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The seventh amendment to the Cosmetics Directive and the WTO: are they really adversaries?

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By enacting the seventh amendment to the Cosmetics Directive,[1] the EU took a radical step for the protection of laboratory animals, a step unparalleled elsewhere in the world. The aim of this legislation is to bring an end to the use of animals for testing cosmetic products. The seventh amendment contains a range of measures designed to work together to achieve its aim. These include phased-in bans on the sale within the EU of animal-tested cosmetics and on the use of animals to test cosmetics within the territory of the EU.[2] All testing must cease by 11 March 2009 and sales must stop by the same date, with a postponement, for the sales ban only, to 11 March 2013 for three categories of test where the development of alternatives is proving to be difficult. Within the specified time frames, the bans will fall as and when suitable non-animal methods become available.

Even during the Directive's pre-legislative stages, some commentators[3] expressed concern that the marketing ban would be in breach of the EU's obligations under the World Trade Organisation (WTO), particularly under Article III of the General Agreement on Tariffs and Trade (GATT).[4] GATT Article III is intended to prohibit discrimination within a country as between the products of domestic and foreign producers. It provides that imported goods must be treated no less favourably than like products of domestic origin with regard to any laws, regulations or requirements affecting their internal sale. The crucial issue, of course, is what exactly is meant in this context by a "like" product. This question goes to the heart of concerns over the WTO compatibility of the seventh amendment's ban on the sale of animal-tested cosmetics.

On the face of it, GATT Article III seems to pose no threat to this animal protection measure. It does not appear to prevent countries from prohibiting the sale of animal-tested cosmetics, either of domestic origin or imported, provided both are treated in the same way. This policy does not seem to conflict with the GATT because most people do not consider animal-tested cosmetics to be "like" non-animal-tested cosmetics.[5] However, apprehension over this point has arisen as a result of comments made in WTO Panel[6] decisions in the cases of *Tuna/Dolphin I*[7] and *Tuna/Dolphin II*.[8] The Panels held that, in assessing whether two products are "like", one must only consider the end product and not the way in which it was produced. In other words, one cannot take into account process and production methods where they do not endow the final product with clearly distinguishing characteristics. Such methods are generally called "non-product-related process and production methods" ("npr-PPMs"). According to this line of reasoning, the seventh amendment's sales ban is potentially incompatible with the GATT.

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[1] Directive 2003/15/EC of the European Parliament and of the Council of 27 February 2003 amending Council Directive 76/768/EEC, OJ L 66, 11.3.2003, p. 26.
[2] Article 1(2) which inserts a new article, Article 4a, into the Cosmetics Directive.
[3] See for example Austen, M. and Richards, T. (eds), "Editors' note", *Basic Legal Documents on International Animal Welfare and Wildlife Conservation*, 2000, p. 494.
[4] The text of the WTO Agreement, the GATT and WTO case reports are available on the WTO's website at www.wto.org.
[5] "Opinion Poll on Animal Testing for Cosmetics", commissioned by the RSPCA and the British Union for the Abolition of Vivisection and conducted by Opinion Research Business, May 1999, available on the website of the Eurogroup for Animal Welfare at www.eurogroupanimalwelfare.org.
[6] The Panel is a tribunal of first instance for adjudicating on trade disputes. Decisions of the Panel may be appealed to the WTO Appellate Body on points of law.
[7] *United States – Restrictions on Imports of Tuna*, International Legal Materials, 1991, vol. 30, p. 1598.
[8] *United States – Restrictions on Imports of Tuna*, International Legal Materials, 1994, vol. 33, p. 839.

However, it is submitted here that, on the contrary, the measure is by no means doomed. It is contended that there are four factors which are likely to promote its acceptance within the GATT and, additionally, that there are a range of defences to be made in the event of a challenge. These supportive influences are discussed below, beginning with the points favouring initial acceptance.

First, the text of the GATT does not actually contain any explicit "rule" against making process/production-based distinctions between otherwise "like" products. The widely-held interpretation of "like products" (and therefore the origin of the widely-held view of the restriction) derives primarily from the Panel reports from over a decade ago in the *Tuna/Dolphin* cases. This being so, the next argument goes to the status of these reports.

Second, neither of the *Tuna/Dolphin* cases was formally adopted by the GATT Council and therefore they cannot be regarded as binding, the WTO Appellate Body having held that unadopted Panel reports have no legal status in the GATT or WTO system.[9]

Third, in the subsequent cases of *Japan/Alcoholic Beverages*,[10] *Shrimp/Turtles*[11] and *Asbestos*,[12] the Appellate Body, while not repudiating the conventional view derived from the *Tuna/Dolphin* cases, did not expressly endorse it either, even though it had the opportunity to do so. Significantly, in *Japan/Alcoholic Beverages*, it ruled that, in determining product likeness, Panels must use their best judgment on a case-by-case basis, bearing in mind that physical and chemical features are not the only relevant aspects. They must also take into account matters such as consumers' tastes and habits, recognising that they vary from country to country.[13]

Fourth, it can be argued on policy grounds that there is a case for treating certain non-product-related restrictions as being compliant with the GATT. The influential legal writers Howse and Regan[14] have challenged the notion that npr-PPMs are likely inevitably to result in restrictions on trade or to impose costs on producers in developing countries. Drawing on economic theory, they conclude that there is no basis for imposing a strict product/process distinction on the world trading system and that non-product-related measures should be subjected to the same sort of case-by-case analysis that is required for product-related measures. Indeed, Howse and Regan go further. They warn that a rigid product/process distinction is ill-advised because it infects the case-law of the GATT with arbitrariness and incoherence in areas where there are highly visible effects on domestic policies, thereby putting the legitimacy of the trading system itself at stake.

