under the Wildlife and Countryside Act 1981 would be unlikely to succeed.

There is existing correspondence[58] about a case in Somerset where two men were accused of throwing stones at a swan, injuring it. They were observed by fishermen who, although they overheard the men making comments about "swan bashing" and witnessed the vandalism, were reluctant to help the police, although one did provide a name which enabled an arrest to be made. There was therefore very little evidence on which to prosecute. The original summons, under the Protection of Animals Act 1911 section 1, was rejected by the Crown Prosecution Service as obviously incorrect because the swan was neither a domestic nor a captive animal. However, there was sufficient admission by the sole defendant to prove that he had committed a reckless act and although this would have been

[51] Control of Pollution (Angler's Lead Weights) Regulations 1986 – the 1993 Amendment Regulations are not applicable.

[52] "Shocking death toll prompts urgent action", RSPCA Animal Life, Spring 2009, p. 9. The action needed to be prompt because "there were many thousands of swans in the area at the time, driven south by the cold snap".

[53] http://www.timesonline.co.uk/tol/news/uk/article 431570.ece Accessed 22/04/2010.

[54] Section 4 (2)(a).

[55] Section 4(2)(b) – provided the injuries were not inflicted by the euthaniser.

[56] A procedure that could only be carried out under license – section 16.

[57] http://www.theswansanctuary.org.uk/code_of_ practice.php Accessed 04/03/2010.

[58] Between the Crown Prosecution Service and Ms. Dot Beeson who founded and runs the national swan sanctuary at Shepperton.

insufficient to sustain a charge under the Wildlife and Countryside Act 1981 section 1 (1) (a), because that requires intention to be proved, it was enough to bring a prosecution under the Criminal Damage Act 1971 section 1.[59] The defendant was charged with causing "damage to property belonging to the Crown, namely a swan of value". This was based on the Case of Swans 1592, which decided, inter alia, that the Crown owns all swans that cannot be positively identified as owned by anyone else.[60]

However, the fact that in practice "the Crown only normally exercises its prerogative... with regard to swans on the river Thames upstream as far as Oxford and its tributaries and some adjacent waters",[61] has caused some uncertainty. It is quite clear that where a swan in these waters needs to be caught, rescued or ringed, this can only be undertaken with the permission of Her Majesty's Swan Marker, and the Criminal Damage legislation can be used, where required, to protect these swans. But what about unmarked swans on other waters?

Take, for example, the case of the swan killed by the jet skier,[62] where there was insufficient evidence of intention to bring a prosecution under the Wildlife and Countryside Act 1981. Here, the Crown Prosecution Service were unconvinced by arguments that this swan did, in fact, belong to the Queen. They chose instead, to use the Public Order Act 1986, section 5, because there were fortunately sufficient witnesses prepared to testify that they had been alarmed or distressed by the skier's action.

> **Injured swans, if they are lucky, end up in one of the many swan rescue and rehabilitation centres**

But why is there this uncertainty when the Case of Swans makes it quite clear that the "swan is a Royal fowl, and all swans the owner of which is not known belong to the Crown"? Furthermore, the Wild Creatures and Forest Laws Act 1971, section 1 (1)(a) states specifically that Her Majesty retains her prerogative right to swans thus demolishing any argument that this swan was Welsh so would fall outside the right. However, this is probably not the case in Scotland. Colin Reid states that the Crown's rights in swans only apply in England and Wales, and this by virtue of the Case of Swans,[63] and although the Scottish Society for Prevention of Cruelty to Animals consider that the swans at Holyrood belong to the Crown, possibly even wild mute swans too, there seem to be neither cases nor legislation to support this. In the Orkneys, yet another situation may pertain in that "a Norse right called Udal Law is still assumed to hold sway, possibly making swans the property of the people".[64]

Conclusion

Swans were originally protected because they were a valuable commodity, they made delicious eating, but they were also seen to be special, to be found in myths and legends, on coats of arms, to have their place in history. Some, the mute swans, still enjoy the protection of the Queen. Yet they can also be the victims of savage attacks, and they can be much misunderstood. Nothing changes, as a recent item from the Today programme indicates.[65] Now there appears to be an aggressive swan on the river Cam that has been attacking rowers, possibly because last year its cygnets were killed. There has been a suggestion that it should be killed because it is dangerous. At least, with all this publicity, a license can be applied for,[66] hopefully in good time to relocate the bird to a place safer both for it and the general public. This time perhaps, there will be a happy ending.

[59] "... or being reckless as to whether any such property would be destroyed or damaged ...".

[60] http://www.theswansanctuary.org.uk/images/criminal%20damage%20case%20pl.jpg Accessed 04/03/2010.

[61] See letter between the Head of Species Conservation (Defra) and the Joint Nature Conservation Committee, which refers to the earlier correspondence (n.60). See http://www.theswansanctuary.org.uk/images/doe%20swan%20translocation%20code... Accessed 04/03/2010.

[62] See earlier.

[63] Nature Conservation Law, Colin Reid, W.Green, 3rd edition, p. 17.

[64] http://news.bbc.co.uk/1/hi/scotland/4361079.stm Accessed 22/04/2010.

[65] 26 April 2010.

[66] Under Wildlife and Countryside Act 1981, section 16.

Wild animals in travelling circuses: negotiating the road through science, law and politics towards a ban

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In March 2010, Minister for animal welfare Jim Fitzpatrick MP announced that, on the basis of preliminary results from a public consultation, he is "*minded to pursue a ban on wild animals in travelling circuses*" in England.[1] Similar commitments had been made previously (for example, the then Minister Ben Bradshaw MP promised a ban the use of certain non-domesticated species in travelling circuses in March 2006)[2], but the publication of the Report of the Chairman of the Circus Working Group (the Radford Report)[3] in October 2007 led to an apparent rejection of plans to ban wild animals in circuses.

Why did earlier promises of a ban not materialise, and what led to the Minister's latest statement?

Welfare of animals in travelling circuses

A key line of reasoning presented by the Born Free Foundation (BFF) - and its colleagues at the Royal Society for the Prevention of Cruelty to Animals (RSPCA), Animal Defenders International (ADI) and the Captive Animals Protection Society (CAPS) – is that travelling circuses, by virtue of their itinerant nature, cannot provide an environment that meets the needs of wild animals, and further that certain activities (transport, training, performance etc.) are likely to be associated with unavoidable and unacceptable compromises to the animals' welfare. It was suggested that the continued use of wild animals in circuses would run counter to one or more of the provisions under s9(2) of the Animal Welfare Act 2006 ("The Act"). With that in mind, nothing short of a ban would sufficiently protect and *promote* animal welfare (see s12(1) of the Act).

Evidence and the Circus Working Group process

Calley has outlined the process of the Circus Working Group (CWG), and specifically drew attention to the limitations imposed by the exclusion of video evidence from the CWG.[4] It is worth highlighting other problems with the approach adopted in the design of the assessment of animal welfare in travelling circuses, in order to inform debate on this and other animal welfare issues under the authority of Defra and equivalent bodies.

Very few empirical studies of animal welfare in travelling circuses have been carried out. Defra's insistence that peer-reviewed science form the basis of evidence submitted to the CWG placed an extraordinary restriction on the deliberations of the Academic Panel, given the extremely limited number of published studies relating to the welfare of animals in circuses. This was further compounded by the Academic Panel's rejection of all comparative data submitted on animals held in other captive situations - "*The opinion of the Academic Panel is that the environment in circuses is too different from those of farms or zoos*

[1] Letter from Jim Fitzpatrick. www.defra.gov.uk/corporate/consult/circus-wild-animals/jfitzpatrick-circus-letter.pdf. Accessed 11/05/2010

[2] 8 March 2006, col 60WS

[3] Radford M (2007). Wild Animals in Travelling Circuses – The Report of the Chairman of the Circus Working Group. www.defra.gov.uk/foodfarm/farmanimal/welfare/documents/circus-report.pdf. Accessed 27/04/10

[4] Calley D (2008). Non-domesticated animals in travelling circuses: the report of the Chairman of the Circus Working Group. Journal of Animal Welfare Law July 2008: 13-14

for helpful comparisons of research findings to be made".[5] In the absence of direct research on circus animals, the exclusion of read-across from animal welfare research garnered from other animal-keeping systems seems obtuse. The focus on differences in environment, rather than similarities between animals of the same species seemingly overlooks fundamental animal biology. The basic needs and underlying behaviour and physiology of tigers in a circus, for example, do not differ significantly from tigers in a zoo. Indeed, s9(2) of the Act acknowledges species-typical needs (e.g. the "need to be able to exhibit normal behaviour patterns").

As a result of these and other concerns, following publication of the Radford Report, at least one member of the Academic Panel of the CWG wrote to the Secretary of State for Environment outlining their concerns about the process.[6] BFF and RSPCA raised concerns over the terms of reference of the academic review process, the depth and rigour of the analysis and the conclusions of the Academic Panel.[7]

However, the subsequent publication of a review of the suitability of wild animals to life in travelling circuses added a whole new dimension to the preceding assessment of the Academic Panel and subsequent conclusions of the Radford Report.[8] This comprehensive review of the behaviour, health and living / travelling conditions concluded that none of the species most commonly exhibited by circuses (worldwide) were suited to a circus life.

