

“The Hunting Act 2004 has been a useless piece of legislation and therefore should be repealed.” Discuss.

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It is deeply disheartening that, ten years since the ban on hunting with dogs for sport was introduced,¹ the Act’s amendment and repeal has been proposed in Parliament.² Since the ban was imposed, hunting has *adapted* rather than abated³ because law reform stopped short of banning hunting with hounds entirely,⁴ which is why the Act is vulnerable to recrimination and revocation.⁵

Recent plans to amend the Act were motivated by the twin purposes of pest control and bringing the law of England and Wales in line with Scotland.⁶ However, proposals to widen current exemptions to allow for as many dogs ‘as appropriate’ to

enable ‘hunting to be carried out as efficiently as possible’⁷ were political subterfuge to render the ban unenforceable and enable its repeal by the ‘back door’.⁸ Ironically, the Government’s proposed amendment backfired when the SNP announced a subsequent investigation into the operation of the Protection of Wild Mammals (Scotland) Act 2002, with a view to bringing Scottish law in line with England and Wales.⁹ In this respect, the Act may yet prove to be a useful benchmark.

While its rationale for repeal is still to be made publically available¹⁰ the Government will, no doubt, make use of current criticism dogging the Act. Despite being ‘the most

successful wild mammal protection legislation in England and Wales’¹¹ in yielding the highest number of successful prosecutions,¹² the Wooler Review infamously claimed it was ‘business as usual’ for hunters – to the extent that the Act risked

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¹ The Hunting Act 2004 came into force on 18 February 2005.

² See House of Commons Hansard (2015) ‘Oral Answers to Questions: Environment, Food and Rural Affairs’ 12 March: Column 393, Question 11 where the Secretary of State was asked, ‘What her policy is on the repeal of the Hunting Act 2004’.

³ Indeed, there are reports that hunts have more subscribers and supporters, see International Fund for Animal Welfare (2012) ‘No Return to Cruelty’ (London: IFAW) p 16. Pro-hunting organisations have also produced a handbook on how to continue hunting under the ban: Countryside Alliance and the Council of Hunting Associations (2005) ‘How to Keep Hunting: Hunting Handbook 2005-2006’ (London: Countryside Alliance).

⁴ Schedule 1 of the Act provides for exemptions to hunting with dogs including: flushing to guns (stalking and flushing out wild mammals with up to two dogs to be shot as soon as possible thereafter); using one dog below ground to flush out a wild mammal to be shot as soon as possible thereafter for the purposes of protecting game/wild birds; use of dogs to flush out a wild mammal from cover to enable a bird of prey to hunt it; use of dogs to recapture wild mammals; use of

up to two dogs to rescue a wild mammal, use of up to two dogs for the observation or study of a wild mammal.

⁵ See Editor (2005) ‘Legislative Comment: The Hunting Act 2004’ *Criminal Law Review*, Mar, 171.

⁶ Truss E (2015) ‘Amendments to Hunting Act Proposed’ 9 July (London: DEFRA).

⁷ See the draft Hunting Act 2004 (Exempt Hunting) (Amendment) Order 2015, which was laid before Parliament under section 14(b) of the Hunting Act 2004 on 9 July 2015 for approval by resolution of each House of Parliament. However, the vote on the draft order was abandoned on 14 July 2015 the day before it was scheduled to go ahead when it became clear that the SNP (as well as Labour) planned to vote against the Government, see Mason R & Brooks L (2015) ‘Sturgeon: SNP Will Keep Foxhunting in Revenge Against Cameron’ *The Guardian* 14 July.

⁸ Conservatives Against Fox Hunting (2015) ‘Open Letter: The Minister For Sport, the President of Conservative Animal Welfare and the Co Chairman of the All Party Group For Animal Welfare Urge Colleagues to Protect the Hunting Ban From Amendment’ 13 July.

⁹ In a letter to the League Against Cruel Sports Scotland the Environment Minister said that the investigation into the legislation would be scrutinised by the Scottish Parliament’s Rural Affairs Committee in the Wildlife Crime Report (see Peterkin T (2015) ‘MSPs Investigate Whether Fox Hunting Ban Flouted’ *The Scotsman* 12 July). There have been no successful prosecutions in Scotland under the 2002 Act.