It is acknowledged, however, that the WTO has not so far formally recognised the validity of making process/production distinctions between otherwise like products. Thus there remains a threat to the seventh amendment's sales ban on animal-tested cosmetics. Nevertheless, as has been argued above, the case-law on the "like" product issue has undergone significant development since the *Tuna/Dolphin* disputes, and some commentators consider that the Appellate Body has at least left the door open for further development.[15]

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[9] *Argentina/Footwear* (Appellate Body (AB) report, adopted 22 April 1998) WT/DS56/AB/R, para. 43.
[10] AB Report, adopted 4 October 1996, WT/DS 8, 10, 11/AB/R.
[11] AB Report, adopted 6 November 1998, WT/DS58/AB/R.
[12] AB Report, adopted 5 April 2001, WT/DS135/AB/R.
[13] See footnote 10 above, in particular Section H(1)(a) of the AB Report.
[14] Howse, R. and Regan, D., "The Product/Process Distinction: an Illusory Basis for Disciplining 'Unilateralism' in Trade Policy", *European Journal of International Law*, Vol. 11, 2000, p. 249.
[15] Joshi, M., "Are Eco-Labels Consistent with World Trade Organisation Agreements?", *Journal of World Trade*, Vol. 38, 2004, p. 69 (a review article).

Encouraging though these arguments may seem, there is no way of telling whether they would be successful in the event of a challenge before the WTO. If they were to be rejected, then the EU's marketing ban on animal-tested cosmetics would be classed as in breach of GATT rules. Even so, however, all would not be lost at that stage, because it should be possible to have recourse to GATT Article XX which is entitled "General Exceptions" and which enables WTO members, under certain conditions (see below) to take measures that would otherwise be contrary to basic GATT principles. There are two possible grounds for defending the sales ban under Article XX: that the restriction is necessary to protect either "public morals" (Article XX(a)) or "human, animal or plant life or health" (Article XX(b)). Indeed the European Parliament's Committee on the Environment, Public Health and Consumer Policy considers that these headings are applicable in this case.[16]

Some possible arguments to support these grounds are outlined as follows.

Article XX(a), necessary to protect public morals

It is contended that this is the stronger of the two heads of defence. The decision to prohibit the sale of animal-tested cosmetics is a moral choice. In the EU there is a high degree of opposition to the use of animals for testing cosmetics.[17] In these circumstances, a sales ban could be argued to be "necessary" in order to bring an end to worldwide animal suffering through this practice. The purchasing of animal-tested products can be seen as contributing to practices believed to be cruel. This is a moral issue and, accordingly, it is arguable that the public morality exception should enable countries to act as ethical consumers in response to strong public opinion.

Article XX(b), necessary to protect human, animal or plant life or health

The sales ban could be defended as necessary to protect both the life and the health of laboratory animals. Testing concludes with killing the animals involved and furthermore, test animals are often subjected to severe suffering, for example as a result of eye and skin irritation as well as short- and long-term systemic toxic effects.[18] There are, however, potential problems with this defence. Difficulties are likely to centre on counter-arguments to the effect that animal tests are necessary for the protection of human life and health. On the other hand, though, that proposition could be rebutted if, at the relevant time, a full range of alternative methods affording equivalent protection to consumers had been validated.

In order to be justified under any of the specific grounds set out in Article XX, a measure must conform to the conditions set out in the introductory paragraph (the "chapeau") of the Article, according to which it must not amount to "a means of arbitrary or unjustifiable discrimination between countries" or a "disguised restriction on international trade". De Burca and Scott[19] consider that the EU's marketing ban complies with the chapeau as it would operate on a "batch-by-batch" basis and not a country-wide basis. Market access to the EU would not be contingent upon a change of policy on the part of the government or legislature of the state of export, but only upon the practices of the manufacturer in question.

In addition to de Burca and Scott's argument, it can be contended that the EU's position is strengthened by the fairness of its preparation for the application of the new rules: the European Commission is stepping up negotiations

[16] "Report for the first reading of the seventh amendment of the Cosmetics Directive", 21 March 2000, PE 297.227.

[17] Radford, M., *Animal Welfare in Britain: Regulation and Responsibility,* 2001, p. 185.

[18] See for example the OECD Guidelines for the Testing of Chemicals, available at www.oecd.org.

[19] de Burca, G. and Scott, J., "The Impact of the WTO on EU Decision-Making" in *The EU and the WTO: Legal and Constitutional Issues*, edited by de Burca, G. and Scott, J., 2001, at p. 10.

with the Organisation for Economic Cooperation and Development (OECD) to promote acceptance of alternatives on a global scale and to secure mutual recognition of data derived by standardised alternatives;[20] it is also working with the OECD and other international groups to promote research and technology transfer in the field of non-animal test methods.[21]

Furthermore, the seventh amendment requires the Commission to publish regular reports describing progress in alternative methods and specifying implementation dates as methods come on stream.[22] This transparency ensures that third countries will not be treated less fairly by being given less notice or time to comply with the proposed marketing restrictions.

