

## Where Next for Nature?

*Part of the “Carlton Policy Challenge” series of policy papers, presented to the Carlton Club on 11 September 2018*

### Executive Summary

Our wildlife laws are in need of updating and leaving the EU is an opportunity for us to shape a new legal framework for the UK which is more appropriate to the wildlife and habitats of this country and the people who call it home.

In light of the decision to leave the EU, the Countryside Alliance launched a public debate about the future of wildlife law. We put together a collection of essays from individuals and organisations from a range of backgrounds that have a wealth of experience and knowledge of the countryside and wildlife to help inform and stimulate this important debate. Many of the contributors noted that strong wildlife laws and environmental legislation are important. A common theme also emerged around the lack of flexibility in our existing laws, and a desire to move from a system that protects individual animals or species, which can negatively impact on the balance of nature as a whole, to one that focuses on managing species with the aim of increasing biodiversity and maintaining the balance of nature.

Latest research, experience, and the decision to leave the EU, have created a unique moment to reconsider our approach to wildlife law to ensure conservation and protection is balanced with the need for management and sustainable development based on the English common law approach of presumed right as opposed to the European civil law approach of presumed wrong.

We should be bold and radical in our approach, and consider introducing a new piece of legislation to repeal a raft of confusing and sometimes contradictory laws and establish consistent principles in this area once we are outside the EU.

The challenge of managing wildlife and sustaining healthy wild populations is our task and we must address it. The aim should be to empower those with the most knowledge and practical experience to manage wild animals and their habitat in a spirit of stewardship, so as to leave the natural environment, not only in a better state than we inherited it, but also with the ability to manage it sustainably into the future.

### Background

There are varying degrees of wildlife protection in this country, from a number of different sources. Some wildlife is protected as a result of UK law including from the devolved administrations, other wildlife is protected as a result of EU law and international obligations, whilst other wildlife has no specific protection at all.

The current situation is less than satisfactory; a view shared by the Law Commission which began a review into wildlife law in 2012 and concluded in their final report of 2015 that: *“The current law is a patchwork of competing provisions. Some measures are fairly broad, such as those for wild birds; others are focused on a single species, such as badgers. Some measures are concerned with the rights of landowners; others are underpinned by protection and conservation goals.”*

There is little evidence or principle behind these distinctions and yet together they form an extremely powerful body of law which determines the management of our wildlife and countryside.

### **UK law**

In this country, laws to protect wildlife are of ancient provenance. Most early wildlife laws tended to be concerned with preserving sporting interests, particularly that of the monarch and landowners. The Black Act 1723 made it an offence, punishable by hanging, to poach wild deer. This Act was repealed in 1827 and subsequent legislation was more focused on conservation with the Game Act 1831 intended to conserve game by introducing closed seasons and is still the main piece of legislation used to prosecute poachers.

Wildlife law remained focused on protecting game species until the latter half of the 19<sup>th</sup> Century, when the impact of industrialisation on the natural environment and the national psyche created a movement to protect wildlife and the countryside in general. The Wild Birds Protection Act 1880 was probably the first piece of UK domestic legislation concerned with wildlife conservation by creating a general offence of killing 'wild birds' during their breeding seasons. This period also witnessed the establishment of a number of civic societies including the Selbourne Society and the Plumage League, which was set up to campaign against the practice of ladies wearing the feathers of rare birds in their headdresses. These societies merged and formed the basis for the Royal Society for the Protection of Birds (RSPB) which was established in 1904.

A growing understanding of the natural environment and the need to protect it continued throughout the early 20<sup>th</sup> Century with a number of Acts passed protecting wild birds and other animals. The latter part of last century saw the introduction of species specific legislation such as the Badgers Act, Conservation of Seals Act and the Deer Acts which were based more on welfare arguments rather than conservation. It also witnessed the growth of the animal rights movement which helped in the passing of the Hunting Act 2004; an Act not based on conservation or welfare evidence but on politics and prejudice.

