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A note from ALAW

This edition of the Journal covers autumn 2012 through to winter 2013.

2012 has been a productive year for ALAW and includes a re-designed website, seminars, e-bulletins and raising our profile with the student population. A highlight of 2012 was the internationally renowned philosopher Peter Singer’s keynote speech at ALAW’s charity dinner in the summer.

The shadow over 2013 is, of course, the rescheduled badger cull. Dr Spencer looks at the so-called ‘Krebs Trial’, the contested nature of science and how it interplays with law and politics. He ends by briefly speculating on what could have resulted if all the resources aimed at supporting culling could have been invested in cattle-based measures instead. Dr Angus Nurse assesses the Law Commission’s proposals regarding wildlife law reform in the UK. The plight of former lab Chimps in the USA is discussed by the New England Anti-Vivisection Society while the issue of fur and the EU is discussed by Sabine Brels. ALAW is delighted to welcome the article by Liz Tyson, Director of the Captive Animals’ Protection Society, which explores licensing in relation to circus animals.

I hope you will enjoy this edition and all best wishes for the year ahead.

Jill Williams
Editor
Bovine tuberculosis (bTB) is a serious problem for farmers, with an outbreak estimated to cost the farmer £12,000. It is also a problem for government with £500m spent over the last decade to control the disease in England and estimates of future cost run to £1bn for the next decade. In addition to these economic losses, we should add the suffering caused to animals and farmers and the lost food production.

Government is concerned with bTB because it is a zoonotic disease; that is, it can cause disease in humans. In the 1920s there were some 50,000 human cases in the UK per year, killing 5% of those infected. Eradication of the disease became government policy in the 1950s and was achieved with some success by annual testing of cattle and culling of reactors. By 1979 only 89 herds were affected.

However, some cases persisted, especially in the South West of England and it was thought that there was a wildlife reservoir of infection maintaining the disease in cattle. The badger has been thought to be the host since the early 1970s. For a time, the culling of badgers was carried out to try and tackle the disease but several reviews could not be certain how effective this was. Eventually, a review conducted by Professor John Krebs, reporting in 1997, proposed an experimental trial to try and establish the efficacy of badger culling.

In this short article I discuss the ‘Krebs Trial’, more properly known as the Randomised Badger Culling Trial (RBCT), its findings and the government’s response. Then I go on to discuss two proposed badger culls, one in Wales and the most recent proposal for England. In the discussion that follows, I outline some thoughts on the interplay between science, law and politics.

Randomised Badger Culling Trial

The RBCT was organised by the Independent Scientific Group on Cattle TB (ISG), and was carried out between 1998 and 2006 with the ISG reporting in summer 2007. The trial was carried out by dividing 30 areas each into threes. In one of each of these ‘triplets’ as many badgers as possible were culled. This was known as proactive culling. In a second triplet area, badgers were killed only around a farm that had suffered a bTB outbreak. This was known as reactive culling. In the third triplet, no culling took place, but badger numbers and activity were surveyed.

The trial found that reactive culling actually made things worse and caused an increase in bTB. In the proactive culling area there was a 19% reduction in bTB cases within the cull area but a 29% increase in cases in areas adjoining the cull area.

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The trial found that reactive culling actually made things worse and caused an increase in bTB. In the proactive culling area there was a 19% reduction in bTB cases within the cull area but a 29% increase in cases in areas adjoining the cull area. This culling of badgers leading to an increase in bTB cases outside the cull area is called the

Government is concerned with bTB because it is a zoonotic disease; that is, it can cause disease in humans.

perturbation effect. Animals that escape culling efforts roam widely and potentially increase risk to cattle in adjoining areas⁶.

The final report of the ISG, published in June 2007, came to a clear conclusion. “While badgers are clearly a source of cattle TB, careful evaluation of our own and others’ data indicates that badger culling can make no meaningful contribution to cattle TB control in Britain”⁷. After reviewing the report, the then Labour government decided to rule out badger culling as part of its bTB strategy.

Many people did not accept this decision or the evidence of the ISG report. Farming groups and vets continued to argue for a cull of badgers. Further work was done which suggested that culling was more effective over time than the ISG thought. Devolution meant that badger culling was a devolved matter in Scotland and Wales and the Welsh government decided to propose a pilot cull.

**Welsh Badger Cull 2008-11**

The Welsh government which was, in 2008 a coalition between Labour and Plaid Cymru, decided on a pilot cull in Pembrokeshire. The significant amount of coastline would, it was argued, limit the perturbation effect and the government anticipated an overall reduction in bTB cases of 9%. This proposed cull was halted following a legal challenge by the Badger Trust. Judges in the Court of Appeal prevented the cull on three grounds: the minister failed to carry out a balancing exercise of harms against potential benefits of culling; the minister was in error laying an order applying to all of Wales when the consultation was limited to the proposed cull area, and, that the anticipated 9% reduction in bTB cases failed the requirement of the Animal Health Act 1981 that a cull should ‘substantially reduce’ the incidence of the disease⁸.

In May 2011 the Labour Party won exactly half the seats in the Welsh Assembly and decided to govern alone. The new government put the cull on hold and announced a review. Finally, in March 2012, it was announced that culling would no longer form part of the government’s approach.

Meanwhile, in England, the coalition government in Westminster was preparing a cull.

**England Badger Cull 2010-12**

The coalition agreement specifically mentioned bTB and said that the government would introduce ‘As part of a package of measures ... a carefully managed and science-led policy of badger control in areas with high and persistent levels of bovine tuberculosis”⁹.

Consultation began in September 2010 on a plan to allow farmers to organise a cull, at their expense, over a large area rather have a cull conducted by Defra staff. Culling would take place by trapping and shooting and by ‘free shooting’ badgers. Licences would be issued by Natural England under the Protection of Badgers Act 1992 and the Wildlife and Countryside Act 1981.

Two pilot areas, one in Somerset and one in Gloucestershire, were approved. Culling was due to start in summer 2012. However, a legal challenge by the Badger Trust was, this time, unsuccessful but delayed the cull, as did a request by the police to delay the cull until after the Olympic Games.

In October 2012, Owen Paterson, the Secretary of State, announced that the cull would be postponed until summer 2013. The above reasons were part of the justification for the decision but also important was new evidence on badger numbers. Scientific evidence suggests that to be effective, proactive culling must kill at least 70% of the badgers. However, the latest survey of badger numbers revealed that there were far more badgers in the pilot areas than had been previously thought.

After reviewing the report, the then Labour government decided to rule out badger culling as part of its bTB strategy.

Finally, in March 2012, it was announced that culling would no longer form part of the government’s approach.

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Consequently, the farmers could not be certain of achieving the 70% target before the closed season.

It should be understood that the government and the National Farmers’ Union remain fully committed to carrying out the cull in summer 2013. The policy has not changed. Barring any successful legal challenge next year it is intended that the cull will go ahead.

Discussion

In this short article I have tried to give a flavour of the scientific evidence around badger culling and to describe some policy responses that followed the ISG’s report in 2007. Elsewhere I have written a fuller account of bTB as a policy issue. In this final section I want to try and draw out some conclusions about the science and politics of bTB.

Science has played a key role in bTB. Science identified the causative organism, devised tests to detect the disease in cattle, and gave us considerable understanding of the ecology of badgers. The RBCT also provided strong evidence on the efficacy of badger culling to control the disease. In particular it showed that reactive culling makes things worse.

With proactive culling the evidence is open to interpretation and development. The ISG used a cost-benefit approach which can be challenged. Indeed, the government’s own Chief Scientific Adviser argued soon after the ISG report was published that the scientific evidence supported a cull. Defra have also argued that the benefits of the RBCT trial have persisted which, too, might alter the calculation. The point I am making is that the science is contested. Because it is contested, both supporters and opponents of a cull can use science to support their case. While most scientists in the debate are opposed to a cull, as evidenced in this letter to the *Observer*, the coalition agreement says that a cull will be ‘science-led’. The role of science here is to make the cull as effective as possible. Therefore, we must conclude, science alone cannot tell us if we *ought to* cull badgers as part of a strategy to control bTB.