Of course only time will tell whether the seventh amendment and the WTO can co-exist peaceably or whether they will become adversaries in the global trading system. The present article suggests, however, that WTO case-law does not automatically rule out the marketing ban contained in the Directive, particularly as it is structured so as to promote WTO-compatibility. Even in the event of a challenge, there are defences to be made out in support of the measure. And lastly, it is important to be aware of the fact that civil society is no longer excluded from the dispute settlement processes of the WTO. A series of Appellate Body rulings has established that both the Appellate Body and the Panels are entitled to accept and consider, on a discretionary basis, unsolicited *amicus curie* submissions from non-governmental organisations and individuals.[23] Howse,[24] writing with first hand knowledge of the WTO *amicus* system, has suggested that in cases where competing values are concerned, a persuasive *amicus* brief can create a widened view that may be of greater significance to the way a case is decided than any specific legal argument, even when the *amicus* submission is not formally used in deciding the case. Surely this development in WTO case-law offers encouraging opportunities for individuals and organisations seeking to defend the values enshrined in this remarkable legislation.

[20] Opinion of the Economic and Social Committee, OJ C 367, 27.9.1976, p. 367 at para. 2.6.
[21] See for example Hartung, T., et al., "ECVAM's Response to the Changing Political Environment for Alternatives", *ATLA*, Vol. 31, 2003, p. 473. (ECVAM is the European Centre for the Validation of Alternative Methods.)
[22] Article 1(9).
[23] Howse, R., "Membership and its Privileges: the WTO, Civil Society, and the *Amicus* Brief Controversy", *European Law Journal*, Vol. 9, No 4, 2003, p. 496.
[24] Ibid.
[25] (2005) QB 579.

MEDIA WATCH

"**When is an act of Parliament not an act of Parliament**?", New Law Journal, Vol. 156, No 7210, 2006, pp. 191-193

This article discusses the challenge made in *R (Jackson)* v *Attorney General*[25] to the validity of the Hunting Act 2004.

"**Crime brief**", New Law Journal, Vol. 156, No 7221, 2006, pp. 672-673

Andrew Keogh (solicitor) discusses the extent to which the age and financial circumstances of a defendant to an animal cruelty charge should be taken into consideration where she could not afford to take the animal to the vet.

"**Rules on animal tests may face big changes**", *Financial Times*, 5 April 2006

Clive Cookson reports on proposals by the Home Office's Animal Procedures Committee and the Laboratory Animal Science Association for changes in the regulation and reporting of animal experiments to illustrate the amount of suffering animals experience in research.

"**Breeding of freak pets to be curbed**", *The Sunday Times*, 28 May 2006

Jonathan Leake considers plans under the Animal Welfare Bill 2005 to curb intensive inbreeding.

UK CASE LAW

Guildford Borough Council v Hein[26]

The appellant had a history of convictions under the Breeding of Dogs Act 1973 (the "1973 Act") and in 1996 acquired a conviction for offences under the Protection of Animals Act 1911 (the "1911 Act"). She was also convicted in 1996 of a further offence under the 1973 Act and disqualified from keeping dogs for a period of seven years. In November 2001 she was convicted under the 1973 Act for keeping a breeding establishment for which no licence was in force, as a result of which she was disqualified from having custody of dogs for seven years and the dogs in her custody were taken into the possession of the local authority. In anticipation of the periods of disqualification coming to an end, the local authority sought an injunction restraining the appellant from keeping any dogs at her premises, a declaration that it was entitled to sell or dispose of the dogs in its possession and damages in respect of the expense of caring for the dogs while in its possession.

The judge granted an injunction that the appellant was entitled to keep no more than three dogs, if those dogs were of the same gender. A declaration was made that unless the appellant provided the local authority with a suitable address to which the dogs in their possession could be returned she must relinquish ownership of them and the local authority would have the power to sell or dispose of them. The judge dismissed the local authority's claim for damages. The appellant appealed against the injunction and the declaration and the local authority appealed against the decision in relation to the costs of the dogs' upkeep since the orders preventing the appellant from having custody of the dogs expired.

The Court of Appeal affirmed that an injunction could only properly be granted at the suit of a local authority, exceptionally, and where there is something more than mere infringement of the criminal law in respect of which the assistance of civil proceedings should be invoked for the protection or promotion of the interests of the inhabitants of the area, and where it was possible to drawn the inference that the defendant's unlawful activities would continue unless effectively restrained by the law. It was noted that the appellant's convictions were largely under the 1973 Act and did not involve offences of cruelty. Her only convictions for cruelty were in 1996 and may have been inadvertent and there had been no suggestion of any further cruelty offences. Further, there had been no offences under the 1973 Act since 2001. It was therefore questionable whether it ought to be inferred that the appellant would continue to commit offences under the 1973 Act unless restrained by injunction. It was held that bearing in mind that the jurisdiction is to be invoked exceptionally and with great caution and that it had not been satisfactorily demonstrated that the appellant was likely to re-offend, or that if she did the sanctions under the Act would be inadequate, the judge erred in granting an injunction.

In relation to the judge's declaration it was noted that, unlike the Protection of Animals Act 1911 (section 3), the 1973 Act did not have the power to deprive an offender of ownership of dogs and in this respect there was a lacuna in the Act. The judge had fallen into error by granting the injunction and declaration in order to fill a gap in the law, which he was not entitled to do (see *Worcestershire County Council* v *Tongue*[27]).

It was further held that there was no legal basis upon which the local authority could recover the cost of caring for the dogs whilst in their custody after the period of bailment.

[26] [2005] EWCA Civ 979.

[27] [2004] EWCA 140 [2004] Ch 236.