These laws have created an inconsistent and confusing situation, in which it is completely legal for a farmer to shoot a fox but not hunt it, and completely illegal to kill a badger by any means no matter what the situation is on the ground.

### **EU law**

By the time the UK joined the European Economic Community (EEC) in 1973 there was already a substantial body of domestic wildlife law on our statute book which we continued to add to and amend independently of our membership of the EEC and into the EU.

There is no doubt, however, that wildlife law changed substantially as a result of our membership of the EU. The most significant of the EU wildlife laws are the Birds Directive 1979 and the Habitats Directive 1992. These are mainly implemented in UK law by the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations, although the Game Acts and other legislation are also part of the legislative package giving EU law effect in this country.

The Birds Directive provides legal protection to all wild birds but allows Member States to issue exemptions for their control in certain circumstances so long as it does not impact on the overall population of the species. Meanwhile there is no similar blanket protection for mammals. This approach partly reflects the requirements of international obligations, particularly the Bern Convention on the Conservation of European Wildlife and Natural Habitats which the UK ratified in 1982, but it also reflects a European civil law attitude to policy making which favours a prescriptive and precautionary approach to legislating.

EU law generally assumes that if something is not specifically permitted it must be illegal. This is in stark contrast to the English common law approach where if something is not forbidden it is allowed. The Birds Directive is a good example of this in practice as blanket protection is given to all wild birds and then exemptions are granted, rather than starting from the position of identifying which birds might be in need of protection.

Whilst EU nature conservation policy has been ambitious compared with many parts of the world, and in some cases has been a driving force for good, it has also created a frustratingly bureaucratic system which is often not appropriate to the situation in the UK. One of the best examples is the protection enjoyed by Great Crested Newts which are numerous in this country but threatened in some parts of continental Europe, which accounts for their status as a 'European Protected Species', having considerable consequences, particularly in relation to UK planning policy.

A European approach to conservation has too often failed to allow for flexibility or common sense and instead incentivised policies that are not appropriate for the UK, and often do more harm than good for wildlife overall. A situation that has not been helped by our own agencies such as Natural England, Scottish Natural Heritage, and Natural Resources Wales, which have been reluctant to grant consent for control of certain species such as for ravens, buzzards, and cormorants.

### **The opportunity for change**

Leaving the EU not only provides the opportunity to improve existing wildlife protection arrangements determined by the EU but also to undertake a general review of wildlife laws in this country to ensure we have a consistent and concise legal framework in this area post Brexit. This is a unique moment to develop a sustainable nature conservation policy that balances the particular requirements of UK species and habitats while taking account of our economic and social requirements.

The Law Commission identified many of the problems surrounding the existing body of wildlife law during the review which was commissioned in 2012. Their final report of 2015, however, did not represent a radical departure from the existing situation, or a system based on consistent principles across all species. They were clearly constrained by the need to conform to a shifting interpretation of EU law and, as such, animals were subject to different regimes depending on whether they were an EU protected species, a UK protected species, or enjoying no specific protection. There will be scope for another review once we have left the EU to establish what is possible under the terms of our new relationship with Europe.

Proper consideration must also be given to the requirements of our international obligations in this area, which it is right that we uphold. The most comprehensive set of requirements is contained in the Bern Convention which imposes obligations on signatory countries to protect over 500 wild plant species and more than 1,000 wild animal species. Ensuring we remain compliant with the Bern Convention will limit the scope of any possible change to wildlife laws once we are outside of the EU, but we will have greater freedom and flexibility as to how we interpret the requirements. For example, the Bern Convention splits protection for wildlife into two groups: those wild animals which are completely protected; and those which are protected with exemptions. The EU Birds Directive, which interprets the requirements of the Convention, splits protection into three groups with a far more complicated set of exemptions. Leaving the EU will remove the middle tier of implementation and enable the UK to develop an approach which is better suited for this country.