Feasibility Study

Following the conclusion of the CWG and the publication of the Radford Report, Defra undertook a "feasibility study" to investigate the possibility of regulating the use of wild animals in travelling circuses. The exact details and methodology of this study were not revealed to the campaigning groups at the time, and it was only in early 2010 that some of the findings were made public. Requests made by CAPS under the Freedom of Information Act 2000 for the full inspection reports have been denied, citing exemption under s41 of the Act.

Despite the denial of read-across from animal welfare in zoos to circuses by the Academic Panel of the CWG, two Government-appointed Zoo Inspectors were tasked with carrying out site inspections of travelling circuses as part of the feasibility study. The Inspectors acknowledge the apparent contradiction between using regulatory standards for zoos when inspecting circuses.[9] However, they make frequent references to Performing Animal Welfare Standards International (PAWSI) standards in their report on circuses, despite PAWSI having its roots in the commercial performing animal industry and lacking scientifically-validated standards. Without sight of the full findings, it is difficult to comment further on their inspections.

In August 2009, ADI released undercover footage from the Great British Circus showing elephants being hit. While no case was brought against the circus under the AWA, this exposé reignited concern for the welfare of animals in circuses among members of the public and Parliamentarians. It is against this backdrop that a public consultation on how best to safeguard the welfare of wild animals in travelling circuses in England was conducted.

The preliminary results of the public consultation indicate that 94.5% of respondents believed that a ban on the use of wild animals in travelling circuses was the best option to achieve consistently better welfare standards for these animals; while 95.5% believed that there are no species of wild animal, for which it is acceptable to use in travelling circuses.[10]

Even nineteenth century debates on animal protection legislation included acknowledgement of public opinion as a primary enabler for legislation relating to animal welfare.[11] Despite this, the need to reflect public opinion and to protect the welfare of wild animals in travelling circuses was very nearly frustrated by limitations in the design and execution of the Working Group and the feasibility study, and despite the encouraging indications from the Minister, a ban still faces obstacles. As I write, it seems that this is now an issue to be decided by politics: the main political parties differ in their positions on this issue, and action to ban wild animals in circuses will depend on the make-up of the Government after the General Election of May 2010. Whatever the outcome for wild animals in travelling circuses, lessons should be learned as to how science and public opinion can, and cannot, inform discussions relating animal welfare law.

Acknowledgements

BFF thanks David Thomas for his advice on this issue.

[5] s5.1.5

[6] Letter to Hilary Benn, 05/03/2008

[7] RSPCA & Born Free Foundation (2008). Comments on: 'Wild Animals in Travelling Circuses – The Report of the Chairman of the Circus Working Group, October 2007'

[8] Iossa G, Soulsbury C & Harris S (2009). Are wild animals suited to a travelling circus life? Animal Welfare 18: 129-140

[9] Stevenson MF & Fielding M. Circus Inspection Project. www.defra.gov.uk/foodfarm/farmanimal/welfare/act/documents/circus-feasibility-study.pdf. Accessed 27/04/10

[10] Defra. Initial summary of responses to the Defra public consultation exercise on the use of Wild Animals in Circuses. www.defra.gov.uk/corporate/consult/circus-wild-animals/responses.pdf. Accessed 11/05/2010

[11] Martin R (1824). Bear baiting – House of Commons Debate, 11 February 1824 vol 10. Richard Martin MP, 1824: "he wished to prohibit those cruelties which public opinion would follow him in saying ought to be prohibited"

Cases And Other Materials Concerning Animal Welfare

Friend v United Kingdom; Countryside Alliance v United Kingdom (2010) 50 EHRR SE6

1. These two applications were brought following extensive litigation in the United Kingdom, commencing in the High Court and concluding in the House of Lords. The applications brought before the European Court of Human Rights (ECtHR) sought to challenge various bans on fox hunting and the hunting of other wild mammals with dogs in the United Kingdom. The first application was brought by a British national and related to his challenge to the ban on hunting in Scotland and to a similar ban in England and Wales. The second application was lodged by Countryside Alliance, a non-governmental organisation that seeks to influence legislation and public policy that has an impact on the country side, rural people and their activities. The ten remaining applicants were British nationals who claimed to have been affected by the ban in different ways. Countryside Alliance and the ten other applicants sought to challenge hunting bans in England and Wales only. The first applicant argued that the hunting ban in England and Wales was a violation of his rights under Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion) and 11 (freedom of assembly and association) of the Convention and of Article 14 (prohibition of discrimination) taken in conjunction with those Articles. The second applicants complained under Article 8 of the Convention and Article 1 of Protocol 1 (protection of property).

The ten remaining applicants were British nationals who claimed to have been affected by the ban in different ways.

2. Ultimately, the ECtHR held that it was unable to accept that the hunting bans introduced by the Hunting Act 2004 and the Protection of Wild Mammals (Scotland) Act 2002 amounted to a violation of the applicants' rights under Article 8. It stated that although Article 8 encompasses the right to establish and develop relationships with other human beings, even a broad construction of it does not mean that it protects every activity a person may engage in with other human beings in order to establish such relationships. The ECtHR further declared that it shared the view of the House of Lords that hunting is by its very nature a public activity and therefore too far removed from the personal autonomy of the applicants for the hunting bans to amount to an interference with their rights under Article 8. In relation to the applicants' argument that hunting is part of their lifestyle, the Court also held that mere participation in a common social activity, without more, cannot create membership of a national or ethnic minority. In relation to the argument advanced by the second applicants that the bans amounted to a violation of the right to respect for one's home, the Court held that the concept of home does not include land over which the owner permits or causes a sport to be conducted.

3. With respect to arguments made pursuant to Article 11, the ECtHR held that while it was prepared to assume that the Article may extend to the protection of an assembly of an essentially social character, it noted that the hunting bans in Scotland, England and Wales as they apply to the first applicant did not prevent or restrict his right to assemble with other huntsmen and thus did not interfere with his right of assembly *per se*. Alternatively, the Court indicated that it shared

the view of Lord Bingham to the effect that the interference may be regarded as justified under paragraph 2 of Article 11. In relation to the question of necessity and proportionality of the bans, the Court recalled that State authorities are in principle in a better position than the international judge to give an opinion on the exact content of those moral and ethical requirements. Further, a wider margin of appreciation must be accorded to State authorities in regulating a particular assembly the further that assembly moves from one of a political character to one of a purely social character. Hence, the ECtHR ultimately held that the hunting bans fell within the margin of appreciation enjoyed by the State. Similarly, in relation to the alleged violation of Article 1 of Protocol 1, the ECtHR held that it was unnecessary to establish the extent to which this Article was engaged, since, even assuming that the ban in England and Wales interfered with the property rights of the second applicants, it considered that the ban served a legitimate aim and was proportionate for the purpose of that Article. Interestingly, the ECtHR also held that the United Kingdom courts (High Court, Court of Appeal and House of Lords) had given the greatest possible scrutiny to the applicants' complaints and were each unanimous in finding that the ban was proportionate as a result of which, serious reasons would be required for the ECtHR to depart from their clear findings.

The Royal Society for the Prevention of Cruelty to Animals v King [2010] EWHC 637 (Admin)

1. This was an appeal by case stated from a decision of a District Judge of the Magistrates' Court delivered at Portsmouth Magistrates' Court dismissing six summonses against the respondents alleging offences under the Animal Welfare Act 2006. The judge upheld the submission that there was no case to answer because the informations had been laid more than six months after the dates of the alleged offences and were therefore outside the limitation period prescribed by section 127 of the Magistrates' Courts Act 1980. The prosecution had sought to rely upon section 31 of the Animal Welfare Act 2006 which provides that notwithstanding anything in section 127 of the Magistrates' Courts Act 1980, a Magistrates' Court may try an information relating to an offence under the 2006 Act if, *inter alia*, the information is laid before the end of the period of three years beginning with the date of the commission of the offence and before the end of the period of six months beginning with the date on which evidence which the prosecutor thinks is sufficient to justify the proceedings comes to his knowledge. In relation to the latter, a certificate signed by the prosecutor indicating the date on which evidence came to his knowledge is conclusive evidence of the fact. The prosecution had failed to produce a signed certificate or to adduce any other admissible evidence of the existence of a certificate. It had only presented the Court with a statement of the prosecution case manager dated 13 August 2009 attaching an unsigned letter dated 29th January 2008 indicating that evidence came to his knowledge on 27 December 2007 in respect of informations laid on 12 February 2008. The statement indicated that the original letter had been signed and provided to the court for service on the court.

2. In dismissing the appeal, the High Court held that given a certificate in proper from is conclusive, subject to limited qualifications recognised in the case law, the court should not adopt a loose approach to the formal requirements of the subsection. Good faith requires that somebody signing a certificate should be applying his mind to what he is doing and should have at that time knowledge of the matters which he is certifying. In this case, there was reason to doubt the accuracy of the memory of the prosecution case manager in relation to the signing of the original certificate.