¹⁰ The Conservative Government has promised Parliament the, ‘opportunity to repeal the hunting Act on a free vote, with a government bill in government time’: Conservative Party Manifesto (2015) ‘Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future’ (London: Conservative Party) p 25

¹¹ League Against Cruel Sports (2014) ‘The Hunting Act 2004: Ten Years On’ November (Surrey: LACS) p 5.

¹² To date there have been over 430 successful prosecutions under the Act according to huntingact.org. Ministry of Justice data regarding convictions since 2005 to 2013 reveals the Act has the highest number of convictions and conviction rate (65%) of any piece of wildlife legislation, see League Against Cruel Sports (2014) above p 8.

undermining the police, CPS and the rule of law.¹³ Perhaps hunters ‘have little respect for the law’¹⁴ because of the way the Parliament Acts 1911 and 1949 were used to force the Act through Parliament.¹⁵ However, it is more arguable that the substantive law contained within the Act itself has made illegal hunting possible and its implementation problematic.

For example, the Act’s provisions are perceived as complex and ambiguous since illegal hunting with dogs was never defined save for permitted exemptions.¹⁶ Paragraph 1 of Schedule 1, for instance, regarding the stalking and flushing to guns, contains five conditions which must be satisfied and has been described as, ‘so torturous that any person using dogs may be best advised to be accompanied by legal counsel’.¹⁷ Furthermore, the definition of ‘hunt’ in section 1 has been restrictively interpreted to require a wild mammal to have been specifically ‘identified’¹⁸ thereby creating a further element of the offence for prosecutors to establish beyond reasonable doubt.¹⁹ The prosecution must also show the defendant was

actively ‘engaged’ in the pursuit under section 11(2), not merely attending or observing (which, by comparison, is all that is required under section 5(1)(b) to commit a hare coursing offence).²⁰ Nor can there be an offence of *attempting* to hunt; it is a summary only offence and only offences triable as an indictable offence can be charged as attempts under the Criminal Attempts Act 1981 s 1(4).²¹

A further criticism of the Act is that it is possible for illegal hunters to manipulate its exemptions.²² If a defendant raises one of the exclusions in the Act, and the judge or magistrates consider the evidential

burden met, the prosecution must prove, to the criminal standard, that the exemption does not apply.²³ Therefore, defendants may claim to have been using packs of dogs to hunt rabbits or rats rather than wild mammals²⁴ or allege they accidentally pursued a fox where the hounds have deviated from artificial trails. Indeed, animal welfare groups consider trail hunting to be a false alibi for illegal hunting.²⁵ The falconry exemption is also purportedly abused, with terriermen carrying birds of prey in cages on the backs of quad bikes, enabling the hunt to deploy packs of hounds.²⁶ However, a perusal of the judgements contained on huntingact.org indicates that judges appear to be wise to such attempts to deceive.²⁷

Additionally, the investigation of hunting offences and evidence gathering is notoriously difficult given the nature of the ‘sport’ and reliant on the courage and conviction of hunt monitors²⁸ as well as the effective penetration of hunting commands, practices and culture.²⁹ On occasion, CPS reluctance to

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¹³Wooler S (2014) ‘The Independent Review of the Prosecution Activity of the Royal Society for the Prevention of Cruelty to Animals’ 24 September (London: RSPCA) p 109 and 120.

¹⁴League Against Cruel Sports (2014) fn 11, p 12.

¹⁵See the pro-hunting lobbies unsuccessful legal challenge to the procedure used: *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 (HL). Tyler argues that effective regulation requires fairness in the exercise of legal authority and the process legal authorities use, see Tyler T (2003) ‘Procedural Justice, Legitimacy and the Effective Rule of Law’ 30 *Crime and Justice* 283. The Countryside Alliance still describe the Act as ‘an abuse of parliamentary process’, see Countryside Alliance (2011) ‘The Hunting Act 2004: The Case for Repeal’ (London: Countryside Alliance) Introduction, p 5.

¹⁶Section 1 of the Act provides: “A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt”.

¹⁷Harrop S (2005) ‘The Hunting Act 2004: Cruelty, Countryside, Conservation, Culture or a Class Act?’ 7(3) *Environmental Law Review* 201, p 204.

¹⁸*DPP v Wright*; *R (Scott & Ors) v Taunton Deane Magistrates Court* [2009] EWHC 105 (Admin); [2010] QB 224.