As well as political opportunities for change, there is also a practical necessity as a result of changes in wildlife populations in recent years. Our wildlife laws were mostly drawn up at a time when predators were rare because of the attentions of farmers and gamekeepers followed by the effect of the intensification of agriculture from the 1950s onwards. Now we live in a world of rebounding predator numbers and the species we are losing, such as curlew and lapwing, are the prey species.

A recent survey of British mammals estimated that there are twice as many badgers as there were 20 years ago with around 550,000 living in this country. The protection of badgers does not relate to the status of the species which was never threatened and is now extremely numerous. The Badgers Act was

based on justified concerns about the welfare of individual badgers that were subject of cruel activities such as baiting. However, by rejecting the possibility of managing, including humanely culling individuals of an over-populous species that is in conflict with people, we are moving the debate from one about animal welfare to one about animal rights. In most of mainland Europe it is legal to cull badgers humanely where necessary.

The reality is that our continued absolute protection of some species, like the badger, is not logical nor does it protect the welfare of individual badgers or the overall health of the species. This inconsistency is unhelpful both in terms of practical wildlife management and respect for the legitimacy of the law.

### **The principles for change**

A different approach does not mean a lowering of standards, or a reduction in our ambition for wildlife. Being clearer, simpler, and more consistent could enable us to develop a nature conservation policy which is flexible, effective, and sustainable. It could also address the difference between the needs of a species as a whole and individuals of that species, and the need to maintain a balance between species.

At the centre of any change must be the desire to strike a balance between competing interests and ensure conservation policy is appropriate to the UK. Species like rats, corvids, and foxes need to be managed, while invasive species such as grey squirrels, American crayfish, and mink, have driven their native rivals to near extinction. We clearly need intervention in these cases, but it must be done in an appropriate way. Legislation to protect the red squirrel makes sense in this country, but not in Poland, where most squirrels are red and are at pest levels in many places.

Three main interests converge in the case of managing wildlife and the task is to find a balance between them:

- Protecting endangered species and promoting biodiversity
- The interests of farmers in controlling pests
- The interests of conservationists, including those who hunt, fish and shoot

Any new policy should seek to empower those who have a genuine interest in the welfare of wild animals and their habitat. There has long been an association between people who hunt and a deep sense of care for the land. William Somerville's poem *The Chase*, written in 1735, is a wonderful insight into the passion for conservation which huntsmen and women have, often more than many others. No conservation, however, makes sense if it is only directed to the past, and we continue to make the case for the conservation work carried out by people who hunt, fish, and shoot.

There is an important distinction that needs to be made in this debate between animal welfare and animal rights. While we negotiate our conflicts through the language of rights and duties, no such negotiations are available to animals. If we treat animals as having rights, we will be treating them in a way that they can neither understand nor respond to meaningfully.

Animals are not persons and we should consider them from the legal point of view not as individuals but as species. No species should be excluded from management if its numbers are damaging to other species or the interests of people. The increase of the badger population has coincided with a decline in other species such as the hedgehog, and an increase in cases of Bovine Tuberculosis. However, it is right that we have regard to the welfare of individual animals in terms of the means deployed to manage them.

### **The policies for change**

We must start with an overview of all existing legislation in this area and be prepared to make bold and radical changes.

All legislation creates new incentives and we should recognise that animal welfare provisions, if not properly thought through, may incentivise behaviour that has the reverse of the intended result. Some studies have shown that numbers of foxes and hares have decreased since the introduction of the Hunting Act 2004, as shooting of these animals is now far more common place.

What is needed is a clear, objective, and comprehensive legal package, designed to secure the welfare of species and the renewal of their habitat, while outlawing human cruelty. A new comprehensive law governing wildlife management would have to address the following issues:

- The definition of cruelty – the intentional causing of ‘unnecessary’ suffering, where ‘unnecessary’ means unnecessary to a legitimate interest.
- The definition of legitimate human interest – increasing biodiversity, agriculture and general husbandry, culling of pests, management of habitats, recreational interests where suffering is not the goal and is minimised.
- The definition of protected species – it should be possible to extend it rapidly to newly endangered species, like the water vole and to withdraw it from protected species that have successfully multiplied to the point of threatening the biological equilibrium such as cormorants, ravens, and buzzards.