![the government and the National Farmers' Union remain fully committed to carrying out the cull in summer 2013](image)

That decision is a political one, and there might be principled or practical reasons for ministers to favour one position over another. Generally, the geographical location of a party’s support will exert a strong influence on its position. Parties with rural support such as the Conservatives, Liberal Democrats and Plaid Cymru are more likely to support a cull than Labour, whose support is more urban. Nevertheless, as the Welsh case shows, Labour can support a cull when in coalition. Whatever political decision any minister makes, one can be sure that science will be mobilised in support of it.

And what of the law? Not being a lawyer I tread carefully here! I would, tentatively, suggest that the legal barriers to a cull are quite high. The Badger Trust successfully prevented the cull in Wales and, while it was unsuccessful in England in 2012, there can be little doubt that a fresh, probably eleventh hour, action will be launched in 2013. Because of the time-sensitive nature of a cull, using the law to delay might be effective as prevention regardless of the outcome of the case.

No mention has been made of vaccination. Why not vaccinate cows? That may be the holy grail of bTB policy but, for now, is not an option. The law, in the form of EU regulation, is a problem here. Even once science has developed a test that allows the vaccine to be distinguished from a disease-causing reaction in a cow, it will take some years to work through the regulatory process and be permitted for use.

Finally, significant resources have been invested over the years in trying to find evidence to support badger culling and to organise effective culls. The evidence is, at best, equivocal. What, we might ask, could we have done with those resources instead to take action on cattle-based measures to reduce the impact of the disease on farmers and to accelerate the process towards an effective and approved vaccine?

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12Culling badgers could increase the problem of TB in Cattle. *Observer* 14 October 2012. Available at [http://www.guardian.co.uk/theobserver/2012/oct14/letters-observer](http://www.guardian.co.uk/theobserver/2012/oct14/letters-observer)
In August 2012, the Law Commission published its proposals on wildlife law reform for the UK. Its aim is to review all UK wildlife law simplifying the legislative wildlife protection regime, whilst at the same time addressing much of the inconsistency and confusion considered to exist within UK wildlife law.1

Few would argue with this overall goal. For several years, investigators, NGOs and wildlife protection activists have voiced concerns about the perceived inadequacy of the UK regime.2 The species-specific nature of much UK wildlife law means that a patchwork of different legislation affording different levels of protection to different species exists.3 NGOs have also highlighted inadequacies in individual legislation such that legislation intended to protect wildlife often fails to do so and ambiguous or inadequate wording actually allows animal killing or fails to provide adequate protection for effective animal welfare.4 Such confusion also causes problems in the investigation of wildlife crime with investigators and prosecutors needing to understand a complex range of legislation, powers of arrest and sanctions.

The Commission’s proposals seek to resolve these problems in part by providing for a single integrated Wildlife Management Bill, consistent with EU law and harmonising various UK wildlife provisions. This article assesses the Commission’s proposals against the key problems of wildlife law identified by NGOs and in previous research.

The Current Legislative Regime and International Obligations

Historically UK wildlife law has been ‘associated with socio-economic structures’ largely dominated by wildlife’s value as either economic or social resource.5 Wildlife protection law operates in part as conservation or wildlife management legislation according to wildlife’s property or economic value, rather than purely as species protection or criminal law. As a result of a variety of legislative interventions, the UK wildlife law regime consists of a vast, fragmented range of statutes and subordinate legislation used to protect wildlife, or more accurately, allow for management of wildlife and to prosecute offences once committed. Within the UK’s complex wildlife protection regime, species specific legislation such as the Deer Act 1991 and Protection of Badgers Act 1992 combine with general protective legislation such as the Wildlife & Countryside Act 1981 and the Wild Mammals (Protection) Act 1996. However, legislation has also been

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3 Ibid.


enacted to implement international and European wildlife protection legislation. For example, the wild bird provisions of the Wildlife and Countryside Act 1981 were intended to implement the 1979 EC Directive on Wild Birds and give protection to all forms of native wild birds (with certain exceptions for pest control and agricultural purposes).

In addition to this, wildlife offences can also be caught by other forms of legislation aimed at regulating commercial activities or creating offences in relation to other activities (e.g. the Customs and Excise Management Act 1979 which regulates the import and export of prohibited items, including wildlife). It is also important to note that devolved legislation sometimes provides for different protection. For example, the Wildlife and Natural Environment (Scotland) Act 2011 provides for the offence of ‘vicarious liability’ which is not yet replicated in other wildlife legislation. A distinction should also be made between wildlife crimes and poaching offences involving species of game birds or animals specially bred for game shooting although the Law Commission’s approach to wildlife law incorporates poaching and game species.

In principle, the Commission’s approach is one of directly transposing EU law into UK law to develop a consistent approach to wildlife protection. Throughout its consultation document the Commission makes clear that its role is not to increase levels of protection for wildlife. The Commission identifies that international agreements such as the Bern Convention, the Ramsar Convention, the Convention on the International Trade in Endangered Species (CITES) and the UN’s Aarhus Convention ‘set benchmarks for national action while protecting a certain level of national autonomy’.10 EU law, binding on the UK, places a higher obligation on domestic legislation than broader international agreements and thus the Commission’s approach is generally one of using the exact terminology of EU legislation consistent with the current Government’s policy of copying out EU obligations.

However within the Commission’s approach there is scope to enhance animal protection where domestic law already allows for this and provides an opportunity to go beyond the basics of EU law. NGOs have raised concerns that an unintended potential consequence of the Commission’s proposals is an increased ability to exploit wildlife through a relaxation of the regulatory regime, increased use of general licences, and the resultant reduction in scrutiny of ‘authorised’ animal killing. The Commission’s approach, which utilises general orders and open general licences to cover classes of operation rather than requiring individual licence

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10 Wildlife and Natural Environment (Scotland) Act 2011, Section 18.

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wildlife offences can also be caught by other forms of legislation aimed at regulating commercial activities
wildlife legislation, the ad-hoc development of wildlife policing and policy creates with it a risk that no matter what the legislative regime, the enforcement of wildlife legislation may itself be inconsistent and inadequate even if the Commission achieves coherence in sentencing and wildlife protection provisions.

Crucial to any new regime is a coherent approach to the subject of wildlife criminality and the abuse of animals.

Although the Wolverhampton report focused solely on wildlife trade, its conclusions on the inadequacies and inconsistency in the way that legislation is enforced have been echoed by successive writers and NGOs in looking at other aspects of wildlife crime. The picture that emerges of wildlife crime through the available literature is that of legislation inadequate to the task of wildlife protection, subject to an equally inconsistent enforcement regime (albeit one where individual police officers contribute significant amounts of time and effort within their own area) and one that fails to address the specific nature of wildlife offending. While there is no doubt that there is an inconsistency in wildlife criminality and the abuse of animals. A further University of Wolverhampton report published in June 2002 concluded that organised crime had become "increasingly involved in the most lucrative parts of the illegal trade" and subsequent research investigating different types of offenders involved in wildlife law violations identified that rather than all wildlife offenders being rational-thinking profit-driven individuals, wildlife crime is a complex varied phenomenon involving a range of offenders with different motivations and offending characteristics. Thus while the Commission acknowledges that fines can easily be internalised by high-profiteering businesses, there is considerable and consistent research evidence that wildlife crime is not only growing in scale but has links with other crimes (e.g. organised crime, illegal trafficking and illegal gambling) and represents a distinct form of criminality. While it can involve offenders who are clearly motivated by profit (particularly with respect to trade in endangered species which can sell for thousands of pounds) and involves criminal actors involved in other forms of crime it also involves individuals motivated by a desire to inflict harm on animals, those subsumed into a subculture that positively promotes animal killing, and those involved in countryside businesses for whom non-compliance with wildlife law has become an economic necessity.

The problems of wildlife law can, thus broadly be identified as general problems of enforcement and enforcement resources ambiguous wording and inconsistency of protection between species, and weak or ineffectual sentencing provisions when the specific nature of the illegal trade is complex varied and involves offenders with different motivations.

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of wildlife criminality is taken into account. While it is not the Commission’s remit to improve wildlife protection and it clearly acknowledges this within its proposals, within its chosen approach there is scope to address several of these problems.