> **the ECtHR held that it was unable to accept that the hunting bans introduced by the Hunting Act 2004**

Ward v RSPCA [2010] EWHC 347 (Admin)

1. Mr. Ward and his partner had operated a smallholding which was inspected by the RSPCA. Inspectors found that two of Mr. Ward's ponies were in a severely distressed state and were suffering muscle wastage due to a worm infestation. The RSPCA discovered that Mr. Ward and his partner had administered treatment, but when that had been unsuccessful, they had not sought advice from a vet. When the RSPCA intervened, the ponies received treatment and recovered. In the Magistrates' Court, Mr. Ward was convicted of causing unnecessary suffering to the ponies pursuant to section 4 of the Animal Welfare Act 2006. He was disqualified from owning equine animals or cattle, keeping them or participating in the keeping of such animals and prohibited from applying to lift the disqualification for three years. He appealed to the Crown Court and then to the High Court by way of case stated. The three questions put to that court were whether:

- the court was entitled to consider either of Mr. Ward's two previous convictions for causing unnecessary suffering to animals material to the issue of disqualification;
- it was appropriate to include cattle within Mr. Ward's disqualification;
- the court was entitled to give weight to the fact that Mr. Ward's previous disqualification expired less than three years before the commission of the instant offences;
- it was inconsistent to disqualify Mr. Ward while not disqualifying his partner;
- it was appropriate to disqualify Mr. Ward when he was carrying on business in a partnership with another.

> **Inspectors found that two of Mr. Ward's ponies were in a severely distressed state and were suffering muscle wastage due to a worm infestation.**

2.The High Court ultimately dismissed Mr. Ward's appeal, holding that it was clear pursuant to section 143(2) of the Criminal Justice Act that the court was entitled to have regard to previous convictions and to treat them as an aggravating factor. Given that one of Mr. Ward's previous convictions had concerned cattle and given his lack of care in the instant case, it was right that cattle had been included in the current disqualification. The Crown Court had also been right to stress that the last disqualification had expired only three years before the later offences. There was reason for the difference in treatment between Mr. Ward and his partner, namely the latter did not have any previous convictions. Further, in relation to the last question, the High Court held that the 2006 Act was intended to promote the welfare of animals and part of the mechanism of protection was an order for disqualification following conviction for an offence. In view of this, it was appropriate to disqualify Mr. Ward though this may cast a burden upon his partner.

RSPCA v Johnson [2009] EWHC 2702 (Admin)

1. In this case, the RSPCA appealed by way of case stated against a decision of a District Judge that an information had been laid out of time. The RSPCA had laid an information on 11 June 2008 against Mr. Johnson for causing unnecessary suffering to an animal between May 2007 and June 2007. The RSPCA first saw the horse in question on 11 June 2007 and made concerted efforts to find Mr. Johnson, having identified him through the British Horseracing Authority. He was eventually located in May 2008. The RSPCA sought to rely upon a letter dated 4 June 2008 and signed by its prosecutions case manager certifying that it was not until 21 December 2007 that evidence sufficient to justify the proceedings had come into his possession. Mr. Johnson argued that the information had been laid outside the six-month time limit imposed by section 127 of the Magistrates' Court Act. The District Judge found that there was sufficient evidence by August 2007 that Mr. Johnson owned the horse and that the delay in issuing the information amounted to an abuse of process. He also found that the

> **The RSPCA had laid an information on 11 June 2008 against Mr. Johnson for causing unnecessary suffering to an animal**

certificate was a misguided attempt to extend time. The issue before the High Court was whether the certificate was conclusive evidence of when the RPSCA had sufficient evidence to justify the prosecution, with the RSPCA submitting that the judge had no power to go behind the certificate to conduct an analysis of who knew what and when.

2. In allowing the appeal the High Court held that there was no defect on the face of the certificate which was conclusive as to abuse of process. Although the District Judge had found abuse between June 2007 and June 2008, no abuse was revealed by the conduct of the RSPCA during the period up to the issuing of the information and much of the delay was caused by Mr. Johnson. It was in the public interest that careful enquiries were made and the more elusive a person was, the more likely an inspector would want to have the clearest evidence. While prosecutors are not permitted to shuffle papers between officers or to sit on information so as to extend a time limit, there is a degree of judgment involved in bringing a prosecution.

"Ban for owner of donkey in pig attack" *The Times*, 17 April 2010

1. A man was found guilty in Towcester Magistrates' Court of eight counts of contravening the Animal Welfare Act 2006 by failing to prevent a donkey from attacking other farm animals. The prosecution

was brought by Northamptonshire County Council's trading standards department which adduced video footage showing the donkey holding a pig between its teeth and shaking it violently. The man was banned from keeping any animal except a cat or dog for three years and ordered to pay court costs of £6,080.

"Farmer admits allowing lame cattle to suffer" *Carmarthen Journal*, 14 April 2010

1. A prosecution was brought in Cardigan Magistrates' Court by Ceredigion Council against a couple in relation to the manner in which they had kept 28 milking cows. Upon an initial inspection by animal health officers, the cows were found to be lame and an Improvement Notice was issued to the couple.

> **A man was found guilty in Towcester Magistrates' Court of eight counts of contravening the Animal Welfare Act 2006**

Upon further examination one year later, lameness had not decreased. Six cows were housed in a shed where faeces were piled high and a water trough was full of faeces. There was no dry area nor water available. The couple initially pleaded not guilty to nine counts of causing unnecessary suffering to a protected animal under the Animal Welfare Act 2006. After a DVD showing the extent of lameness in the cattle was played, defence counsel entered pleas of guilty to six counts. The Magistrate sentenced the farm owner to a conditional discharge for two years and also ordered him to pay £3,000 towards council costs.

Swiss public defender scheme for animals

1. On 5 March 2010, *The Guardian* reported on the work of Antoine Goetschel, who has been the animal advocate for the canton of Zurich since 2007, though the position has existed since 1991. The article noted that Goetschel has been appointed to the position for a period of four years by the State in order to ensure that he not be perceived as being too close to animal rights NGOs, rather than as a civil servant.

2. The article also reported that in late 2008, a new Animal Act was passed into law in Switzerland which is 150 pages long and explains in great detail how dozens of species are to be kept by their owners, be they companion animals or livestock. It is anticipated that the law will come into force in November 2010, after which time the owner of a rabbit, for example, could be prosecuted for keeping their pet in a hutch that does not meet the legal criteria. In relation to this, Goetschel was reported as having argued that although the new Swiss law appears comprehensive, its protection is limited to vertebrates which, he stated, only account for 5% of the animal world. The species he represents in order of frequency are dogs, cows, cats and pigs.

3. The article referred to a referendum which was due to take place two days later in Switzerland and which was to determine whether an animal advocate would be required by law in all twenty-six Swiss cantons. It was initiated by the Swiss Animal Protection Group through a mechanism whereby any citizen who collects 100,000 signatures from eligible voters can force a nationwide referendum on their chosen issue. Subsequent news reports indicate that the referendum of 7 March 2010 was defeated, though it seems that the canton of Zurich continues to maintain Goetschel as its animal advocate.

Letter to DEFRA regarding Beak Trimming of Laying Hens

On 8 September 2009, Farm Animal Welfare Council (FAWC) wrote to Jim Fitzpatrick MP, Minister for Farming and the Environment in response to a 2007 request by Lord Rooker, then Minister for Animal Welfare, asking that FAWC reconsider its advice about beak trimming of laying hens in view of research that had been undertaken at the University of Glasgow on 'Chronic neurophysiologic and anatomical changes associated with infra-red beak treatment.'

In the letter, FAWC notes that beak trimming of laying hens is to be banned in Britain after December 2010.

It also expresses the view that, although the research at Glasgow found that hens do not suffer chronic pain after infra-red beak treatment, FAWC remains concerned about this method of beak trimming because of the trauma to the bird *during* the procedure, loss of a sensory tool and loss of integrity of a living animal by the removal of part of its beak. As a

result, FAWC, reiterates its earlier advice that beak trimming should not be permitted in Britain.

However, FAWC also notes that though the poultry industry was made aware of the 2010 ban on beak trimming some seven years ago, it has made limited progress on controlling injurious pecking of hens under commercial conditions by developing new husbandry systems, for example. As a result, the ban is likely to have a negative effect on hens. For this reason, FAWC proposes that the ban should not be introduced with effect from December 2010 but should be deferred until it can be demonstrated reliably and under commercial conditions that laying hens can be managed without beak trimming and without a greater risk to their welfare. It also recommends that infra-red treatment should be the only method used routinely from a set date, such as January 2011.

FAWC notes that beak trimming of laying hens is to be banned in Britain after December 2010.