Keam v the Department for the Environment, Food and Rural Affairs[28]

The appellant was convicted of an offence under the Welfare of Farmed Animals (England) Regulations 2000, Regulation 13, for failing to take all reasonable steps to ensure the welfare of cattle which a third party had paid him to keep on his farm. The appellant became seriously ill and therefore made arrangements for a local farmer to make daily visits to feed and water the cattle, keep the premises clean and call the owner's vet if any of the animals became sick. During this time a vet engaged by the respondent found that one of the cattle was lame and had probably been lame for around one week. On appeal against his conviction the appellant argued that he had discharged his duty of care by appointing an independent contractor. The appeal was allowed and the magistrates' decision quashed. Stanley Burnton J considered that a person "took all reasonable steps" for the purposes of the regulations when he did all that he personally could to ensure that the animals he kept were in a condition that complied with the regulations. Where an independent contractor was engaged the trial judge should still consider whether he had taken all reasonable steps, which might include, for example, ensuring that the independent contractor was competent and ensuring that the independent contractor was doing all that ought to be done in caring for the animals. The fact that the independent contractor had failed to do so did not, in itself, amount to proof that the keeper had failed to take all reasonable steps, such as to justify imposition of criminal liability.

Animal welfare victory on pet fairs law: the decision in R (Haynes) v Stafford Borough Council[29]

On 14 June 2006, in a judgment that will be of considerable interest to local authorities and environmental and animal welfare groups, the High Court ruled that the Pet Animals Act 1951 bans the selling of animals as pets at markets and fairs.

The context in which that judgment was given was a challenge to a licence granted under the 1951 Act for the holding of a one-day "pet fair" at an agricultural showground at which up to 13,000 birds were to be sold by several hundred breeders and dealers. That event was organised by the Parrot Society UK, which "rented out" tables and spaces from which individuals and companies operated independently of one another. Each individual or company paid a fee to the Parrot Society in exchange for the right, *inter alia*, to sell birds (whether as pets or otherwise) from a particular table or space, and at least some of those who paid such a fee were carrying on businesses of selling birds as pets.

The local authority concerned, Stafford Borough Council, had granted a licence to the Parrot Society under section 1 of the 1951 Act in respect of the event. Section 1 makes it an offence to "keep a pet shop" except under the authority of a licence granted under that Act.

The challenger, Mr Haynes, was a disabled man who ran an animal rescue and rehoming charity from his garden. He was concerned that the holding of the fair in his locality would lead to many impulse purchases of birds being made, which would subsequently translate into a burden on him and his charity. He was also disturbed by covertly filmed video footage of a previous bird fair held at the same showground, which he regarded as demonstrating that basic principles of animal welfare and hygiene were being ignored. In addition, he feared that the gathering of so many birds in one place and their subsequent transportation by purchasers to homes across the UK might provide ideal circumstances for an uncontrollable outbreak of highly pathogenic avian influenza of the H5N1 subtype ("avian flu").

Mr Haynes' challenge to the licence granted by the Council was based, however, on two discrete points of law.

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[28] (2005) 1 JP 512.
[29] [2006] EWHC 1366 (Admin).

First, he argued that the holding of the event involved the commission of criminal offences contrary to section 2 of the 1951 Act (as amended in 1983), which made it an offence for any person to "carry on a business of selling animals as pets in any part of a street or public place, or at a stall or barrow in a market".

Secondly, he argued that, even if that were not so, each individual trader carrying on a business of selling animals as pets at the fair had to be separately licensed. In that regard, he noted that section 7 of the 1951 Act provided that references to the keeping of a pet shop were to be construed "as references to the carrying on at premises of any nature … of a business of selling animals as pets". The organiser of the event was not itself carrying on such a business, and it was not open to the Council to grant a single licence to the organiser in respect of the carrying on of such businesses by multiple independent traders.

After the claim for judicial review had been commenced, an outbreak of avian flu at an Essex quarantine centre led to the European Commission imposing a ban on the importation of birds from outside the EU, as well as on gatherings of birds at markets and fairs save when authorised by national authorities following a risk assessment.[30] The latter ban was implemented in the UK by way of regulations[31] which prohibited the gathering together of birds at fairs and shows except under the authority of a licence issued by the Secretary of State. The Secretary of State could grant such a licence only subject to a risk assessment and if she was satisfied that the transit of birds to and from the gathering would not significantly increase the risk of transmission of avian flu.

Rather than adopting a procedure whereby individual licences in respect of each gathering of birds had to be applied for, the Secretary of State instead created a "general licensing" regime which allowed any person to hold such a gathering provided that certain specified conditions were complied with. The claimant obtained permission from the Court to amend his grounds of challenge so as effectively to challenge the *vires* of the general licensing regime, arguing that each gathering posed its own particular risks which had, in each case, to be assessed before a licence under the regulations was granted.

Thus, by the time the proceedings came before Walker J for the substantive hearing, there were effectively three grounds of challenge: two concerning the interpretation of the 1951 Act, and one concerning the avian flu licensing regime.

Before determining those grounds, the judge raised a concern as to whether it would be appropriate to make declarations in which it might be intrinsic that persons concerned with the licensed pet fair, which by that time had already been held, had committed criminal offences. However, he ultimately decided that the important points of law raised by the case could be decided by the grant of declarations which were carefully worded so as to avoid any finding of criminal liability being made.

In relation to the first ground of challenge, the Court held that the section 2 offence of carrying on a business of selling animals as pets in a "market" referred to "a concourse of buyers and sellers", and was not (as the Council had argued) confined to franchise markets, street markets, open markets, or public markets.