A Manifesto for Wildlife Law

In principle at least, UK wildlife law is broadly adequate to its purpose as conservation or species management legislation, albeit a high level of legal expertise is often required even at the investigatory stage and there is little provision in UK wildlife law and its enforcement response for crime prevention. In principle the Commission’s proposals, which build on the improvements provided for by the Countryside and Rights of Way Act 2000 (CRoW) and the Wildlife and Natural Environment (Scotland) Act 2011 will at least provide for a single piece of legislation. However in an enforcement system that is largely voluntary, lacks resources and relies too heavily on the NGO sector, the Commission’s proposals will ideally address the following issues.

i. Review all wildlife law to ensure consistency in penalties, police powers and specification of offences.

ii. Consider consolidation of wildlife law into themes to suit purpose and produce ‘super’ wildlife legislation across the following themes: Conservation and Habitat Protection, Environment and Biodiversity, Wildlife Protection and Management, Countryside and Recreation. This can be achieved through its single bill approach with each theme forming a section of the new bill. It should adopt existing good practice from UK legislation but strengthen it through consolidating good practice that achieves effective protection and sustainability according to its theme.

iii. Review all legislation to close loopholes or ambiguous wording. For example in the Conservation of Seals Act 1970 seals could be killed ‘in the vicinity’ of fishing gear. There is no definition of ‘in the vicinity’ in the Act and the Seals Forum has reported that there is also confusion over what constitutes nets or fishing gear. Such loopholes allow the killing of wildlife that are otherwise protected and should be removed across UK wildlife laws.

iv. Harmonise references to wilfully or intentionally in wildlife law with appropriate wording that not only reflects the requirements of EU law but also allows investigators to proceed with cases where an offence has clearly been committed, without also having to prove the wildlife knowledge or intentions towards wildlife of the offender. Thus a definition that incorporates both accidental and deliberate disturbance and harm to wildlife and addresses the failure of an offender to modify their action when it should have been obvious that there would be consequences should be consistently applied across all wildlife legislation.

v. Introduce an outright ban on snares and other indiscriminate forms of killing wildlife by conducting a comprehensive review of prohibited forms of killing wildlife and specifying additional ones accordingly.

vi. Ensure that wildlife crime is a Home Office/Ministry of Justice mainstream policing issue rather than DEFRA/NGO environmental one and allocate resources accordingly. While this may be outside the scope of the Commission’s proposals per se, in their implementation there is a need for wildlife crime to be seen as part of an overall criminal profile and mainstream criminal activity, and policed, prosecuted, and sentenced accordingly.

vii. Make specific provision for crime prevention in wildlife legislation and in the revised enforcement regime.

viii. Strengthen/expand the registration scheme for wildlife so that all British birds of prey kept in captivity are required to be registered and are subject to an inspection and enforcement regime.

ix. Use statutory rather than voluntary codes e.g. the Hunting Act 2004 Code for use of dogs. While it is outside the scope of this article to discuss the topic in detail, voluntary codes are rarely effective as they rely on the goodwill and compliance intent of those involved in the regulated activity while persistent offenders rarely comply with regulations and such codes.

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22Section 9(1)(c) of the Act.


x. Introduce ‘cause and permit’ provisions into all wildlife protection legislation to make it an offence for employers to encourage or pressure staff into committing wildlife offences.

The Commission’s proposals address some of these issues, proposing for example to use the term ‘intentionally or recklessly’ to transpose the EU law term ‘deliberately’ into UK law as a means of dealing with deliberate actions. The Commission also clarifies that this includes the concept of subjective recklessness for both circumstances and consequences.25 The Commission also raises consultation questions concerning, for example, whether there should be a legal requirement for reporting of all members of a species killed or taken and also whether there should be a wildlife offence that extends liability to an employer or someone who exercises control over an individual. Thus within the scope of the Commission’s proposals there remains opportunity for wildlife protection to be strengthened by not only improving the coherence of legislation but also its enforcement regime. However, further concerns occur on this aspect of the proposals.

A New Enforcement Regime

The Commission’s enforcement approach is based on a mixture of criminal and civil sanctions suggesting that ‘criminalising regulatory transgressions may not always be the appropriate way of ensuring beneficial outcomes. It may be better to provide the non-compliant individual or organisation with advice or guidance.’26 This is consistent with the Coalition Government’s approach of generally reducing business’ regulatory burden, with a belief in risk-based regulation in accordance with the Hampton Principles27 and which suggests that UK regimes for achieving compliance with business regulations through regulatory inspections and enforcement are generally complex and ineffective. The Commission identifies that the government’s approach is generally that regulation should only be resorted to where ‘satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches.’28 However while the risk-based, prosecution-as-last-resort regulatory approach is consistent with government policy and its approach to ‘light touch’ regulation there are potential flaws with this approach, not least the possibility that offenders could engage in repeat offending before any use of criminal sanctions is considered or begins to bite. Given academic and policy research on the nature of criminality in wildlife law violations the advice and guidance/decriminalisation approach proposed by the consultation also raises concerns. Academic research on the use of civil sanctions as an approach to consumer problems conducted on behalf of the Department for Business Enterprise and Regulatory Reform (BERR) noted both a lack of willingness on the part of enforcers to use civil sanctions and the increased resources required for this approach to be effective where criminality was an inherent problem that needed to be addressed.29 In addition, while the Commission refers to the US Environmental Protection Agency’s (EPA) use of administrative penalties, these have often been ineffective as a solution to wildlife crime and environmental non-compliance, resulting in US NGOs challenging the ineffectiveness of EPA enforcement activity which has persistently failed to address problems and allowed ongoing non-compliance. Thus while civil sanctions may be attractive politically as a way of seeming to decriminalise legitimate business activity they are often ineffective in dealing with environmental/wildlife criminality. While the consultation

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suggests that the current regime is too reliant on criminalisation, a different view emerges from research evidence suggesting instead that a weak enforcement regime allows a wider range of criminality and transfer of criminality from mainstream crime into wildlife crime.

Preliminary Conclusions

The Commission’s proposals take a pragmatic approach to wildlife law reform by directly transposing EU law wherever possible with potential for clarifying ambiguities in legislation and closing legislative loopholes that should be welcomed. But the proposals would also appear to allow wider scope for killing of wildlife without the need for the individual circumstances of that killing to be justified and risk relaxing the existing regime for monitoring the ‘lawful’ killing of wildlife. Transparency is an important factor in wildlife use, management or control and reducing transparency in animal killing operations by allowing for a class based approach which provides for decision makers to allow animal killing under specified circumstances but rationalises these by providing for general categories across legislation is a matter of concern.

As with most legislative proposals the devil is in the detail and while there are concerns about any approach that seemingly reduces the criminal justice response to wildlife offending, the Commission allows for consultation responders to comment on a wide range of issues which have scope to considerably influence the shape of the eventual legislative proposals. Its proposals need careful scrutiny and a detailed, measured response but the Commission might just have allowed an opportunity for a significant number of wildlife law problems to be addressed.
1. Cases

Hermann v Germany [2012] ECHR 1110 – 26 June 2012

The applicant alleged that, based on his moral objections to hunting, his rights under Article 1 of Protocol 1 (peaceful enjoyment of property) and Article 9 of the Convention (freedom of conscience) had been violated by the Federal Hunting Act of Germany when taken alone and in conjunction with Article 14 of the Convention. The following Act compels landowners of a certain size of land in certain areas to accept hunting on their property and to join a local hunting association.

Subject to the case of Chassagnou and Others v France, it was held that there had been a violation of Article 14 in conjunction with Article 1. By compelling a landowner to transfer hunting rights over their land so that others could make use of them in a way which was incompatible with their own beliefs imposed a disproportionate burden which would not be justified under the second paragraph of Article 1 Protocol 1. Based on the findings of Article 1 of Protocol 1, the appellants' rights under Article 9 were not considered.

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

The appellant badger trust challenged the decision of the respondent to adopt a policy on bovine TB (Btb) and badger control in England which would authorise England to license farmers and landowners to cull badgers lawfully under s.10(2)(a) of the Protection of Badgers Act 1992. The policy of the respondent Secretary of State for the Environment, Food and Rural Affairs was held to be lawful. The proposed policy involved issuing licences to farmers and landowners under s.10(2)(a) so that they could cull badgers to prevent Btb and its transmission and was not geographically limited to the area specified in the license.