FAWC's ultimate recommendations on this issue are as follows:

that Britain learns from producers in Switzerland, Austria and Scandinavia who are successfully managing large flocks of laying hens without beak trimming;

that a stronger emphasis is placed upon choice of strains and/or genetic selection for hens that are not prone to injurious pecking;

that there be use of smaller groups in husbandry systems (including enriched cages), both because they are advantageous in themselves and because they allow trials of alternatives to beak-trimming in part rather than all of a large flock;

that there be contingency plans for the control of injurious pecking in hens with intact beaks, including the financial implications;

that there be provided financial incentives for not beak trimming, for example, from retailers or from Common Agricultural Policy funding;

that the DEFRA Beak Trimming Action Group be reconvened with a mandate to develop and implement the above strategy, supported by public funds;

That the ban on beak trimming is not deferred indefinitely and that deferment is reviewed in 2015.

Ban whale hunting if serious about EU accession, says European Commission

On 11 December 2009, Eurogroup reported that the European Commission had confirmed in a letter to the Whale and Dolphin Conservation Society that Iceland will be required to ban the hunting of whales if it succeeds in becoming a new EU Member State. Some months prior to December 2009, Iceland sought EU membership and talks began with the European Commission to investigate its eligibility to join. Animal welfare supporters across the Union subsequently expressed concern about Iceland's insistence on the keeping of the whale hunt, given that this is contrary to requirements for membership. Under the EU's

Iceland will be required to ban the hunting of whales if it succeeds in becoming a new EU Member State.

Habitats Directive, whales are protected from deliberate disturbance, capture and killing within European Community waters. The Commission is expected to formulate its opinion on Iceland's accession application at some point during 2010

First step in court case against Spain over zoo infringement

On 15 October 2009, Eurogroup reported that the first step was taken in legal proceedings against Spain over the country's infringement of the EU Zoo Directive. For a number of years, Spain had failed to meet EU regulations on the keeping of wild animals in zoos. Following the gathering of evidence by a number of Spanish animal welfare NGOs, the European Commission determined to investigate the situation. As Spain did not heed the warnings of the Commission rapidly to seek compliance with the rules, the European Court of Justice officially started legal proceedings against Spain at the end of August 2009. The court case will result in a judgment that pertains to zoos in no less than 9 of Spain's 17 autonomous regions. Criteria for obtaining the necessary licensing include compliance with Zoo Directive stipulations such as proper care for the animals' welfare, participation in scientific activities and contributing to the education of zoo visitors. Zoos that do not comply with these rules and therefore are not licensed should be closed, a duty Spain had neglected to carry out.

News Digest

Beavers and flooding?

Beavers, a "keystone" riparian species[1] have now been reintroduced to over 19 European countries. In part, this is due to the European Union's Habitat Directive[2] which, for a number of reasons, requires Member States to consider the desirability of reintroducing certain species, but also because their presence "increases biodiversity and modifies the surrounding ecosystem" beneficially and "could offer help with flood protection".[3] Unfortunately, they are now being blamed for, inter alia, the recent flooding along the river Oder in Central Europe.[4] It is to be hoped that there will be an official inquiry into exactly what are the cause/s of the problem, which might perhaps include extraordinary weather, over-concretization and loss of wetlands.

The Hackney Fox Attack.

On the night of 5 June, it seems that a fox crept into a house in London and made its way up the stairs into the bedroom of 9 month old twin girls, whom it then attacked. The injuries were serious, bites to the arms and faces with one baby ending up in intensive care. It cannot be emphasized enough that such behaviour is quite incredibly rare[5] and there is no way of knowing why it happened. Understandably, the family and neighbours want fox numbers reduced in their vicinity and pest control officers have already killed four animals, live-trapping, then humanely destroying them. As the fox is classified as a pest, it does not receive the usual protection offered to animals under the Wildlife and Countryside Act 1981. It seems unlikely there will be a wholesale cull. However, perhaps the best way forward is by always treating foxes with respect, recognizing them for the wild animals they are, then, if we are lucky, these normally shy animals will continue to grace our gardens with their presence.

Badger Cull

In September 2009, the Minister for Rural Affairs in Wales announced she would be signing the Order which would give Welsh Ministers the powers to implement the cull of badgers to curb bovine TB.[6] Although the Badger Trust brought an action in judicial review to challenge this decision, the High Court ruled that the cull was lawful.[7] The cull was on again, only to be postponed once more, until the result of the Badger Trust's appeal is heard about the end of June. Meanwhile, in England, in 2007, the Independent Scientific Group on Cattle TB published its final report on the Randomised Badger Culling Trial (RBCT), one of its many conclusions being "badgers are a clear source of infection for cattle".[8] It also recommended the removal of some badgers. However, Sir David King made it quite clear that "the overriding aim is to control TB in cattle ... it is not to eliminate badgers" although "a secondary aim is to control TB in those badger populations ..." in certain areas of high cattle TB prevalence.[9] Defra then commissioned a report[10] to study the aftermath of the RBCT. Published in February 2010, it claimed that the benefits of widespread badger culling were not sustainable 3 ½ years after a cull has ended. Furthermore, " "patchy" and "unco-ordinated circumstances" are highly likely to increase rather than reduce incidences of bovine TB in cattle".[11] In May, an update on the report "released by one of the research group has shown that the positive effects of culling had "reappeared" 37 - 42 months after culling in the trial area had ceased".[12] New Zealand, which had a similarly intractable problem, has now managed dramatically to reduce its incidence of bovine TB using a 3-pronged approach. The main disease vector is the possum, an invasive non-native species, and TB has been eradicated "from10 of the geographic areas through targeted killing of possums".[13] In addition, farmers "fund and are deeply involved in all aspects of the TB programme".[14] More importantly, "the AHB and Otago University ... have developed an oral TB vaccine for possums" and have visited both the UK and Ireland regarding an oral vaccine for badgers, a vaccine that is already being evaluated in Ireland where it seems to be "relatively efficacious in preventing TB in badgers".[15] Is the Government really going to carry out a cull when vaccination seems about ready to solve the problem?

[1] Collen and Gibson, 2001.

[2] Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ. No. L 206 of 22 July 1992.

[3] Briefing Paper for the Salmon and Trout Association – see www.salmon-trout .org/Beaver_Reintroduction_ Briefing_paper.pdf accessed 15/06/2010.

[4] Roger Boyes "Floods cause havoc as beavers bite the land that saves them", The Times 27 May 2010. They are also holding up the construction of a controversial bridge and have tunnelled into a sewerage works releasing untreated sewerage.

[5] In 2009,"5,221 people, including 1,250 children, were treated in hospital in England..." for dog bites – see Iain Hollingshead "Outfoxed", The Daily Telegraph, 12 June 2010. This informative article also contains some beautiful pictures of foxes.

[6] "Powers sought for badger cull",http://news.bbc.co.uk /1/hi/wales/8282779.stm Accessed 10 June 2010.

[7] Valerie Elliott "High Court gives go-ahead for badger cull to curb bovine TB", The Times, 17 April 2010.

[8] Sir David King "Bovine Tuberculosis in Cattle and Badgers" a report by the Chief Scientific Adviser.

[9] Ibid.

[10] Carried out by Imperial College London and the Zoological Society of London.

[11] "Badger culls not cost effective", http://news.bbc.co.uk /1/hi/wales/8507010.stm Accessed 10 June 2010.

[12] "Badger culling can control TB, says research", Farmers Weekly, 28 May 2010 http://www.fwi.co.uk /Articles/2010/05/28/121478/ Badger-culling-can-control-TB-say... Accessed 10 June 2010.

[13] "Ways in which New Zealand has reduced bovine TB" http://www.clearstats.co.uk/bovinetbnewzealand.php Accessed 10 June 2010.

[14] Ibid.

[15] Ibid.

The welfare gap: the Dangerous Wild Animals Act 1976 and the application to primates

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The Dangerous Wild Animals Act 1976[2] (the Act) is evocative of the exotic, the interesting - the edgy even. The reality is somewhat different as it is relatively ineffectual, serially overlooked and until recently has not even mustered any notable interest from those charged with its operation. With a legislative existence stated to be premised on tackling the potential threat to society from a passing trend for owning big cats[3] , the Act, in common with many enactments responding to an ill defined 'problem', has struggled to remain relevant. During the debate on amendments to the Act in 1984, the Under Secretary of State for the Environment reflected on its genesis, stating that 'there was an underlying reluctance to list species about which there might be scope for serious disagreement as to how dangerous they were, some comparatively harmless species were embraced within certain broad categories. Other more dangerous kinds were omitted'[4]. This short article will outline the Act, recent amendments to it, and offer a critique of its operational effectiveness when measured against its stated purposes, and its place in the overall scheme of protection of animal welfare for the species which are included in its Schedule. To add some context, a particular focus is placed upon primate species which, arguably, demonstrates that the way in which the Act as currently configured is unable to protect the welfare of wild animals wholly unsuitable for ownership by non-specialist keepers.