¹⁹For criticism of the judgement in *DPP v Wright*, above, see Wooler S (2014) fn 13, p 110.

²⁰See Lillingston S and Davis L (2007) ‘Prosecution Under the Hunting Act’ 5 *Journal of Animal Welfare Law* 7 who argue that the hare is better protected under the Act than the fox.

²¹Crown Prosecution Service (2013) ‘Legal Guidance: The Hunting Act 2004’ (published online) available at http://www.cps.gov.uk/legal/h_to_k/hunting_act/

²²In contrast, where the hunting engaged in was not actually exempt under the Act, there is a statutory defence in Section 4 that the defendant *reasonably believed* that the hunting was exempt.

²³*DPP v Wright*, at fn 18, p 225.

²⁴See Schedule 1, paras 3-4.

²⁵League Against Cruel Sports (2014) fn 11, p 13; Protect Our Wild Animals (2008) ‘The Myth of Accidental Fox Hunting’ (Cardiff: POWA).

²⁶POWA (2015) ‘Build on the Ban: Strengthen the Act’ Reform Not Repeal (published online) p 1 para 10, available at <http://campaigntostrengthenthehuntingact.com/reform-not-repeal.php>; Moss S (2006) ‘The Banned Rode On’ *The Guardian* 7 November; BBC News (2005) ‘Eagles “Used to Beat Hunting Ban”’ 17 September.

²⁷For example, in the prosecution of the Quantock Stag hounds for illegally hunting deer in 2007, District Judge Parsons stated the defendants were, ‘*disingenuous in attempting to deceive me into believing they were exempt hunting... This was a continual act of hunting over a period of two and three quarter hours... the dogs may well have been deployed in relay to use fresh dogs to chase the deer faster and harder, to tire them quicker and to compensate for having to hunt with only two dogs.*’

²⁸See Association of Chief Police Officers’ Guidance to Assistant Chief Constables (Operations) (2005) ‘The Hunting Act 2004: National Tactical Considerations’ 17 January (Sussex: ACPO); Brunstrom C (2009) ‘Association of Chief Police Officer of England, Wales & Northern Ireland: Guidance on Hunting Act Enforcement’ (London: ACPO) Section 4 Enforcement, 4.2; Wooler S (2014) fn 13, p 111.

²⁹For an overview of hunting culture see Marvin G (2007) ‘English Foxhunting: A Prohibited Practice’ 14(3) *International Journal of Cultural Property* 339.

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prosecute³⁰ has resulted in animal welfare organisations picking up the mantle³¹ (as well as the bill) in controversial private prosecutions³² that hunters have claimed were politically motivated.³³

If an Act of Parliament’s legal effectiveness is assessed by how closely it achieves its policy objectives,³⁴ the Act has been successful in as much as it was intended to be a political compromise:³⁵ hunting with dogs is banned and the moral victory won³⁶ (for the time being) while hunters continue to test the Act to the very extent of its exemptions.³⁷ However, in practice this state of affairs has satisfied neither party.³⁸

However, if an Act’s efficacy is to be judged on its ability to achieve social change and institutional transformation,³⁹ it is perhaps too early to judge the Act’s legacy. Efforts to enforce the law are improving since test cases and legal challenges were resolved and the

police finally received quality training on the Act.⁴⁰ A dedicated website has been set up for law enforcement professionals that lists successful prosecutions and decodes hunting commands. Prosecution practices have been reviewed⁴¹ and commitment renewed to pursuing illegal hunters through public and private prosecutions where necessary⁴² and, moreover, there are sensible proposals to strengthen the law to close the loopholes⁴³ and increase sentencing powers.⁴⁴

The exempt hunting provisions are undoubtedly the Act’s Achilles’ heel, as the draft order to amend the Act in 2015 demonstrated. Nonetheless, to suggest that the Act has been useless or should be repealed is to undermine the gargantuan effort involved in getting the Act onto the

Statute Book⁴⁵ and the costs incurred (both human and financial) of bringing illegal hunters to justice since the Act became law. To date it has survived constitutional,⁴⁶ EC law and human rights challenges⁴⁷ as well as the recently proposed Government amendment. Repeal would be cruel, regressive and unnecessary.

³⁰See the Wooler Review, fn , at pp 39 and 120.