R. (on the application of the RSPCA) v Guildford Crown Court (unreported)

The claim arose out of a three-year disqualification order which was made under s.34(2) of the Animal Welfare Act 2006 for the ill treatment of three horses by the appellant horse dealer. Such an order would prevent the appellant owning animals and keeping or participating in the keeping of animals. The appellant appealed against the order.

Application was granted and it was held that the court had no discretion to make a disqualification order under s.34 of the Animal Welfare Act 2006 which excluded any of the activities outlined in s.34(2).
Wood Green Animal Shelters v The Commissioners for Her Majesty’s Revenue & Customs [2012] UKFTT 437 (TC)

The appellant animal welfare charity received donations from adopters who took animals from their shelter to be housed. During a VAT control visit in 1999 a customs officer found that the appellant treated re-housing income as income from non-business activity.

The money that the appellant received from adopters was held to be fixed fees and not donations. As such the welfare charity was entitled to recover input tax.

2. Other materials

Readers may be interested to read a new paper by Chris Draper of BornFree (a regular contributor to the Animal Welfare Journal) and Stephen Harris of the School of Biology Sciences, University of Bristol, which raises concerns about the inspection process in relation to zoos and animal welfare standards. Go to http://www.mdpi.com/2076-2615/2/4/507 to download the report in full.

A call for a National Animal Cruelty Offenders’ Register was made by Professor Andrew Linzey, a theologian at Oxford University and the director of the Oxford Centre for Animal Ethics, in an address at St Albans Cathedral on Sunday 30 September. The Animal Offenders’ register is recommended, along with compulsory empathy training, as a “two stage approach based on Christian principles of repentance and compassion” in response to the many thousands of animal cruelty cases each year.

“It is too easy just to condemn; animal protectionists need to invest in the change they want to see in the world”

“For a long time, animal protectionists have been calling for stricter penalties for those convicted of animal abuse. And the usual measures, including fines and community orders, seem a pretty weak-kneed response to those who deliberately inflict cruelty. That is why some are now calling for automatic prison sentences for cruelty and long ones at that. But prison, it seems to me, is not the answer. We know that around 40% of prisoners reoffend and prison frequently dehumanises people. We have to find a way in which the seriousness of animal cruelty can be registered, offenders effectively treated, and animals saved from cruelty. This requires a radical rethink”, argues Linzey.

“Compulsory empathy training for offenders would not be a soft option. Over a period of months, even years, people who are cruel would need to attend classes that require them to confront their own proclivities toward violence and learn to empathise with the suffering of animals.”

“Animal protectionists should step up to the plate and embrace this opportunity to lead empathy training courses. They should help fund them, run them, and staff them with professionals. It is too easy just to condemn; animal protectionists need to invest in the change they want to see in the world.”

“For those who cannot or will not undergo empathy training, or those who do not successfully complete the course, or those who reoffend, then their name needs to be placed on a national register. Those on the register would be forbidden from keeping an animal, or working with them. This register could be consulted by individuals and employers and it would become an offence to sell an animal to such a person or employ them in animal-related work.”

Professor Linzey argues that the low priority given to animal cruelty in the criminal justice system is reflective of a much deeper blindness: “Our society hasn’t yet appreciated what is at stake for human beings. Cruelty is not just a vice; it is a social vice. There is a well-established link between animal abuse and human violence supported by hundreds of psychological, medical, sociological, and statistical studies. A world in which animal cruelty goes unchecked is bound to be a less morally safe world for human beings.”

For more information about the Centre and its Fellows, please see its website at www.oxfordanimalethics.com.

Animal cruelty crimes should be treated with the same seriousness as crimes against humans, claims leading psychologist.

“Almost without exception, the perpetrators of animal cruelty crimes are the same individuals who carry out aggressive and violent acts including assault, partner and child abuse. Thus, animal cruelty crimes should be treated with the same seriousness as crimes against humans. Moreover, the punishments should reflect their severity”, claims leading psychologist Professor Eleonora Gullone, Associate Professor in Psychology at Monash University, Australia.
The claim is made in Professor Gullone’s pioneering new book *Animal Cruelty, Antisocial Behaviour, and Aggression: More Than A Link* published this month. She argues that animal cruelty behaviours are a form of antisocial behaviour that appear right alongside human aggression and violence. The book maintains that “by enacting adequate animal cruelty laws that properly indicate the seriousness of the animal cruelty crime committed, future violence toward both human and animal victims can be prevented.”

The book is part of the Palgrave Macmillan Animal Ethics book series in partnership with the Oxford Centre for Animal Ethics. The Palgrave Macmillan book series is jointly edited by the internationally known theologian the Reverend Professor Andrew Linzey, Director of the Oxford Centre for Animal Ethics, and Professor Priscilla Cohn, Emeritus Professor in Philosophy at Penn State University and Associate Director of the Centre.

In addition to being Professor in Psychology at Monash University, Professor Gullone is a Fellow of the Australian Psychological Society, the Oxford Centre for Animal Ethics, UK, and the Institute for Human-Animal Connection, University of Denver, USA. Her research areas include emotional development and regulation, antisocial behaviour and animal cruelty. Professor Gullone’s research has focussed upon the emotional development of children and adolescents, including empathy development and she has published more than 100 articles in internationally renowned journals.

Animal Cruelty, Antisocial Behaviour, and Aggression: More Than A Link is published on 31 October in the U.K. GBP 55.00 and 27 November in the US priced USD 85.00.

Kim Stallwood reports from the recent Minding Animals International Conference.

**Minding Animals International Conference July 2012**

Along with Animal Law, Animal Studies (sometimes referred to as Human-Animal Studies) is an important development in the endeavour to establish moral and legal rights for animals. Animal Studies, which is principally in the Humanities and Social Sciences, is the study of our relationship with animals and theirs with us. For example, the fields of literature may evaluate the way in which animal characters are presented in fiction or political theory may propose different approaches to how animals could be represented in the democratic process.

Minding Animals International is an important player in Animal Studies because it publishes an E-bulletin tracking developments and an international conference every three years. The first MAI conference was held in Australia in 2009 and was attended by more 500 scholars, advocates, artists, scientists, policy makers and others. The second MAI international conference occurred at the University of Utrecht in the Netherlands in July with 700 plus attendees.

The conference was an opportunity to explore the links between science, humanities and ethics to help further the trans-disciplinary field of Animal Studies to be more responsive to the protection of animals.

Two of the conference highlights were the public lectures given by Nobel Prize winner for literature, John Coetzee, and popular author and scientist, Marc Bekoff. Fringe events included a meeting of the Institute of Critical Animal Studies, which explored broadly the animal issue and its relationship with academia and advocacy. The conference program included plenary sessions and parallel seminars and workshops as well as films and discussion groups.

Plans are underway for the next MAI conference in 2015. Please sign up for the MAI E-bulletin at www.mindinganimals.com.

**Tiger Nation**

Tigers have provoked considerable controversy in the Indian courts this year. Over half the world’s population of wild tigers roam India’s 41 forest reserves – about 1,700 wild tigers in total.
At the heart of it is a debate on whether tourism is a benefit or a threat. Opinions differ as to whether well regulated tourism helps by bringing in income to poor rural communities and raising awareness as in much of Africa, or whether the state should try to just keep tigers off limits and hidden from public gaze.

Matters came to a head in mid summer when India’s Supreme Court demanded that the various state authorities action earlier rulings to submit plans for conservation to the National Tiger Conservation Authority (NCTA). In the process they implemented an immediate temporary ban on all tourism activities to ensure people took action on what had otherwise been a long drawn out process. Much legal argument later and some backtracking resulted in the ban being lifted in mid Oct, but with severe restrictions and not before considerable damage had been done to the specialist tiger eco-lodges around the parks who have seen their International Tourist numbers plummet and leaving considerable numbers of local guides and drivers out of work.