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[30] See Commission Decision 2005/745/EC of 21 October 2005 amending Decision 2005/734/EC laying down biosecurity measures to reduce the risk of transmission of highly pathogenic avian influenza caused by influenza A virus of subtype H5N1 from birds living in the wild to poultry and other captive birds and providing for an early detection system in areas at particular risk, OJ L 279, 22.10.2005, which inserted a new Article 2a into Decision 2005/734/EC.

[31] The Avian Influenza (Preventive Measures) Regulations 2005 (SI 2005/2989), and subsequently the Avian Influenza (Preventive Measures) (No 2) Regulations 2005 (SI 2005/3394).

The Hansard material which the Council had relied on in contending that the word "market" was so confined did not support that contention, even if one assumed that it could be appropriate to refer to Hansard as an interpretative tool in that connexion. On the contrary, the concerns expressed in Parliament at the time when the 1951 Act was amended in 1983 to prohibit sales of animals as pets from market stalls could equally arise in relation to markets which were not in streets or other public places. The payment of money for a ticket to enter a showground was no guarantee against impulse buying. Any need for protection from the weather arose whether or not markets were public. Similarly, concerns as to animal welfare generally, and pets being sold by persons who were not experts, were just as applicable to showground markets as they were to street and non-street open markets. Furthermore, it was clearly irrelevant whether a particular market was or was not held under a common law market franchise.

As to the contention that the 1983 Act was aimed at open markets, the only relevant distinction which could be made was that an open market could be more likely to give rise to problems of protection from bad weather. Reading into section 2 a distinction between open and non-open markets, however, would give priority to considerations of bad weather over other general considerations which would apply to both open and non-open markets. There was no justification for thinking that Parliament intended to do so.

It had been strenuously asserted by the Parrot Society that its event was a well-regulated bird fair attended by expert vendors. Even if that were so in the case of that particular event, it would not necessarily be true of all non-street or non-open markets. It could not, therefore, properly lead to the conclusion that concerns about animal welfare and lack of expertise could have no application to non-street markets or non-open markets.

The Court's conclusion on the first ground meant that it was, strictly speaking, unnecessary also to resolve the second ground. Nevertheless, the Court also considered that ground and granted a declaration making clear that the mere provision by an event organiser of facilities which enabled other persons to carry on businesses of selling animals as pets did not have the consequence that the organiser was himself to be regarded as the keeper of a pet shop at that event.

In granting that declaration, the Court rejected the Council's contention that only an event organiser could undertake to meet conditions which might be thought desirable under section 1 of the 1951 Act. A local authority could, when licensing individual traders, insist that there be an organiser of the event, that the organiser enter into an undertaking to meet relevant conditions, and that the individual trader so far as appropriate also meet relevant conditions. In those circumstances there was no basis for giving the relevant words of the 1951 Act anything other than their natural meaning.

However, the Court dismissed the Claimant's challenge to the Secretary of State's avian flu "general licensing" regime, holding that, since the Secretary of State's risk assessment indicated that no gathering of birds would significantly increase the risk of avian flu transmission in the UK provided that certain specified conditions were complied with, it had been lawful for her to institute that regime, rather than licensing each gathering of birds individually.

Comment

One-day pet sales have long been a source of concern to, and a focus of campaigning activity by, conservation and animal welfare groups, which have typically condemned such events as gigantic "jumble sales" of animals which encouraged the international trade in imported wildlife. Those groups have also long maintained that the holding of such events was illegal by reason of

section 2 of the 1951 Act. The organisers have countered that pet fairs played in important role in enabling hobbyist breeders and keepers to exchange information with one another, and disputed claims that welfare conditions were invariably poor. In addition, they argued that the law in respect of such events was unclear.

The consequence of these competing arguments was the adoption by different local authorities of different views as to the lawfulness of pet fairs, with most authorities treating them as illegal, other authorities licensing them, and yet others regarding them as falling within a lacuna in the 1951 Act regime. As Walker J stated, the fact that people in different areas of the country were in practice governed by different views as to what the law of the country as a whole required was offensive to the rule of law, and the fact that this had continued for approaching 25 years made it all the more so. Walker J's judgment will therefore be welcomed by local authorities for providing clarity as to the proper application of the 1951 Act to pet fair events.

Court of Appeal dismisses challenges to the Hunting Act: the decision in R (Countryside Alliance and others) v HM Attorney General and the Secretary of State for the Environment, Food and Rural affairs; Derwin and others v HM Attorney General and the Secretary of State for the Environment, Food and Rural affairs, RSPCA intervening[32]

On 23 June 2006 the Court of Appeal gave judgment in two appeals and one application for permission to appeal arising from challenges to the Hunting Act 2004. The two appeals arose from a judgment of the Divisional Court in *Countryside Alliance and others; Derwin and others; Friend and Thomas* v *HM Attorney General and the Secretary of State for the Environment Food and Rural Affairs and another, RSPCA intervening.*[33] The first appeal, brought by the Countryside Alliance and a number of individuals (the "human rights appeal") was based upon submissions that the ban contained in the Hunting Act infringed a number of the appellant's rights under the European Convention on Human Rights (ECHR). The second appeal (the "EC appeal"), brought by a number of individuals, challenged the Hunting Act on the basis that the ban infringed the appellants' rights under the free movement provisions of the EC Treaty.

As a precondition to the determination of both appeals their Lordships considered whether the Divisional Court had correctly interpreted the legislative aim of the Hunting Act. In this respect their Lordships agreed with the Divisional Court that the objective of the Hunting Act is a composite one of preventing or reducing unnecessary suffering to wild mammals. Their Lordships rejected submissions that no legislative aim could be found in the Hunting Act, and therefore that it was impossible for any restriction contained in or flowing from it to be justified in ECHR terms.