In force since October 1976, the Act performs a dual function of protecting the public and seeking to provide a baseline for welfare considerations. During its progress through the House of Lords Lord Chelwood stated that '*the general policy of the Bill is quite clear. It is that in future the keeping of dangerous wild animals by private individuals should be made a wholly exceptional circumstance*'[5]. It was also observed in the Committee stage that the welfare aspects of the Act were subordinate to the public safety aspect[6]. The long title offers no clues as to any wider purpose stating merely that it is 'an Act to regulate the keeping of certain kinds of dangerous wild animals'. The Act does not define what a dangerous wild animal actually is, although a working definition was adopted in the 1980s as discussed below. Instead the kinds of species subject to its provisions are listed on a Schedule.

The Dangerous Wild Animals Act 1976 (the Act) is evocative of the exotic, the interesting - the edgy even.

The regulation is achieved through an inspection and licensing scheme operated by local authorities in relation to animals included on the Schedule. In practice, due to the

[1] I would specifically like to thank Brooke Aldrich for her help and advice, and in permitting me access to local authority data collected by the Monkey Sanctuary Trust in Looe, Cornwall, a project delivered by Wild Futures www.wildfutures.org.

[2] Eliz. II c.38.

[3] See e.g. Defra website http://www.defra.gov.uk/wildlife-pets/wildlife/protect/dwaa/about.htm , for an account of a sale of a lion in a UK department store see e.g. http://www.bornfree.org.uk/campaigns/big-cats/about/christian-the-lion/ .

[4] HC Deb 02 July 1984 vol 63 c124, Rt. Hon William Waldegrave MP.

[5] Lord Chelmwood, Second reading, House of Lords Official Report, Fifth Series, vol 374, cited in A.G. Greenwood, P.A. Cusdin, M. Radford, Effectiveness Study of the Dangerous Wild Animals Act , Defra 2001, p .10.

[6] Ibid.

basic licensing considerations, this has meant that the Act has mainly focused on protecting the public from the risks of keeping, and escaping, wild animals. In the latter case a claim has been made that no serious indents have arisen since the Act was passed into law[7], thus appearing to evidence its success: a very clear success when measured against annual injuries, and even fatalities, caused by dog attacks. Ad hoc reports of specific instances of attacks[8], or high profile social concerns have in the past resulted in attempts to add to the Act's reach, as witnessed in 1991 when a Bill was introduced in order to add the Japanese Tosa and the Pit Bull Terrier to the Schedule: the attempt was ultimately unsuccessful and these two breeds were among those included in the Dangerous Dogs Act of the same year[9].

The Act is essentially aimed at private animal keepers. Section 5 of the Act is clear that it does not apply to dangerous wild animals kept in a licensed zoo[10], a circus[11], premises licensed as a pet shop[12] or a place designated as a scientific establishment[13]. The considerations and steps which must be undertaken permits a local authority to assess, pre-licensing , of both keeper and premises in order to determine the suitability (*suitability* is not defined however) of an individual to keep the animal(s) and ensure that premises are fit for purpose, including protecting public safety[14]. The local authority retains a discretion in the grant of a licence; and as is the case for most licensing regimes it is permitted to specify whatever conditions it considers appropriate, subject to the exception contained in s1(6) of certain minimum requirements. These minimum requirements relate, for example to matters such as location, movement and insurance requirements. Licences may be varied or revoked at any time.

Other than ensuring the premises housing an animal are secure, the Act is concerned with phytosanitary measures relating to disease control, although this aspect alone is not sufficient to require a licence under the Act[15]. Alongside the public safety and nuisance concerns, the Act also contains some limited welfare provisions: a vet authorised by a local authority must inspect premises where the animal is to be held pursuant to the licence. A licence may only be granted if the report is enough to enable the authority to determine that the animal concerned may suitably be housed there[16]. There is also provision in section 1(3) that the licence should not be granted unless the accommodation is suitable to the animal concerned; that that there is adequate food, water and bedding; and that the animal will be visited regularly. These minimal welfare provisions were the subject of a degree of controversy during the consultation for the most recent amendment to the Act. Defra took the view that there was no longer any need to require welfare conditions to be satisfied prior to the grant of a licence.[17] Defra have also previously stated that welfare is not a listing criterion for the purposes of the Act with the result that welfare considerations become solely, in practice, the ambit of other legislative mechanisms. This was despite the recognised welfare purpose of the Act itself, stated as recently as 2007 when the last significant change was made to the schedule[18]. As it transpired concerns raised through the consultation process ensured that this proposal was dropped. This means, in theory at least, that the Act retains some worth in the wider animal welfare toolkit, and that determinations made under it should continue to reflect that purpose.

> **The regulation is achieved through an inspection and licensing scheme operated by local authorities**

In addition to the somewhat resigned continuation of the welfare provisions by Defra, the decentralised nature of the workings of the Act has prompted concerns by interested parties over a number of years. The operation and administration, including enforcement, by local authorities is not subject to central influence or even a reporting requirement, so that practice is varied, even to the extent that there is no uniform

[7] Regulatory Reform Committee, Draft Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2009, Seventh Report of Session 2008–09 HC 795, HMSO, London, p5.

[8] HC Deb 02 July 1984 vol 63 cc122, Rt Hon. Greg Knight MP, detailing attacks by squirrel monkeys used as photographers props.

[9] Eliz. II, c.65. That Act providing another example of hastily contrived legislation being accused of not adequately fulfilling its purpose.

[10] Pursuant to the Zoo licensing Act 1981.

[11] Defined in section 7(4) as 'any place where animals are kept or introduced wholly or mainly for the purpose of performing tricks or manoeuvres'. In the case of *South Kesteven DC v Mackie* [2000] 1 W.L.R. 1461,the Court of Appeal adopted a broad interpretation of the Parliamentary intention so far as the circus exempting was concerned holding that the owners of dangerous circus performing wild animals did not require a licence when they were kept in winter quarters

[12] Pursuant to the Pet Animals Act 1951.

[13] Pursuant to the Animals (Scientific Procedures) Act 1986.

[14] Section 1(2), section1 (3).

[15] Section1 (3) (e): although this is the remit of specialist legislation otherwise beyond the scope of this evaluation.

[16] Section 1(5).

[17] Op cit. note 7.

[18] See the Explanatory Memorandum to The Dangerous Wild Animals Act 1976 (Modification) (No.2) Order 2007 (SI 2007/2465) at para 7.2.

licence cost. The position has been confirmed through Parliamentary questions over a number of years[19] but there has been no concerted attempt at any point to gather data or to coordinate practice. Indeed *Greenwood* (et al) noted in 2001 that 'since the Act's inception in 1976 there has been little guidance to local authorities'. The position has not improved, although Defra's website makes claim to forthcoming 'comprehensive guidance for local authorities and keepers on the provisions of the Act… It is hoped the guidance it will promote a more consistent implementation of the legislation, assist with increasing support and compliance amongst animal keepers and, ultimately, in more effective operation of the Act'[20]. The shape of this guidance is unclear at the time of writing, but the description, which continues by reference to the needs of certain types of animals, might hopefully reflect the sort of guidance provided by way of the codes of practice made pursuant to the Animal Welfare Act 2006[21]. In any case whatever form the guidance takes will be an improvement on the current situation of nothing.

The maximum penalty for a person convicted under any provision of the Act is a level 5 fine[22]. Offences relate to the keeping of a specimen without a licence[23]; failure to comply with a condition of a licence[24], or obstructing a local authority inspector or vet[25]. Section 3 also contains a provision requiring a licences person to enable inspectors or vets to enter the premises for the purposes of determining whether an offence is being committed. Local authorities are also given the power to seize and dispose of animals without compensation by virtue of section 4: this power is parasitical on the commission of an offence, and is backed by a cost recovery mechanism, in that any expenditure incurred by the enforcing authority may be recovered as a civil debt from the keeper or licence holder of the specimen. A court may also revoke a licence and prevent a person from keeping a dangerous wild animal for any period which it may think fit, where an offence is committed under the Act, or under a range of other provisions as diverse as the Performing Animals (Regulation) Act 1925 through to certain sections of the Animal Welfare Act 2006[26].

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On its face, subject to the general critique applicable to appropriateness of penalties which characterises animal welfare and environmental sentencing concerns, the enforcement provisions are probably what would be expected. The perception of the Act is of a regulatory system, containing, basically, administrative offences, of failure to posses, or breach of the conditions of, the appropriate permit. The system is undermined however by the less than adequate application and enforcement of the Act's provisions, and something noted by research and Defra itself[27]. When Defra's guidance sees the light of day it may generate a feeling that the sponsoring department is taking a greater role in ensuring that the purposes of the Act are being met; which might have a galvanising effect on the authorities tasked with its implementation. There is of course the risk that this historically low-priority area of local authority regulatory responsibility will be put firmly on the back burner in the climate of public sector rationalisation and deregulatory pressures following the UK's recent general election, and consequent change of government.