New Social Media site Tiger Nation www.tigernation.org uses tourist photos to help tell the stories of individual tigers and to raise awareness of issues around conservation. Spokesman Richard Dikstra says – “It’s a pity the debate became so polarized – well regulated tourism can actually help conservation and the community. Where tourism numbers are highest tiger numbers have been on the increase. The focus tiger tourists bring to what is happening in the parks helps improve what happens on the ground and the income they bring really benefits local communities. What was needed was well-considered discussion on guidelines involving all stakeholders – not simply the NTCA railroading its views – the Supreme Court was not really the best forum to sort out these detailed issues. Hopefully in the long term wiser councils will prevail.”

Richard Dikstra, Director, Tiger Nation, 5 December 2012.

Over half the world’s population of wild tigers roam India’s 41 forest reserves – about 1,700 wild tigers in total.
Implementing the CHIMP Act: The Case for Federally Promulgated Criteria to Immediately Retire Chimpanzees from Laboratories to Sanctuary

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Katherine Meyer, Partner, Meyer Glitzenstein & Crystal

Over 900 chimpanzees continue to languish in laboratories in the U.S., the last remaining large-scale user of chimpanzees for research.1 The U.S. government owns or financially supports nearly 600 of them.2 Some were wild-caught in Africa; others were born in a lab or sent from zoos, circuses, and animal trainers. Some were taught to communicate using sign language or raised in family settings - only to be sent into biomedical experimentation when funding ran out or they became too strong to manage. According to available information, more than one-third of all chimpanzees in laboratories - approximately 350 - are elderly3; the vast majority are not actively being used in research; most have been held for decades; and all are suffering.

The first significant use of chimpanzees in research in the U.S. dates back to the 1920s, and the current large population is the result of a 1986 National Institutes of Health (NIH) initiative to breed chimpanzees thought to be useful for AIDS research. However, research on chimpanzees has been shown to be unnecessary and even disadvantageous to human medical advances, including in HIV/AIDS. Although chimpanzees are our closest relatives, they - like all other species used to study human health and disease - differ significantly from humans. These differences can result in crucial disparities in the way disease occurs or progresses in chimpanzees versus humans, and in how we respond to drugs and treatments.

For these reasons, chimpanzee use in biomedical research has decreased dramatically and is at a historic low. In fiscal year 2011, of the more than 94,000 active projects sponsored by the NIH, only 53 used chimpanzees (0.056%).4 Even the two areas of historic widespread use have rapidly declined: AIDS-related chimpanzee studies fell by nearly 90% from 1998 to 2005,5 and chimpanzee use in hepatitis C research has declined by nearly 60% over the past 30 years and is at a historic low. Over the same period, the use of non-animal hepatitis C research methods increased 80-fold.6 The vast majority of chimpanzees currently in laboratories are not presently part of an active research protocol, and most will never be used in research.7

As stated in a 2000 U.S. Senate Committee Report, because chimpanzees turned out not to be “suitable” models for research, the federal government was left with “a

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http://www.nap.edu/openbook.php?record_id=13257
3 Based on 2011 - 2012 FOIA responses from NIH and on correspondence with facilities.
http://www.nap.edu/openbook.php?record_id=13257
because to date the Secretary has not defined criteria, labs have been allowed to decide which chimpanzees, if any, to retire

surplus of several hundred chimpanzees that are no longer useful in medical research" and were being “warehoused in expensive federally funded research laboratory facilities.” While rejecting euthanasia as an option, the U.S. Congress addressed this “surplus” problem in 2000 by enacting the Chimpanzee Health Improvement, Maintenance, and Protection (CHIMP) Act to provide a system for the lifetime care of chimpanzees determined to be “not needed” in research. However, 12 years later the goal of the CHIMP Act has yet to be realized. The purpose of this article is to discuss a Rulemaking Petition which seeks to fulfill the Congressional intention of the law and retire chimpanzees to sanctuary.

Inadequate Application of the CHIMP Act

The Secretary of Health and Human Services (HHS) has the authority under the CHIMP Act to issue criteria for determining whether a chimpanzee is “not needed” for federally funded research and which, in turn, would trigger the requirement that any such chimpanzee must be retired to sanctuary. However, because to date the Secretary has not defined criteria, labs have been allowed to decide which chimpanzees, if any, to retire. This approach has created a conflict of interest, as the laboratories holding chimpanzees receive federal funding to maintain and care for them and, therefore, have a financial motivation to keep them.

Thus, relatively few - only about 161 chimpanzees have been retired since the CHIMP Act was enacted in 2000. This reality is indefensible considering the overarching purpose of the statute and that 80-90% of chimpanzees now in laboratories are not being actively used in research; use of chimpanzees for biomedical research has declined dramatically and chimpanzees have been determined to be unnecessary in nearly all areas of current biomedical use; a significant number of chimpanzees in laboratories are elderly, have inadequate medical records, have been used in multiple areas of research, and are suffering physically and psychologically; retirement to sanctuary would be beneficial for the chimpanzees’ well-being; and retiring chimpanzees to sanctuary would be economically beneficial to the American public - in tax dollar savings and reallocation of remaining federal funds to more promising areas of research.

A Rulemaking Petition to Define Retirement Criteria

In response to this problem, the New England Anti-Vivisection Society, along with co-petitioners the North American Primate Sanctuary Alliance (NAPSA), Save the Chimps, Fauna Foundation, Animal Protection of New Mexico, the Kerulos Center, former Senator Bob Smith (a lead sponsor of the CHIMP Act), and Friends of Washoe filed a formal Rulemaking Petition with the Secretary of HHS requesting the government issue criteria defining when a chimpanzee is not needed for research and therefore eligible for retirement. In the U.S., a concerned party may file a Rulemaking Petition with any government agency by documenting the need for and requesting specific agency action. The submitted Rulemaking Petition proposes scientifically based standards by which to determine when chimpanzees in laboratories are “not needed” in research within the meaning of the CHIMP Act. They include the following:

1. Chimpanzees held or proposed for research in which chimpanzees have been determined to be unnecessary
   A 2011 National Academies Institute of Medicine report found that most current use of chimpanzees for biomedical research is unnecessary. In addition, further evidence shows that chimpanzees are not needed in research areas they have been used in such as HIV/AIDS, cancer, hepatitis C, comparative genomics, malaria, drug development/pharmacokinetics,
biodefense, and monoclonal antibodies studies. Under the CHIMP Act, chimpanzees should not be held in laboratories for potential research in areas in which they have been determined to be unnecessary.

2. Chimpanzees who have not been assigned to a research protocol in 10 or more years

The majority of federally owned and/or supported chimpanzees have been held in laboratories for decades. Yet, 80-90% are not in active research or testing protocols. A significant impetus for the CHIMP Act was to save taxpayer dollars - it is fiscally untenable to continue to house and maintain up to 10 times the number of chimpanzees currently being used for research or testing. Sanctuaries provide high quality care at a lower cost than laboratories. Further, a 2006 public opinion survey showed that 71% of the American public believed that a chimpanzee held in a laboratory for 10 years or more should be retired. This finding came prior to increased public concern for chimpanzees in research in the wake of growing socio-political and scientific debate about their use during the last six years.

3. Chimpanzees with inadequate medical records and with multi-use histories

Chimpanzees in laboratories commonly have inadequate medical records, which limit researchers’ abilities to have a complete understanding of the chimpanzees’ histories and to adequately interpret data from any research in which they are used. In addition, many chimpanzees have been infected with multiple viruses and used in multiple areas of disease research, sometimes in different laboratories, further confounding research data and casting further doubt on its scientific validity.

4. Elderly chimpanzees

According to available information, more than one-third of the over 900 chimpanzees held in U.S. laboratories are elderly (i.e., a male chimpanzee 25 years or older or a female 30 years or older). These aging chimpanzees have spent most or all of their lives in an unnatural environment as research subjects, and they have been exposed to many different biomedical protocols and pathogens and subjected to a multitude of stressful procedures. It has been unequivocally demonstrated that cellular insults caused by stress, illness, and exposure to certain chemicals adversely affect the aging process.

Therefore, it is likely that any results gained from chimpanzee aging studies would be both difficult to interpret and impossible to extrapolate to the average human being. There are also increased physical risks for elderly chimpanzees who are used in experiments.