<u>The human rights appeal</u>

The human rights appeal relied on alleged infringements of the appellants' rights under Articles 8 and 11 of and Article 1 of the First Protocol to the ECHR.

The appellants argued that the ban infringed their Article 8 rights (right to respect for private life and the home). They alleged direct and indirect infringements; the direct infringements alleged were that they would be prevented from hunting or using or allowing others to use their land for this purpose; the indirect infringements alleged were that the ban would cause a decline in hunting activities, which could place in jeopardy the appellants' homes and livelihood. Their Lordships found that these submissions stretched the ambit of Article 8 "far wider than has ever been recognised in Strasbourg jurisprudence"

[32] [2006] EWCA Civ 817.

[33] [2005] EWHC 1677.

and that there had been no failure to respect the appellants' rights to their private or family lives or homes. The appellants' submissions alleging infringement of Article 11 (right to freedom of peaceful assembly and to freedom of association with others) were also rejected, on the basis that the Hunting Act did not prohibit the assembly of individuals, but merely a particular activity that could be undertaken by an assembled group.

It was accepted that the ban did infringe to some extent the appellants' rights under Article 1 of the First Protocol (peaceful enjoyment of possessions). In other respects the ban did not infringe those rights. Where there were infringements it was held that these were justified, on the grounds that the aim pursued by the Hunting Act is legitimate, that the ban is proportionate to the aim pursued and that the passing of the ban was a permissible course of action for the State to take.

The EC appeal

It was recalled that under Community law (i) there must be no unjustified barriers to interstate trade; (ii) lawful barriers can only be created for strictly limited reasons; (iii) therefore any provision in a Member State's domestic, legal order that creates a barrier can only be lawfully enforced if the State can justify it in Community terms; (iv) any interference with interstate trade, however minor, engages this area of Community jurisprudence; and (v) once engaged, the Member State is required to justify the legislation in question in all of its aspects and not merely in respect of any aspect of it that directly interferes with interstate trade.

The EC appellants submitted that the ban fell within Article 28 of the EC Treaty as a quantitative restriction on imports of hunting-related goods into the UK from other Member States. This claim failed on the grounds that the ban was not aimed at products from other Member States, or indeed at products at all, and that it did not have a discriminatory effect on imported goods. Similarly, in relation to the submission that the ban fell within Article 49 by restricting the freedom of providers, based in the UK, to provide hunting-related services to the nationals of other Member States (and the freedom of nationals of other Member States to receive such services) it was held that to engage Article 49 a measure must have a direct inhibiting effect on the free movement of services. It was held not to be sufficient that the measure merely decreases the demand for a particular service within a Member State.

Application for permission to appeal

Their Lordships also considered an application on behalf of two individuals for permission to appeal from a decision of the Divisional Court dismissing their application for judicial review and refusing permission to appeal. The application relied on Articles 8, 9, 10, 11, 14, 17 and 53 of the ECHR, the provisions of a number of international agreements and the Race Relations Act 1976. In relation to the arguments under the ECHR their Lordships were not persuaded that these added anything to the arguments already made. The international instruments relied upon had not been incorporated into domestic law, so that the rights asserted were not directly enforceable by private individuals in a domestic court. Finally, in relation to the claim under the Race Relations Act it was held that the hunting community is not an ethnic group and has no entitlement to protection against discrimination on "racial grounds".

Conclusion

The Court of Appeal resolutely dismissed the challenges to the validity of the Hunting Act 2004 under the ECHR and EC law. In a lengthy judgment, giving full consideration to the nature of hunting and the Parliamentary history of the Act their Lordships upheld the will of Parliament to ban hunting with dogs of certain wild mammals.

R (RSPCA) v Chester Crown Court[34]

A couple who ran a business rehabilitating horses due for slaughter were convicted of causing unnecessary suffering to two horses contrary to section 1(1)(a) of the Protection of Animals Act 1911. In consequence they were both disqualified for life (under section 1(1) of the Protection of Animals (Amendment) Act 1954) from having equines in their custody. The defendants appealed and the Crown Court amended the sentence to prevent them from keeping more than 25 horses at any one time. The RSPCA sought judicial review of the Court's decision on the grounds that the court had no jurisdiction to impose that sentence. The Administrative Court upheld the complaint on the basis that the Court had no discretion under the Protection of Animals (Amendment) Act to impose such a sentence, and that accordingly it had exceeded its jurisdiction.

LEGISLATION

In February 2006 the Scottish Executive announced changes to the Animal Health and Welfare (Scotland) Bill 2005, making it an offence to make, show or distribute films of animals fighting in the UK. The Bill has already entered its first parliamentary stage and includes, amongst other features, a duty of care for pet owners to prevent suffering and new powers to take suffering animals into care and to license certain animal gatherings.

In March 2006 MPs considering the Animal Welfare Bill 2005 voted for ending the practice of docking dogs' tails, with the exception of working dogs used by police, rescue services, the armed forces and pest control officers. A total ban on tail docking was defeated by 278 to 267. The exception of working dogs comes as a disappointment to those seeking a total end to this practice, which has been the subject of much criticism over the years.

[34] (2006) 170 JPN 62.