A new piece of legislation could be used to repeal a raft of confusing and sometimes contradicting laws and establish consistent principles in this area once we are outside of the EU. At the heart of this should be a presumption in favour of management within a new legal framework.

Wildlife law has been dominated by political factors more than many other areas of law, not least the long debates around the Hunting Act. A key objective of any new law must be to depoliticise the decision-making process and establish a framework for wild animal protection that is able to stand the test of time and change of government.

Any new law must also be enforceable, which is not something to which proper consideration has been given in many of our wildlife laws to date. At the time of the Law Commission’s report into wildlife law in 2015, the then Association of Chief Police Officers recognised that *“conservation legislation is, in our view, badly in need of consolidation.”* If a case does reach the courts then prosecution can be hampered by a lack of knowledge in the Crown Prosecution Service, inconsistent sentencing by judges and magistrates and a lack of specialist prosecutors for wildlife crimes.

Enforcement of wildlife law also fails to acknowledge the role it could play in crime prevention. The primary role of wildlife law enforcement is to detect and arrest the offender after the crime has been committed, but where a crime has been committed against wildlife this is often too late. In a post Brexit review of wildlife law, the introduction of crime prevention measures could be as important as improvements in legislation. This must include recognition that wildlife crime too often results from impossible conflicts between pursuing legitimate interests and the inflexibility of the law. We must seek to tackle the causes of crime as well as offences.

### **Potential challenges**

There will clearly be challenges to any attempt to introduce radical reform of our wildlife laws, not least from a number of environmental groups who support a continuation of the European approach and further protections rather than using this opportunity to seek real improvements to nature conservation policy.

The decision to leave the EU has opened a public debate about the future of countryside and wildlife management, which is to be welcomed. There are important questions about how to manage our countryside and support rural communities after we leave the EU, particularly in upland and other

marginal areas. However, there are those who are using this opportunity to call for a complete abandonment of management under the romantic view of 'rewilding'.

Humanity has always had a key role to play and we must avoid the false view that sees the presence of people as negative; imagining some kind of perfect state of nature at some unidentified point in the past. Our wildlife laws must recognise the essential role people must play both in protecting the natural environment and also managing wildlife in a way that ensures that a balance is struck between our needs and our environment, as well as between species and overall biodiversity.

The introduction of lynx, wolves and beavers as a substitute to the management from people has gained popularity, but as a general policy would fail to address the need for a managed countryside. One of the reasons so many landowners fear the idea of reintroducing beavers and lynx is that they know that such species would be fully protected, so if they do damage there is nothing they can do about it. We need an exit strategy if reintroductions do not work out.

There are also political challenges to any change in the law, with allegations that Conservatives do not take animal welfare and conservation seriously, even if a passion for wildlife and conservation is the motivation behind any change in the law.

While we may be a nation of animal lovers, polling has shown that at election time animal welfare is not a priority for most voters. Taking an evidence-based and principled approach to wildlife management will not do the Conservative Party any damage at the ballot box. Conservatives should not be afraid to take on reform in this area and ensure that leaving the EU is used as an opportunity for improvement in laws that govern wildlife protection and management. This is an important task as it will set the direction of travel for the next generation. We must learn the lessons from the past if we are to have a better future for nature.

While new UK specific wildlife laws may be desirable, the benefits of promoting new laws will always need to be balanced against the danger of new legislation being hijacked by those whose agenda is ideological – animal rights – as opposed to a practical concern with animal welfare and proper wildlife management, a concern shared by farmers, hunters, shooters, and anglers long before the current animal rights agenda achieved such influence.

To deliver laws which genuinely benefit wildlife we will need a political party, government and a parliament, prepared to stand up to the animal rightists and legislate on the basis of principle and evidence for our benefit, and for the benefit of all our wildlife and the environment as a whole.

***Countryside Alliance  
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