5. Chimpanzees with physical illnesses

Autopsy reports, medical records, and the health statuses of chimpanzees in or from laboratories indicate a high probability that many chimpanzees currently in laboratories could be suffering from multiple and/or terminal diseases. A recent review of autopsies performed over the last 10 years on chimpanzees who died in laboratories, or after transfer from laboratory to sanctuary, revealed that 64% of those chimpanzees suffered significant chronic illnesses and 69% had multi-organ diseases that should have made them ineligible for research on scientific, as well as ethical, grounds. Some chimpanzees remained in laboratories even though their autopsy records indicated that they had been suffering from multi-organ diseases, they had “Do Not Resuscitate” orders in their medical records.
records, or they had been diagnosed with terminal illnesses prior to death - in some cases months and even years prior to death.19

6. Chimpanzees suffering psychologically

The stress that chimpanzees endure in laboratories should make them ineligible for research. With few exceptions, laboratories are barren, hostile environments that deprive chimpanzees of trees, fresh air, grass, family, and friends. Though they are supposed to be given contact with their own species, such contact can be very minimal and does not match their natural, rich family network. For some experiments it is legal to isolate them entirely. The pain of procedures and the stress and fear of never fully knowing what is happening compounds these already adverse conditions. Even the impact of “routine” blood draws or injections is magnified because they typically require anaesthetization, which in the laboratory is often by dart gun. Darting - known as “knockdowns” - is terrifying for chimpanzees and they anxiously try to evade the darts. Sometimes they are surrounded by many lab personnel with dart guns, and it is not unusual for a chimpanzee to be darted several times to administer the correct dose.

These extremely stressful laboratory conditions can result in chimpanzees suffering from self-mutilation, stereotypic behaviour, learned helplessness, inappropriate aggression, fear, withdrawal, diarrhoea, anorexia, high infant mortality, post-traumatic stress disorder, anxiety, and other abnormal behaviours. Chimpanzees in labs exhibit multiple signs of chronic stress and psychological suffering, which not only severely impacts their well-being, but also makes them inappropriate for research. The stress experienced by chimpanzees has adverse effects on any experimental results due to changes in biochemical pathways and gene expression that result in organ damage and/or disease.20 For example, the impact of stress on the immune system and inflammatory responses is critical, as most chimpanzee experimentation involves studying infectious diseases.21 Even the stress of routine procedures like transporting chimpanzees, cage cleaning, and anaesthesia for physical examinations cause changes to body weight, hormone levels, heart rate, and blood pressure.22 Years of psychological and physical trauma, including all of these stressors, affects experimental data and makes chimpanzee use scientifically indefensible.

7. Family or group member of a chimpanzee being retired

Finally, because of the importance of keeping chimpanzee social groups together, and the Animal Welfare Act’s mandate that those who use primates in research must consider their psychological well being, the Petition proposes that criteria should specify that if a chimpanzee is determined to be “not needed” and therefore required to be sent to sanctuary, a family or significant group member should accompany the chimpanzee to live at the sanctuary even if the family or group member has not likewise been determined to be “not needed.”

Retirement to Sanctuary is Urgent

It is urgent that the Secretary of HHS define specific, enforceable criteria to retire chimpanzees to sanctuary as time is running out for many elderly and ill chimpanzees. With appropriate federal funding, there is space for all federally owned and supported chimpanzees in NAPSA facilities (including Chimp Haven, the statutorily designated recipient for retired chimpanzees), which all meet the high standards set by the Global Federation of Animal Sanctuaries. Implementing such criteria would help ensure hundreds of chimpanzees who have been subjected to years of trauma, confinement, and research can at last live out the remainder of their lives in sanctuaries capable of providing for their physical and psychological well-being.

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"Anti-fur" Policy and the European Union Paradox: Towards a Ban on Fur Farming for Community Law Consistency

Sabine Brels

Animal welfare is an important objective of the European policy. According to the recent Treaty on European Union and the Treaty establishing a Constitution for Europe, this objective even seems to be a new general and constitutional principle of Community law. Since the 1970s, the Council of Europe began to adopt Conventions to protect animal welfare. The European Union (EU) followed in adopting numerous protection instruments in various domains, such as farming, transports, slaughter, experimentation, pets, wild animals captivity in zoos, fishing methods to protect cetaceans and other measures regarding fur trade. While the general European instruments on farming generally include fur farming, there are many more measures aimed at improving the conditions of animals raised for food than for fur production.

Indeed, animal suffering in fur farming seems to be neglected contrary to other community priorities on animal welfare. This fact is particularly obvious when we look at secondary community law instruments specifying some regulations for certain species. Although there is specific directives on calves, pigs, chickens and laying hens, there is no regulation aiming to protect other species as farmed fish, ducks and geese (against force-feeding) or fur-bearing animals in farms. Even if detailed recommendations were adopted by the European Council on those species (and others), they are not legally binding in the European Union as long as they are not becoming community directives. Concerning fur farming, the labelling of animal suffering in fur farming seems to be neglected contrary to other community priorities on animal welfare.
of fur products is the only project undertaken in the EU since 2011. Therefore, specific regulations on fur farming are still missing in Community Law. However, some import-bans of particular interest were adopted by the EU to protect some fur-bearing animals outside of its borders. Those embargos are affecting seal products, cat and dog fur from China, and fur products from animals caught by leghold traps.

1. The fur policy paradox in the European Union

While some import-bans were adopted by the EU to protect certain animals captured, hunted or killed for their fur, there are currently no specific community measures aiming to protect animals raised for their fur. The methods used in those farms are recognized as being particularly cruel and, moreover, captivity is even harder for wild animals (such as foxes and minks). Additionally, a report of the Scientific Committee of the European Commission confirmed that the methods of keeping and killing of animals used in fur farming are contrary to the European standards of animal welfare. Nevertheless, the European Union remains the largest producer of factory farmed fur in the world. Around 30 million mink, 2 million fox and 100,000 raccoons are killed each year in EU fur factories. This production represents approximately 70% of mink furs and 63% of the fox furs (amongst others), in no less than 6000 farms.

Despite the numerous fur farms inside of its own borders, the European Union plays another role on the international scene by endeavouring to protect certain fur-bearing animals outside of its borders. Import bans were decided on the skins of seal pups in 1983, furs of animals caught by leghold traps in 1991, cat and dog fur in 2007 and seal products in 2009. The ethical argument for these embargos was that those products are stemming from “cruel” methods contrary to the “welfare of animals”. However, it can be noted that the EU continue to allow itself cruel methods such as force-feeding (for the production of foie gras) or killing methods such as ritual slaughter without previous stunning.

Challenging the rules of International Economic Law (promoting free trade and discouraging obstacles to international trade), the community embargos are questionable within the framework of the World Trade Organization (WTO). Although complaints were made by adversely affected countries on these EU’s restrictions, the WTO dispute resolution body has yet to rule. Until then, no judgment were to be decided by the judicial organs of the WTO in

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Footnotes:


12 EUROPEAN COMMISSION, The welfare of animals kept for fur production, Report of the Scientific Committee on Animal Health and Animal Welfare, 2001. Detention is usually in narrow cages and killing methods include gassing, neck-breaking and electrocution to not spoil the fur of the animals which are generally not cared properly (as only fur is valuable) and develop stereotypes (as self-mutilation) that reflect the contrary to the “welfare of animals”.


14 Id.


16 Council Regulation (EEC) No 1254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of polys and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, 09 11 1991.


18 Id. §5. *Seals are sentient beings that can experience pain, distress, fear and other forms of suffering. [...] In its resolution of 12 October 2006 on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, [...] the European Parliament called on the Commission to propose a total import ban on seal products. In its Recommendation 1776 (2006) of 17 November 2006 on seal hunting, the Parliamentary Assembly of the Council of Europe recommended inviting the Member States of the Council of Europe practicing seal hunting to ban all cruel hunting methods which do not guarantee the instantaneous death, without suffering, of the animals, to prohibit the stunning of animals with instruments such as hakapiks, bludgeons and guns, and to promote initiatives aimed at prohibiting trade in seal products*.