CONSULTATION PAPERS

The Department for the Environment, Food and Rural Affairs (DEFRA) has issued a consultation paper on proposed amendments to the Welfare of Animals (Slaughter or Killing) Regulations 1995 which would permit the use of gas as a method for killing birds outside a slaughter house in the event that a cull is considered necessary due to an outbreak of avian flu. The regulations specify the methods of slaughter that may be used in a slaughterhouse or elsewhere (in compliance with Directive 93/119/EC[35]) and currently permit slaughter of healthy birds on a farm by decapitation, electrocution or dislocation of the neck. The amendment will permit gas to be used to kill end of lay hens in their poultry shed or following removal from the shed in a contained environment. However, the amendments also envisage the use of gassing in other circumstances, where birds are unable to be removed from the farm, including a scenario where there is a collapse in the market due to falling public confidence in poultry products. DEFRA is asking for comments on – amongst other issues – whether gas is a suitable method for killing in these circumstances and whether the criteria for welfare killing are reasonable and practicable.

DEFRA has also issued a consultation paper on the implementation of Council Regulation (EC) No 1/2005 on the protection of animals during transport and related operations.[36] The Regulation comes into force on 5 January 2007 and requirements for competence certificates come into force on 5 January 2008. It aims to improve animal welfare by raising transportation standards and contains new

[35] Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing, OJ L 340, 31.12.1993, p. 21.

[36] Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, OJ L 3, 5.1.2005, p. 1.

provisions for enforcement capability. The new Regulation necessitates the replacement of the Welfare of Animals (Transport) Order 1997, which implemented earlier directives. The UK proposals for legislation to implement the Regulation and the questions posed for consultation can be found in the consultation document "Welfare of animals during transport – Consultation on the implementation of EU Regulation 1/2005", which is available from DEFRA.

Towards a re-classification of great apes as "persons"

Penny Morgan
Comparative psychologist

In 2005 the late Suíça, a chimpanzee, became part of Brazilian legal history as the first animal to be considered a "legal subject". The judge in the case, Edmundo Lúcio da Cruz, who analysed the petition for habeas corpus submitted to the Brazilian courts, ruled in favour of Suíça. He stated that "criminal procedural law is not static, but rather subject to constant change, and new decisions have to adapt to new times. I believe that even with Suíça's death, this subject will endure in continuous debates, principally in law school courses."[37]

The prosecutor in the case, Heron Santana, believes that the acceptance of the chimpanzee as a legal subject, even if not in time to save her from her cage, where she appeared to be suffering from depression, should establish the justice system of Bahia as an example to the world

An Animal Welfare Act was passed by the New Zealand Parliament on 7 October 1999 which recognised the need for protection for "non-human hominids" – a world first – and included the following statement: "No research, testing or teaching involving the use of a 'non-human hominid' is permitted unless … [it] is in the best interests of the non-human hominid or ... in the interests of the species to which the non-human hominid belongs and … the benefits to be derived ... are not outweighed by the likely harm to the non-human hominid."[38]

In 1998 the UK government announced a policy not to allow the use of great apes for experiments.

The implication of the above is that the sentience and sapience of great apes is beginning to be recognised. It is argued below that they should, in fact, be granted the legal status of "persons".

Is there any scientific evidence to suggest that this should happen? There are two main areas of science which prompt us to urgently address the nature of what it is to be human: **genetics** and **comparative psychology.**

In the area of **genetics**, the closeness of our DNA with that of great apes is now beyond doubt. Estimates range from 95% to 98.5% depending upon whether coding or non-coding DNA is taken into account. This can be compared to any two humans who share 99.9% of their DNA. According to one author "humans and chimps only differ by about 1% in gene sequences".[39]

In Goodman's recent study[40] humans and chimpanzees came out with a similarity of 99.4% comparing 97 genes. Goodman believes that all of the surviving great apes should be included in the taxonomic

[37] "Historic decision recognises chimpanzee as legal subject", *Correio da Bahia*, 6 October 2005.

[38] Animal Welfare Act 1999, Section 85 and Appendix II.

[39] Oefner, P., cited in Pickrell, J., "Humans, chimps not as closely related as thought?", *National Geographic News,* 24 September 2002. See also Britten, R.J., "Divergence between samples of chimpanzee and human DNA sequences is 5% counting indels", *Proc. Nat. Acad. Sciences*, Vol. 99, No 21, 2002, pp. 13633-5.

[40] Goodman, M. "Natural selection's role in shaping 99.4% non-synonymous DNA identity between congeneric humans and chimpanzees", *Proc. Nat. Acad. Sciences*, Vol. 100, No 12, 2003, pp. 7181-8.

grouping "Hominidae";[41] and that humans and chimpanzees should share the genus Homo. Chimpanzees and bonobos would then become Homo troglodytes and Homo paniscus respectively.

However, genetic relatedness – perhaps an uncertain moral platform anyway – has not thus far been sufficient to prompt a re-assessment of legal status, so what of behavioural indicators?