³¹LACS, IFAW and the RSPCA have all brought private prosecutions under the Act. LACS states that it has had to bring prosecutions under the Act to show the CPS that the Act is enforceable, see LACS (2014) fn 13, p 9.

³²For example, in the Heythrop Hunt prosecution brought by the RSPCA, the trial judge commented on whether the £327,000 costs represented value for money for its donors, see Minchin R (2012) ‘David Cameron’s Local Heythrop Hunt Fined for Fox Hunting’ *The Independent* 17 December.

³³Davies C (2012) ‘David Cameron’s Local Hunt Convicted After RSPCA Prosecution’ *The Guardian* 17 December. However the Wooler Review found no evidence of improper or political motivation by the RSPCA Prosecutions Department, see the Wooler S (2014) fn 13, p 109.

³⁴See Sarat A (1985) ‘Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition’ 9(1) *Legal Studies Forum* 23.

³⁵See Dodds L (2015) ‘Ten Years on From the Fox Hunting Ban, Has Anything Really Changed?’ *The Telegraph* 14 July. In *R (Counterside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 AC 719 (HL) at para 46, Lord Bingham commented on the minimal nature of the ban: ‘If, as has been held, the object of the Act was to eliminate (subject to the specified exemptions) the hunting and killing of wild animals by way of sport, no less far-reaching measure could have achieved that end. As already noted, the

underlying rationale could have been relied on to justify a more comprehensive ban.’

³⁶Cooper J (2007) ‘Violence Animal Cruelty and Human Behaviour’ 171 *JPN* 622.

³⁷Harrop S (2006) ‘Case Comment: Parliamentary Process, Opposition in the House of Lords and the Hunting Act 2004’ *Environmental Law Review* 2006 8(4) 299, p 300.

³⁸House of Commons Briefing Paper (2015) ‘Amending the Hunting Act 2004’ No 6853 13 July (London: House of Commons Library) p 5; Counterside Alliance (2011) fn 15.

³⁹See Seidman A et al (2001) ‘Legislative Drafting for Democratic Social Change: A Manual for Drafters’ (London: Kluwer Law International) p 3 and ch 1.

⁴⁰Publication of guidance on the enforcement of the Act and an ACPO conference on policing the Act was delayed until after various test cases brought under the Act were heard: Royal Society for the Prevention of Cruelty to Animals (2009) ‘Hunting Act 2004 Briefing’ December (London: RSPCA) p 2. Over the past five years LACS has also provided training to the police, see the League Against Cruel Sports (2011) ‘Report: The 2010/2011 Hunting Season’ 18 May (Surrey: LACS) p 16-18.

⁴¹For example, Wooler S (2014) fn 13.

⁴²The RSPCA has set up its Legal Fighting Fund for this purpose.

⁴³For example, the complete prohibition of dogs below ground, introducing a *mens rea* of recklessness to the

offence to prevent the use of the false alibi of trail hunting, the removal of the ‘observation and research’ exemption, which has been abused by stag hunts to avoid prosecution for illegal hunting (see League Against Cruel Sports (2014) fn 11, pp 12-13; International Fund for Animal Welfare (2015) ‘When it Comes to Hunting, It’s Not the Foxes Who are Sly’ 5 May.

⁴⁴A conviction for an offence under the Act can result in a maximum fine of £5000, although hunters typically receive a much smaller fine within the range of £200 to £850 and therefore it has been said that the impact of such prosecutions is limited: see Wooler S (2014) fn 13, p 39. LACS and IFAW advocate the introduction of custodial sentences similar to the Protection of Badgers Act 1992 and Wild Mammals (Protection) Act 1996, see above.

⁴⁵There were a number of unsuccessful attempts at criminalising hunting wild mammals with dogs before a ban was finally introduced. For the legislative background see Plumb A & Marsh D (2013) ‘Beyond Party Discipline: UK Parliamentary Voting on Fox Hunting’ 8(3) *British Politics* 313; Harrop S (2005) ‘The Hunting Act 2004: Cruelty, Counterside, Conservation, Culture or a Class Act?’ 7(3) *Environmental Law Review* 201.

⁴⁶*R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 (HL).

⁴⁷*R (Counterside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 AC 719 (HL); *Friend v United Kingdom*; *Counterside Alliance v United Kingdom* (2010) 50 EHRR SE6.