The Act itself though has not remained a constant throughout its history. It has evolved, as have the trends in species ownership, since the mid-1970s. The original Schedule for example listed nine kinds of 'dangerous' wild animals, the current Schedule lists fifty three. Certain additions have been in response to certain perceived problems, such as in the early 1980's, the scheduling of 'new world' monkey species. Notable amendments were made to the Schedule in 1981[28], 1984[29], 2007[30], and, most recently, a 2010 measure[31], which took effect on 18th March. The 1980's amendments saw a large increase in

[19]See for example *HC Deb 09 November 1976 vol 919 c147W HC Deb 21 November 1985 vol 87 c259W; HC Deb 17 November 1992 vol 214 c129W.*

[20]See http://www.defra.gov.uk/wildlife pets/wildlife/protect/dwaa/review.htm.

[21]Made for example in relation to dogs and non-human primates.

[22]Section 6(1), Currently £2000.

[23]Section 2(5).

[24]Section 2(6).

[25]Section 3(4).

[26]See in this regard s 6(2).

[27]Op Cit n18 at 7.3, and Greenwood et al, n5 at page 32.

[28]SI 1981/1173.

[29]SI 1984/1111.

[30]SI 2007/2465. There were in fact two modification orders made in 2007, the latter being passed to include certain additional species and to correct an oversight in the geographical application of its predecessor (SI 2007/1437). Separate provision was made for Scotland in the Dangerous Wild Animals Act 1976 (Modification) (Scotland) Order 2008 SSI 2008/302.

[31]The Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2010, SI 2010/839

the number of scheduled animals. The first expansion saw some attempt to rationalise the determinants for classifying an animal as dangerous, including whether the animal's biting or scratching was worse than a feral tomcat; whether the animal's but or kick is worse than a domestic goat or horse; and whether the animal's sting is worse than two wasp stings[32]. This clearly reflected the public safety aspect. Interestingly the 1984 amendment was in part due to pressure by the RSPCA to include certain species, such as, and as were subsequently added this order, the new world monkeys. It was observed by Greenwood et al[33] that there was not really agreement on the inclusion of the new world monkeys as a result of a number of them having small canine teeth, and thus not meeting the test of 'dangerousness' - despite there not being a firm statutory criterion.

The 2007 amendment removed a number of the new world primates listed in 1984 from the Schedule. Tamarins, woolly lemurs, night monkeys, titis and squirrel monkeys were removed as not being considered to be dangerous. In relation to the squirrel monkey in particular there is a particular irony that the issue has gone full circle, as it was that species which received parliamentary attention, on the basis of its perceived threat, in the run up to the 1984 Order[34]. The explanatory memorandum to the 2007 modification order notes that a review of the Act prior to the measure highlighted that it was in need of updating and revision. The revisions were required because, it goes on to elaborate that it was poorly enforced and there was believed to be wide-spread non-compliance; and concludes that 'a number of the species listed in the 1980s were considered to be no more dangerous than domestic cats or dogs and this had further undermined the Act's credibility'[35].

The 2007 amendment removed a number of the new world primates listed in 1984 from the Schedule.

The obvious question however is how does the delisting of species, which it is generally acknowledged require specialist keeping, enable better enforcement or compliance? It must also be determined who is considering the Act as less credible because of its inclusion of certain species which may not be considered to be dangerous by contemporary standards, despite the fact that they have previously been considered to be so. The *actual* effect is to remove the need for an initial assessment of the suitability, whatever that means, of the person to 'keep' the animal; and the suitability of the situation in which it will be kept: hence the welfare 'gap'. What the keeper has is a 'wild' animal. Not an animal which has been domesticated over millennia of human contact and companionship; not an animal that is 'easy', predictable and undemanding. The risk to others may actually be created by the inability of the keeper to meet adequately the needs of the species held: the potential for detriment to the animal's welfare by the failure to meet its basic needs is very real.

The basic thrust of the 2010 amendment is premised on the Regulatory Reform Act 2006[36] which seeks to reduce administrative and regulatory burdens on both the regulated and regulators. Its effect is to modify section 2 of the Act to increase the length of licences to two years, and thus decrease the number of inspections, which has obvious welfare implications. It also regularises the position in relation to when licenses come into effect, basically now from the date of grant, rather than being either from the date of grant or the beginning of the next following year. During debate the concept of removing the requirement for inspections altogether was proposed, although on the basis of fears that this would permit licence renewals, where undertaken at all, without inspection, and would thus undermine necessary protections. This proposal was subsequently dropped. The issue in relation to the welfare implications is discussed in an accompanying statement and it is observed that 'the impact of that change, with respect to both public safety and animal welfare, has yet to be tested by experience… [in the view of] DEFRA, the answer lies in issuing guidance which is intended to

[32]Op cit n5 at page 16.

[33]Ibid, page 17

[34]See e.g. footnote 8.

[35]Wild Animals Act 1976 (Modification) (No.2) Order 2007/2465, Explanatory Memorandum, Defra, 2007, para 7.3.

[36]Eliz. II c.51, section 14.

promote a more consistent implementation of the legislation and they suggest that a cheaper regime will enhance compliance'[37]. The suggestion would thus seem to be that the best guess is that cheaper will mean more effective in terms of the 'existing background of variable enforcement and non-compliance'[38]. Without wishing to appear over critical or emotive, it is the kept animals which will bear the brunt of the uncertainty.

> **the potential for detriment to the animal's welfare by the failure to meet its basic needs is very real**

Application of the Act to primate species provides some context for the Act and its limited, and contracting, welfare provisions. While most primates[39] are listed on the Schedule, the issue of primate keeping generally has been considered by NGOs. They have unearthed evidence such as that within the International Fund for Animal Welfare (IFAW) sponsored report[40] that primates makes unsuitable pets for a variety of public safety and welfare reasons. Recent academic investigation[41] has concluded, similarly, that primates are not suitable to be kept as pets; and that the limitations of the Act, due to its incomplete regulatory oversight of keepers, ensure that the welfare picture is incomplete. In fact there is a definite underestimate of the actual level of the failure of welfare protection. The fact that most households were assessed to be unable to provide adequate husbandry conditions[42] means that the welfare of privately owned primates is likely to be poor - if those conditions are not subject to a minimum assessment of their suitability, such as that required under the Act, the likelihood is that even less will meet them.

Statistically, the RSPCA found that between 2000 and 2005 there were191 welfare complaints in relation to primates, most of which related to neglect[43]. The basic way to mitigate this neglect was found to be the need to enable 'normal' behaviour. The only certain way that can be ensured is through social conditions, adequate housing and enrichment. The implication is of specialist care, which demands specialist knowledge to assess its suitable provision. While a general provision such as the Animal Welfare Act 2006 certainly provides a valuable general tool to be deployed; and the recent Code of Practice[44] provides a good baseline, the removal of certain primates from the Schedule to the Act leaves a potential gap - particularly when

> **primates makes unsuitable pets for a variety of public safety and welfare reasons**

considering the initial acquisition and housing no longer being subject to veterinary assessment of suitability and the inability to require conditions to be applied. This would be the case despite the, admittedly sporadic, application of the Act, which it can only be hoped will become more formalised. The point was raised in the regulatory impact assessment of the primate code, which despite noting that there was no centrally collected data on primate ownership, seizure or prosecution, that local authority inspectors would be able to use the code in their inspections pursuant to the Act. This is perhaps a tacit admission that there is a lack of expertise in relation to primates, but, there remains the issue of the de-listed species which are now not subject to any inspection, irrespective of the criticisms that may be made of current practice.

Research undertaken by Wild Futures, a charity which operates the Monkey Sanctuary at Looe in Cornwall (UK), under the Freedom of Information Act 2000[45] (FOI) has confirmed the conclusions reached by Greenwood et al that the picture in relation to effective local authority oversight of the keeping of dangerous wild animals is operating

[37]The Legislative Reform (Dangerous Wild Animals) (Licensing) Order 2010. Accompanying statement by the Department for Environment, Food and Rural Affairs, March 2010, Defra, HMSO, at paragraph 4.

[38]Ibid.

[39]Most of the primates are also subject to the requirements of Regulation EC/338/1997 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein ,OJ L 61, 3.3.1997, p 1. This implements the Convention on the International Trade in Endangered Species, Washington, 1973 (CITES). Consideration of CITES is beyond the scope of this article however.

[40]Born to be Wild: Primates are not Pets, International Fund for Animal Welfare (Eds.) (2005), London, IFAW; see also Primates as Pets: Is there a case for regulation, RSPCA & Wild Futures (2008).

[41]Soulsbury, Carl D., Iossa, Graziella, Kennell, Sarah, Harris. Stephen(2009)'The Welfare and Suitability of Primates Kept as Pets'. Journal of Applied Animal Welfare science, 12:1, 1-20.

[42]Ibid, page 20.

[43]Ibid, page 19.