19 In the European Union, foie gras is mainly produced in France (first producer), Spain, Hungary and Bulgaria. However, this method is theoretically forbidden as the §14 of the Annex of the 1998 directive on farming (1998) states that “No animal shall be provided with food or liquid in a manner [...] which may cause unnecessary suffering or injury”.


welfare in numerous domains. As fur policy, while continuing to through its embargos, the European Union clearly puts forward its "anti-fur" policy, while continuing to expand its mission to protect animal welfare in numerous domains. As regards to the current state of international trade rules, the European embargos were audacious and risky as the penalties imposed by the WTO can be very expensive (several millions of Euros). However, it is not entirely clear that the European Union would have been subject to penalties by the WTO because of the general exception for measures "necessary to protect public morals" stated in the Article XX a) of the General Agreement on Tariffs and Trade (GATT). Even if this exception theoretically allows the restrictions to international trade in order to protect the public morals, such as regarding the welfare of animals, it is impossible to know if the judicial organs of the WTO would allow import bans like those imposed by the EU to protect animal welfare, as long as no precedent on its implementation exists in this context.

Besides, the European Union paradoxically imposes a model of protection on the international scene, while numerous problems concerning the welfare of animals remain within its own borders (such as ethical issues on fur farming). Then it seems that the EU protection of fur-bearing animals is limited to certain species, like seals or cats and dogs in foreign countries (in particular Canada for the seals and China for the cats and dogs), rather than the minks, foxes and the other species exploited in European countries (especially in Denmark with 32% of the world production of mink fur, Finland with 65% of the farms of foxes, like in Norway and the Netherlands as major producers). Therefore the European regulations reflect a protection that can be qualified as "specist", that is to say, a protection which privileges certain species to the detriment of others. It also points up a policy of interference that is particularly questionable from an International Law perspective. In particular, the European Union could be criticized for dictating to foreign countries how they should act for protecting animal welfare, while it is not providing the best example itself beforehand.

2. A ban on fur farming for Community Law consistency

In order to better embody the "model" it pretends to impose, the European Union could phase out fur farming - as it did for other practices contrary to the welfare of animals, such as recently in banning conventional battery-cages for laying hens. The question here could be to ask if a EU ban on fur farming would be possible? Then, an answer could be to say that this ban would be desirable to restore Community law consistency in the frame of the EU "anti-fur" policy (as well as its key role in promoting animal welfare on the international scene).

Moreover, achievements in this sense seem to be even more possible that the European Commission recognizes and wishes to remedy to the ethical problems posed by fur farming.

A consultation conducted in 2005 also reveals that "more than 80% of the Europeans considers that it is necessary to improve the level of the well-being of animals in fur farms".

Since the adoption of the Treaty on European Union in 2008, Article 11 now allows European citizens to directly invite the European Commission "to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required".

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28For instance in the frame of the Beef-Hormone case at the WTO, the EU were condemned to 116 millions of dollars for having boycotted beef-minz from the US. See F. SINGER, “L’Organisation mondiale du commerce : un obstacle au progrès de la protection legale des animaux”, Les Cahiers antispécistes, no 274, CA n° 25, 2005, p.5.


32Cannot cite as fur farming is a market practice with long tradition.

33Article 11 of the Consolidated version of the Treaty on the Functioning of the European Union, JO C 115/13 of the 09.05.2008: “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaty.”
For example, such an initiative could seek a legal act banning fur farming within the European Union. At least 1 million signatures should be gathered in a petition and this initiative should aim at implementing European treaties. As animal welfare provisions are now found amongst the main principles of the EU Treaties, such a ban proposal would directly aim at implementing them in the specific context of fur farming. Moreover, this initiative would be a means for European citizens to require a response to the growing public demand for a more ethical treatment of animals and for avoiding unnecessary suffering when alternative methods and products are available. Specifically in this case, it can be put forward that synthetic clothes are even more available (quantitatively) and accessible (financially) than real fur ones. Support for the end of fur farming can also be seen within the European Union based upon the increasing opposition to these farms through legal bans and restrictions in the member countries. Indeed, fur farms are already forbidden in Switzerland, Austria, England, and restrictions exist in Sweden, Norway, the Netherlands and in 4 German States. Belgium could also follow the way as a recent law proposal states: “The ill-treatment and the killing of animals in the only purpose to make luxury items are unacceptable from an ethical perspective and justify forbidding the breeding of animals only or mainly for their fur”.

Conclusion
Fur farming is still generating a huge amount of animal suffering around the world, in particular in the European Union which remain the world leader of factory farmed fur production. In addition to the ethical reasons against fur farming, there are environmental reasons that can be opposed. The ecological argument generally put forward to promote the fur industry is fallacious. Indeed, the production of an animal fur coat consumes 66 times more energy than the production of a synthetic fur coat. Far from being more “green”, fur farming is one of the most environmentally harmful industries as the products used for tanning pelts are highly polluting. Considering the dangers of this industry for the environment (affecting indirectly our health) and the huge amount of suffering it generates for animals, it would certainly be preferable to put an end to these farms rather than encouraging their development, especially when animal fur is not a vital utility nowadays. However, it seems that the lure of gain is the sinews of the war between the producers of fur and the defenders of animals, as for most of the problems in the world since a long time!

Ethics or money? Both examples exist in fur farming legislation. Whereas some countries are restricting or prohibiting fur farming, some are supporting this industry by their silence or indifference to this issues. The question remains a to know which value do we want to survive us and transmit to next generations? We already know that the scramble for profit is causing the loss of other living species and our mother-earth. Considering the growing awareness of environmental and animal issues world-wide, we can only hope that, one day, the economical paradigm will finally change into a more ethical one.

At least 1 million signatures should be gathered in a petition and this initiative should aim at implementing European treaties

“Fur farming is still generating a huge amount of animal suffering around the world”

9 For example, UK banned every kind of fur farming for ethical reasons since 2000 (Fur Farming (Prohibition) Act), as did Switzerland in 2005. The Netherlands banned fur farming of minks and chinchillas and fur farming will be banned in Croatia in 2017, as well as in Denmark for foxes in 2024.


11 The Independent, “Fur - the fake debate”, 23 November 2004. “A report by an engineer at the Ford Motor Company calculated that the amount of energy needed to make a real fur coat from farmed animals - accounting for 85 per cent of world production - is 66 times that needed to make a fake fur coat. This takes into account feed, cages, skinning, pelt-drying, processing and transportation. He calculated that a fur coat made from trapped animals still needs nearly four times the energy used for a fake fur coat”, online at: http://www.independent.co.uk/news/uk/this-britain/fur-the-fake-debate-6157396.html. Cf. G.H. SMITH, Energy Study of Real vs. Synthetic Furs, University of Michigan, 1979.

The issue of how to address the use of wild animals in circuses has been tackled successfully in an increasing number of countries. Austria has implemented an outright ban, as has Peru, whilst other countries have implemented some level of species-specific prohibition. Bolivia has taken a further step of banning the use of all animals in circuses since 2009 and Greece announced the same measures earlier this year. At the end of October, the new coalition government in the Netherlands included a ban on the use of wild animals in circuses in its plan to run until 2017.

Whilst these countries now have bans in place or in the pipeline, the approach in Westminster has been at best more cautious. The policy conundrum has been worked upon for over six years at Parliamentary level, and has included working groups, public consultations, parliamentary debates and the threat of judicial review; not to mention a number of mixed messages from Government. Eventually, it seemed a conclusion had been reached when an announcement was made in March 2012 that a ban would be introduced. It was to be implemented via primary legislation on ethical grounds so as to avoid the purportedly insurmountable legal issues presented by prohibition under the Animal Welfare Act 2006 on welfare grounds. Government officials have argued that the lack of conclusive empirical scientific evidence on the issue would mean that a ban on welfare grounds could exceed powers granted to the Secretary of State under Section 12 of the Act and thus leave any ban open to legal challenge. This point is still strongly refuted by the animal welfare lobby on the basis that animal welfare is a "mandated science that comprises an interplay between values and empirical evidence", rather than empirical evidence alone.

However, along with the long-overdue announcement that a ban would be forthcoming in England, came the news that the "strict new licensing regime" which had been first mooted the previous year would be implemented in the meantime in order to "protect the welfare of such animals while they are in use in travelling circuses". The rationale behind it made little sense.

It makes little sense that the Government, confirmed to be committed to reducing red tape, would make plans to introduce a system described as a "convoluted, bureaucratic nightmare" by one MP as a mere temporary measure.