[44]Code of Practice for the Welfare of Privately Kept Non-Human Primates, Defra, January 2010, available at: www.defra.gov.uk/wildlife-pets/pets/cruelty/index.htm

[45]Eliz. II c.36.

at less than 20%. The research undertaken over the last 3 years has determined that there is in the region of 82% non-compliance with the Act so far as it relates to privately kept primates. The use of the FOI as a research tool in this situation has been very effective and netted an astonishing 100% response rate so a complete picture of UK local authority practice has been obtained. The figures show that 280 primates were licensed under the Act in February 2009 (2010 data is currently being collected). With Defra's own estimate of an 85%[46] non-compliance rate and RSPCA/Wild Futures' estimates approaching 82% non-compliance, this could equate to an actual figure of between 1447-4420 licensable, but unlicensed primates being held by private individuals. Crucially, this does not include the tamarins, marmosets, lemurs and squirrel monkeys - the most popular primate 'pets' according to research[47] - as these species have never, or are no longer listed.

The evidence of the Act's failure adequately to reflect the needs of the species, and potentially as a result of poor socialisation, the public at large is compelling. The failure of the welfare considerations is more likely to promote poor welfare and thus poor socialisation which would then pose a more significant threat. The review of the Act in 2001, the Soulsbury research and FOI requests outlined above revealing the ineffectiveness of the Act prompts the initial question as to the point of the 2010 amendment. This is, apparently, as with its 2007 predecessor measure, a remedial response to a legislative measure that is not functioning adequately. The change, it must be submitted is not likely to bring the missing 80% of keepers into the regulatory fold. To conclude this point, the Act must either be taken seriously by those tasked with its operation, or a different basis taken in the case of primates, which either attaches to the trade stage[48], or imposes an outright ban on private ownership as other European countries including Holland and Sweden have done.

The sensible and genuine commitment, and progress, towards animal welfare during the last decade is laudable. The Animal Welfare Act 2006 is undoubtedly a very important piece of legislation, as has been widely reported, although all of the codes of practice are as yet incomplete. The primate code is as great step forward, although if local authorities are not in a position to make inspection pursuant to it, it lacks the impact that might be hoped for. Thus other enactments as applied to wild, zoo kept and 'dangerous' wild animals all require a basic irreducible welfare component: to do so they must be seen to be of significant application; be working; and be able to reflect the needs of the species. There is also an obvious need to balance the regulatory system for those subject to it and those charged with operating it. Clearer and more joined-up laws which never lose sight of the fact that a kept animal must have suitable recognition taken of its welfare needs are imperative. Welfare should be an ever-present consideration. By all of these measures, at least when applied to the keeping of primates, it would appear that the Dangerous Wild Animals Act 1976 cannot offer the protection it should, having been tasked to do so at its inception and through its early evolutionary stages. The most recent changes unfortunately do not close this welfare gap. It is incontrovertible that poor standards of welfare actively promote turnover of animals kept, especially within the pet trade. This obviously has a resultant impact on wild populations, as well as the kept animal itself. The lucrative nature of the current fad for certain 'exotics', including, as outlined above, primates, will necessarily attract those with a profit as opposed to species interest.

The sensible and genuine commitment, and progress, towards animal welfare during the last decade is laudable

[46]This is also the lower end of the Defra estimate, which in the Greenwood (et al) paper was reported in a range of 85-95% non-compliance.

[47]RSPCA, Monkey Sanctuary Trust (2009) Primates as Pets: is there a case for regulation? Unpublished report. Available from info@wildfutures.org

[48]Ignoring for the purposes of this article the potential for the need for certification to comply with the requirements of the Regulation 338/1997.

Business As Normal Or As 'Normalised'? The Future Of The International Whaling Commission

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Originally created in the aftermath of World War II under the terms of the 1946 International Convention for the Regulation of Whaling (ICRW)[1], the International Whaling Commission (IWC) now stands at a crossroads at which its future direction must be determined. At the heart of the controversy, which is scheduled for resolution at its forthcoming 62nd annual meeting, lies the current moratorium on commercial whaling approved back in 1982. The impetus for review was effectively generated by the adoption in 2006 of the so-called St Kitts and Nevis Declaration,[2] which asserted that the IWC could only be saved from collapse by the 'normalisation' of the organisation in accordance with the letter and spirit of its constituent instrument, and other relevant legal principles.

Though both of pivotal significance, the two measures highlighted above differ crucially in terms of their legal status. The moratorium decision, which brought to an end several decades of whaling excess, constituted a legally binding amendment to the Schedule of the ICRW, where the detailed regulations governing the exploitation of whales are established. Such amendments require for their adoption 'a three-fourths majority of those members voting[3], which had become attainable through the progressive influx into the IWC of various non-whaling states, following a call for enhanced attention to the conservation of whales at the 1972 Stockholm Conference on the Human Environment. The inevitable concomitant of the moratorium was that commercial catch limits for all stocks were set at zero. Subsequently, following assiduous "encouragement" by Japan, in particular, of a further expansion of membership to embrace certain developing countries willing to support a renewal of whaling, the voting balance shifted again. Although this constituency never approached the size needed to overturn the moratorium through further amendment of the Schedule, it proved sufficient at the 58th annual meeting in 2006 to achieve the bare majority needed to adopt a non-binding recommendation under Article VI.[4] Thus, Japan was able to secure the call for 'normalisation' of the IWC, which, the resolution asserted, had 'failed to meet its obligations under the terms of the ICRW'.

This claim requires some elucidation, since the ICRW, being focused primarily upon the creation of *powers*, is extremely sparing in its imposition of obligations, whether upon the organisation itself or its members, and there is certainly no specifically stipulated duty that bears upon the matters in issue. The essence of the complaint here, however, as the preamble to the resolution confirms, was that opposition in principle to *any* resumption of commercial whaling, even on a sustainable basis, is "contrary to the object and purpose" of the ICRW, and the International Court of Justice (ICJ) would seem to have confirmed in the *Nicaragua* case that action taken to defeat the very object and purpose of a treaty may amount to a breach thereof even though no infringement of any particular provision can be identified.[5]

The response of anti-whaling IWC members predictably entailed a scramble for further recruitment to the organisation of sufficient like-minded states to restore the voting balance, which was duly achieved by the time of the next meeting. More immediately, a number of them formally dissociated themselves from the normalisation resolution. They also decided to boycott an unofficial meeting organised by Japan to

[1] 161 UNTS 72.

[2] IWC Resolution 2006-1.

[3] Article III(2).

[4] By 33 votes to 32, with one abstention.

[5] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US), *Merits Phase* (1986) ICJ Rep 14.

explore the normalisation process. Yet a posture of wholesale disengagement was never likely to be politically maintainable for long, and a succession of informal meetings followed involving all factions, with the Pew Foundation in particular seeking to act as honest brokers in the quest for a solution. A more modest unofficial initiative, in the form of a position paper,[6] urged the anti-whaling faction to engage fully with the normalisation process, while at the same time challenging the Japanese perspective on interpretation of the ICRW, and in particular its object and purpose, through a radical and dispassionate re-examination of its text and drafting history. By this means, they could not only continue to occupy the high moral ground, but for the first time lay confident claim to the high legal ground as well. Nevertheless, given the undeniable "fisheries" orientation of the ICRW, and the fact that the risk of outright withdrawal of the pro-whaling nations from the IWC could not altogether be excluded, simply preserving the status quo was unlikely to prove sustainable in the long term; some movement from entrenched positions would accordingly be required. By the time of this paper's circulation, the IWC had in fact already launched an inter-sessional process of its own aimed in the first instance at confidence building, in order that the substantive issues arising out of the call for normalisation might then be addressed in a more favourable atmosphere.

The paper's central argument was that traditional perspectives regarding the object and purpose of the ICRW were substantially misconceived. They turn essentially on the preamble's final recital, which asserts that the convention was concluded in order to

provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry ....

This phrase has conventionally been interpreted to create two objectives - namely the conservation of whales and the development of the industry - which are in a relationship of mutual tension, if not outright conflict, and have therefore to be reconciled or harmonised. This is characteristically achieved by selecting (usually on no very clear or compelling basis) one of these as the 'primary' objective and effectively subordinating the other to it. A closer analysis exposes this perspective as highly unconvincing, however, along with its underlying assumption that the convention's aim was simply to create a "whalers' club" in the form of a cartel. In reality, the preparation of the treaty was undertaken as a unilateral initiative by the United States, which by 1946 was only minimally involved in whaling itself, with only one, small-scale whaling station operating in its entire territory at the time. A key objective of post-war US foreign policy, moreover, was actually the *breaking* of the power of trade cartels, which it saw as having contributed substantially to the tensions that had led to world conflict. It was specifically in order to wrest power away from the major whaling nations (principally Norway and the UK) that it sought to establish the IWC, in which membership was, quite deliberately, left open to all states, whether engaged in whaling or not. Accordingly, the total allowable catch was henceforth to be determined on scientific advice, ensuring that exploitation could be contained within reasonable bounds. The US text was ultimately endorsed, with relatively few changes, largely because the established whaling nations also feared that the post-war scramble for resources might get out of hand through the expansion of whaling to other states, and saw institutionally-imposed, global catch quotas as a useful means of preventing this, while preserving their own existing competitive advantage. Thus, the object and purpose of the ICRW should correctly be understood as envisaging the establishment of a mechanism to ensure the proper conservation of whale stocks as a means of *imposing order* on the development of the industry, rather than to foster development of the industry *per se*.

That said, the proper approach to contemporary interpretation must go far beyond merely clarifying the Convention's original objectives. As a treaty establishing permanent institutional arrangements, the ICRW necessarily requires a progressive, evolutionary interpretation to enable it to keep pace with current needs and the unfolding development of the wider international legal system. Thus, to the extent consistent with the text, it should be construed so as to harmonise with contemporary legal norms concerning maritime affairs, human rights, biodiversity conservation, animal welfare and other relevant matters. In particular, the preambular reference to whales as 'resources' should be read to reflect *all* the means by which whales might be exploited today, including for non-consumptive, educational and recreational purposes, and the very

[6] M.J. Bowman, " 'Normalizing' the International Convention for the Regulation of Whaling" (2008) 29 *Michigan JIL* 293-499 (draft version provided on request to the IWC at the prompting of the New Zealand delegation).

concept of 'whaling' reinterpreted so as to embrace modern 'whale-watching', already more widespread and lucrative by far than traditional fishery-style exploitation. This reorientation was facilitated by the fact that the ICRW's own definition of a 'whale catcher' fortuitously included any vessel 'used for the purpose of ... scouting for whales'.[7] Note should also be taken of the recognition in the Biodiversity Convention and elsewhere of the *intrinsic value* of all life-forms alongside their anthropocentric utility, and the concomitant need for their humane treatment. Given the opportunities for non-lethal exploitation, moreover, opposition to the re-establishment of quotas for the commercial killing of whales could not be presented as undermining the objectives of the convention at all. Rather, all claims for quotas should be considered on their respective merits in the light of these alternative opportunities.

The inter-sessional meetings duly moved on to address substantive issues, pursued initially through the medium of a Small Working Group, and then a 12-member Support Group designed to assist the Chair in providing direction to these deliberations. The latter was chaired by Sir Geoffrey Palmer of New Zealand - crucially, not only an experienced politician but an eminent lawyer. The ultimate package presented - a proposed consensus decision jointly advanced by the current IWC Chair and Vice-Chair - envisages a suspension of the moratorium and the consequent setting, for the first time in many years, of IWC-approved catch limits beyond those traditionally allowed for indigenous communities. These quotas, specified not merely for a single season, but right through to 2020, relate not only to the relatively prolific minke but to sperm, humpback, sei, fin and Bryde's whales as well. Predictably, therefore, the scheme has incurred the wrath of NGOs: "a good deal for the whalers and a poor deal for the whales" was the assessment of the Whale and Dolphin Conservation Society (WDCS), which proclaimed the moratorium to be "still the best hope for an end to whaling".[8]

> **the International Whaling Commission (IWC) now stands at a crossroads at which its future direction must be determined**

Yet this judgment glosses over a mass of complexities. The moratorium is scarcely a cast-iron, principled guarantee of protection for whales, as WDCS itself rightly acknowledges. It is, after all, by definition merely a *temporary* halt or delay in exploitation, and the resolution which created it called specifically for a review "by 1990 at the latest". A Revised Management Procedure (RMP), establishing a relatively conservative mechanism for determining catch limits, was agreed as long ago as 1994, and anti-whaling states have been prevaricating since that time on the grounds that the full details of a wider Revised Management Scheme (RMS), embracing such questions as monitoring arrangements, have still to be resolved. In any event, small quotas have always been set, as noted above, for the benefit of indigenous communities, in accordance with their special status for the purposes of international human rights law. In addition, Norway has continued to whale pursuant to a legally valid objection to the ban, registered under Article V(3) of the ICRW, while Iceland more controversially asserts the right to do so by virtue of a reservation attached to its re-accession to the Convention several years ago. Japan, meanwhile, conducts what many regard as essentially commercial whaling activities under the rubric of the right to take whales for research purposes, recognised in Article VIII.

The number of whales taken by virtue of these exceptions has been steadily rising, and now stands, WDCS concedes, at 1,600 whales per year even before the indigenous "take" is included. The quotas proposed are substantially lower, and believed to entail some 3,200 fewer kills in total than would occur if 2005-2009 catch levels continued, or 14,000 less than if the take for 2009 alone was replicated. NGOs are right to stress the significant difference in principle between, on the one hand, killing whales by (politically contested) unilateral fiat and, on the other, doing so with the express sanction of the international community, and it is certainly profoundly regrettable that such approval should even be under consideration. Yet the fact remains that the IWC was originally established in accordance with a traditional fisheries paradigm and cannot realistically be refashioned into something more in keeping with contemporary needs without first defusing the conflict that perpetuates the current stalemate.

[7] Article II(3).

[8] M. Simmonds and S. Fisher, "Oh No, Not Again" New Scientist, Opinion, 10 April 2010.

In particular, it is essential not to underestimate either the legal and practical difficulties involved in achieving such a transformation, or the extent to which the current plan might assist in overcoming them. WDCS, for example, welcomes the proposal to sharpen the focus on conservation generally, but suggests that this is something that the IWC should be doing in any event. Yet there is actually no specific mandate for such action in the ICRW at all, beyond the bare power under Article VI to make recommendations "on any matters which relate to whales or whaling", and even here it remains controversial whether conservation measures beyond the setting of quotas satisfy the stipulated additional requirement of relevance to the Convention's objectives and purposes. Consequently, acceptance of this part of the package would represent a major advance. Equally, the proposal to recognise the non-lethal utility of whales as a management option, and to address the associated issues, would represent a significant shift in the treaty's substantive orientation, enhancing the *legal* strength of demands that consumptive use be marginalised in the future: at present, the recommendations adopted on whale-watching have been treated by whaling states as falling beyond the legal remit of the ICRW, or at best as being of low priority. A further legal controversy would be dissolved by formal, universal commitment, as proposed, to the principle that whales be spared unnecessary suffering and that monitoring procedures specifically address this issue. It would also represent another small step in the long march to securing the protection of animal welfare as an essential, ubiquitous component in the international legal order.

"Norway has continued to whale pursuant to a legally valid objection to the ban"

Another WDCS concern is that the quotas proposed might be circumvented, as in the past, by the framing of objections or the issue of scientific permits, but the plan actually envisages that these powers be legally suspended as part of the overall package. Since almost all conservation treaties allow for the exercise of such powers (albeit usually in narrower terms than the ICRW), getting states to surrender them, even temporarily, represents a fairly radical step. Similarly, the fear that other nations, such as South Korea, might be emboldened to take up commercial whaling is largely countered by the proposal that authorised whaling be restricted to IWC members currently engaged in the practice. Since the moratorium, and zero quotas, will be *automatically* reinstated at the end of the decade if no further progress materialises, no new amendment to the Schedule should be needed at that stage, eliminating the possibility of states registering objections to it and thereby nullifying its effect for them individually. Of course, all these features should be formally confirmed before the new proposal is finally approved, and even then some risk undeniably remains of encouraging certain states to contemplate ultimate (re-)entry into the commercial whaling arena. *Legally*, however, their position should be no more advantageous than it is currently.

For many people, the only satisfactory outcome to this long-running controversy lies in the abandonment of commercial whaling entirely, and the restriction of exploitation of cetaceans to a properly managed regime of recreational and educational observation. Yet the fact remains that there is currently no obvious legal means of securing this result. WDCS places great store by the prospect of an Australian challenge to the legality of Japanese whaling in the Southern Ocean before the International Court, but it remains uncertain either that such proceedings would actually be initiated, or that a successful outcome could be guaranteed. Australia will surely be mindful of the rebuff it has already suffered in its claim against Japan in the *Southern Bluefin Tuna* arbitration,[9] while the very recent *Pulp Mills* case[10] between Argentina and Uruguay scarcely presents the ICJ as the environment's most ardent champion, especially where economic development is at stake.

Consequently, the establishment of quotas that would significantly reduce current catch levels, while at the same time discretely re-orienting the organisation so that such exploitation might more easily be resisted in the future represents a strategy worthy of serious consideration. Indeed, while it has been characterised as "a huge step backwards", it might in time be seen as more of a sideways movement which enabled the future to be viewed and mapped more clearly. And, while stepping out from behind a barrier undoubtedly generates undesired risk, it may also offer the only feasible route to progress, for the "business as normal" option seems to be getting us nowhere.

[9] (2000) 39 ILM 1359.
[10] (2010) ICJ Reports.

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What is ALAW?

ALAW is an organisation of lawyers interested in animal protection law. We see our role as pioneering a better legal framework for animals and ensuring that the existing law is applied properly.

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Animal cruelty does not, of course, recognise national boundaries and we are building up a network of lawyers who are interested in animal protection in many different countries.

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ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international organisations,
- highlight areas of animal welfare law in need of reform,
- disseminate information about animal welfare law, including through articles, conferences, training and encouraging the establishment of tertiary courses,
- through its members provide advice to NGOs and take appropriate test cases,
- provide support and information exchange for lawyers engaged in animal protection law.

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