It makes little sense that the Government, apparently convinced that "there is no place in today's..."
circuses is "licensing the use of wild animals in
animals. As MP Tom Harris put it, law , it simply will not protect
the intention to ban. As a matter of
licensing appears to fly in the face of
As a matter of policy , therefore,
2020.

As a matter of policy, therefore, licensing appears to fly in the face of the intention to ban. As a matter of law, it simply will not protect animals. As MP Tom Harris put it, licensing the use of wild animals in circuses is "regulating cruelty".

Multi-tiered standards: The case of the unlucky monkey

The Welfare of Wild Animals in Travelling Circuses (England) Regulations 2012, which are due to come into effect in the first few days of 2013, add to the growing raft of animal welfare legislation which appears to use as its starting point the limitations of the industry in question, rather than the needs of the animals themselves. Whilst the circus regulations cannot be accused of creating this problem, they certainly exacerbate what is arguably an already inadequate situation.

The point was made by Lord Knight of Weymouth in the House of Lords during the Grand Committee debate on the regulations. He outlined the sorry (albeit hypothetical) tale of a monkey which can largely be summarised as follows:

On Monday the monkey is in a pet shop, on Tuesday she is sold to a private owner. By Wednesday, the owner realises that monkeys don’t make good pets and passes the monkey to a circus. Failing to draw in the expected crowds with his new addition, the circus offloads the monkey to a zoo on the Thursday.

Of course the needs of the monkey herself never change, regardless of whether kept as a pet, in a circus or in a zoo and, in fact, many would argue that her complex needs simply cannot be met in captivity at all. Despite this, the welfare standards that the owner at any particular time has to meet in order to be seen as providing for her welfare in a legal context differ for each environment she finds herself in.

This problem with regard to the circus regulations is perhaps best demonstrated using elephants as an example, in light of the fact that Defra released its welfare standards for elephants in zoos and welfare standards for elephants in circuses within just six months of each other in 2012.

In circuses, elephants are granted just 16-25% of the space that their counterparts held in zoos are prescribed.

In circuses, elephants are granted just 16-25% of the space that their counterparts held in zoos are prescribed. In zoos, it is forbidden to chain elephants unless in exceptional circumstances. Explicitly, zoos are told: "Elephants must not be chained for periods in excess of three out of 24 hours". However the welfare guidance for circuses allows for elephants to be chained overnight, every night of their lives.

Confusingly, and on this specific point, the Minister responsible for the regulations, Lord De Mauley, appears to believe that the overnight chaining allowed in his department’s own welfare guidance was unacceptable and that it could be found to be a breach of the provisions of the Animal Welfare Act 2006. His response to a question on the welfare concerns over elephants being chained overnight was "If anybody - welfare groups or a member of the public - has evidence of this happening, they should contact the relevant enforcement authority".

the welfare guidance for circuses allows for elephants can be chained overnight, every night of their lives.

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8 It should be noted that during this debate Lord Knight erroneously used an example of a species of monkey (marmoset) for which a Dangerous Wild Animals Act 1976 licence is not required. Despite this, principle of the argument remains valid.


It was not entirely clear if he was referring specifically to overnight chaining or acts of cruelty more generally.

The introduction of multi-tiered standards has long been recognised as an issue and was explicitly criticised by the author of the book Animal Machines, published in 1964. In it, Ruth Harrison makes the point that factory farmed chickens were, at that time, protected from being “unnecessarily ... tied by the legs or be allowed to remain so tied for a period longer than is necessary; or unnecessarily be carried head downwards...” by the Conveyance of Live Poultry Order 1919 (since revoked by The Welfare of Poultry (Transport) Order 1988). She makes the point that, as soon as the birds are no longer in “conveyance” within the meaning of the Order, the first thing that happens to them is suspension by their feet on a conveyer belt. She puts the contradiction succinctly:

“But even if it is convenient and economic it is an acknowledgedly cruel way to handle a bird for long, and what is cruel in one place is cruel in another”

Written almost fifty years ago, Harrison’s concerns are still just as relevant today with regard to the new circus regulations. Unless animal welfare legislation begins to look to the needs of the animals as its starting point, and not the limitations of the industry using that animal, these multi-tiered standards can only become further entrenched.

However what it is about the welfare needs of primates and cetaceans that differentiate them so drastically from elephants and big cats, for example, is unclear. A line has clearly been drawn by Government, but no indication has been given as to what criteria have been used to decide which animals sit on either side of that line. Whatever the criteria, it sets the argument against the ability to ban under the Animal Welfare Act 2006 on decidedly shaky ground.

“Oh nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced”
— Albert Einstein

Finally, and leaving all concerns on ethics and welfare to one side, the regulations appear to be unenforceable, which arguably negates their introduction altogether.

The regulations state that a licence is required for the operation of a travelling circus, with the term “travelling circus” defined as “a circus—which travels from place to place for the purpose of giving performances, displays or...”

On primates, he said: “I would therefore want very specific requirements for primates, which I very much doubt circuses could easily meet”.

It is clear that the Minister believes that the use of cetaceans and primates in circuses may well be prohibited on welfare grounds.

A species-specific ban?

As mentioned previously, one of the most fiercely-held views of Government is that a ban under the Animal Welfare Act 2006 would be vulnerable to legal challenge due to a lack of empirical scientific evidence on welfare provision in travelling circuses. Given the repeated insistence on this point, it was surprising to hear the response of Minister, David Heath, on concerns raised over the introduction of different species into travelling circuses as the result of licensing. When asked about the potential of introducing orcas and primates, his response appeared to strongly suggest that a species-specific ban was being put into effect.

Speaking on orcas, he said “I am simply saying that I do not believe there are any circumstances in this world where a travelling circus could go around this country with an orca ... it cannot be done. Therefore, no licence would be issued”.

On primates, he said: “I would therefore want very specific requirements for primates, which I very much doubt circuses could easily meet”.

It is clear that the Minister believes that the use of cetaceans and primates in circuses may well be prohibited on welfare grounds.

exhibitions, and as part of which wild animals are kept or introduced (whether for the purpose of performance, display or otherwise); and any place where a wild animal associated with such a circus is kept”.

Suspension of a licence is the primary sanction for circuses following a recognised failure to meet licence conditions. In order to revoke a licence, a suspension must normally have been invoked beforehand.

The problem presents itself in that, upon suspension, there is nothing that the circus can do with the animals that would allow it to comply with that suspension. As keeping the animals on the road requires a licence, they must be moved somewhere. But holding animals anywhere associated with the circus also requires a licence and thus a Catch-22 situation arises which can only result in the circus breaching the licence suspension. As such, immediately upon suspension, the circus would find itself in contravention of Section 13 of the Animal Welfare Act 2006. The only option to avoid this would be to remove the animals permanently from the circus, which appears to suggest that a suspension is, in effect, a revocation. Either way, it clearly creates an inequitable situation for the circus itself, and for which there does not appear to be a solution.

To conclude, we are left in little doubt that the welfare standards for animals kept in circuses are lower than those for the same animals kept in captive environments such as zoos. Furthermore, it would appear that there is the intention within Government that the regulations act as a barrier to the keeping of some species in circuses, meaning the licensing regime is akin to a species-specific ban. Finally, it appears that sanctions under the regulations cannot be properly enforced without creating what appears to be an inequitable situation for the circus of either revocation under the guise of a suspension or an automatic breach of Section 13 of the Animal Welfare Act 2006. This factor brings the potential efficacy of the system into serious question before it is even in place.

It has long been argued that the correct legislative measure to protect the welfare of wild animals in circuses is an outright ban but it remains to be seen when, and indeed if, that ban will be realised. Until then, the introduction of a system which will see the continued use of these animals for such a spurious and needless practice as circus performances gives us continued, and significant, cause for concern.

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Further reading:
Wild Animals in Circuses: the circus has still not left town, Chris Draper, Journal of Animal Welfare Law, Autumn/Winter 2011

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.

We believe that lawyers should, as well as interpreting laws, ask questions about the philosophy underlying them: they have always played a central role in law reform. There is also a real need to educate professionals and the public alike about the law.

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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- 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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