In **comparative psychology**, astounding discoveries have been and continue to be made concerning the cognitive capacities of great apes. These have emerged from both field- and laboratory-based studies.

a) **Tool manufacture and use**, formerly believed to be the sole preserve of mankind, is now recognised to be widespread amongst great apes in the wild. Tools are used for different purposes e.g. sticks for termite fishing, crushed leaves for sponges, stone hammers and anvils for splitting panda nuts, etc. Tool manufacture also takes place.[42]

Chimpanzees also use medicinal plants to treat nematode infestations, diarrhoea and constipation.[43]

b) **Cultural transmission**. There are at least 39 distinct patterns of behaviour that originate within groups and are passed to subsequent generations within chimpanzee populations,[44] such as the use of logs and stones to break panda nuts.[45] Cultural transmission has also been observed in behaviour variations in gorillas[46] and tool use in orang-utangs.[47] These ethnographic records reflect the nascent cultural stirrings of our own species.

c) **Linguistic studies**. There have been numerous, usually single subject, studies, where the ability to use symbols or American Sign Language has been demonstrated. These have generated much debate centred on the question "What is language?" in respect of which the linguistic theorist Hockett set out 16 requirements that had, he argued, to be met in order to claim that language is being used.[48]

It is arguable that the accomplishments of Kanzi, a bonobo, now 26 years old, dispel the previously-held belief that language is unique to humans. He uses a system of idiographic symbols to communicate and has a vocabulary of more than 500 words. His comprehension of spoken language is at least equivalent to that of a three-year-old child. In a series of experiments[49] Kanzi satisfied Hockett's criteria for language. All of the above argues in favour of a re-classification from object to person.

However, objections have been put forward, such as that based on Rawl's contractarianism.[50] Contractarianism is an ethical theory that attempts to account for our morality by appealing to implicit mutually beneficial agreements, or contracts. For example, human beings refrain from striking each other by reason of an implied contract: "You don't hit me and I won't hit you." The relevance of contractarianism to animal rights stems

[41] Some classifications already include the great apes in this family, others include them in the family Pongidae.
[42] Sanz, C., Morgan, D., and Gulick, G., "New insights into chimpanzees, tools and termites from the Congo Basin", *American Naturalist*, Vol. 164, 2004, pp. 567-581.
[43] Sears, C., "The chimpanzees' medical chest", *New Scientist*, No 1728, 1990, pp. 42-44.
[44] Whiten et al, "Culture in chimpanzees", *Nature*, Vol. 399, 1999, pp. 682-685.
[45] Boesch, C. and Boesch-Acherman, H., "Chimpanzees of the Tai Forest", Oxford University Press, 2000.
[46] Stoinski, T., cited from an interview with Bridges, A., "Cultures affect captive gorillas", The Associated Press, 19 February 2006.
[47] Schaik, van C., "Why are some animals so smart?" *Scientific American*, 13 April 2006.
[48] Hockett, C.F., "The problems of universals in language", in *Universals of language*, ed. Greenberg, J.H., The MIT Press, 1963.
[49] Savage-Rumbaugh, S. and Lewin, R., *Kanzi: the ape at the brink of the human mind*, John Wiley and Sons, 1994.
[50] Rawls, J., *A Theory of Justice*, Oxford University Press, 1971.

from the supposition that non-human animals are incapable of entering into such contracts, coupled with the assertion that rights can be attributed only to those individuals that can do so. That is, animals can't have rights because they lack the rational capacity to assent to a contract requiring them to respect another's rights. However, delayed reciprocal altruism, i.e. "you scratch my back and I'll scratch yours at a later date", is a feature of many non-human societies. As regards primates, Packer was the first to report reciprocal altruism in the form of "political alliances" among male olive baboons.[51] What of those who renege on a "contract"? In chimpanzee societies grudges are borne against "cheats" who are thereafter avoided for future transactions, and may be punished.[52]

Rawl's believes that human beings are essentially self-interested, rational, and autonomous. So, what is important about being human is the ability to freely make choices in pursuit of ones' own interests. How does that differ from the intensely political and calculated actions of both baboon and chimpanzees, making and breaking alliances for social advancement? While not written, such interactions display the salient features of a contract, and the consequences of a breach of contract.

Many of the objections to re-classification apply also to children, the senile and the learning disabled, who nevertheless properly have rights.

The American lawyer Steven Wise has commented: "If a human four-year-old has what it takes for legal personhood, then a chimpanzee should be able to be a legal person in terms of legal rights."[53]

There are probably only 250,000 great apes – gorillas, orang-utans, chimpanzees and bonobos – left, existing in fragmented communities covering 23 countries, some torn by civil war, others devastated by illegal logging, the bush-meat trade, and the Ebola virus. It would surely help their plight if they were re-classified, as it would become very difficult to deny them those rights currently enjoyed only by humans. Among the rights great apes might be granted at the outset are the right to life, the right to freedom and the right to freedom from torture. Some of the current treatment of great apes by humans, such as their use in AIDS research, involving years of solitary confinement, would of course become impossible.

Import of dog and cat fur to the EU: update

Struan Stevenson, MEP

The November 2005 edition of this Journal contained an article on the import of dog and cat fur to the EU, principally from China, and put forward the arguments in favour of a ban on this trade.

The Commissioner for Health and Consumer Protection – Markos Kyprianou – is now preparing a draft directive which would institute such a ban. Five EU Member States have already introduced their own unilateral bans. These are Belgium, Denmark, France, Greece and Italy. However, unilateral bans within the Shenghen zone are fairly toothless, as goods can be moved freely across borders without inspection. Only recently a newspaper in Greece revealed items of cat and dog fur still being sold in tourist shops despite

[51] Packer, C., "Reciprocal altruism in *Papio anubis*", *Nature*, Vol. 265, pp. 441-443, 1977. The formation of short-term coalitions among adult male olive baboons during aggressive interaction against a single adversary is initiated by one male enlisting a partner before fighting an opponent. Packer found considerable evidence that individuals who join an enlisting baboon have previously succeeded in enlisting that very same baboon, suggesting cooperation may be partly based on reciprocity.

[52] De Waal, F.B.M., *Chimpanzee politics: power and sex among apes*, John Hopkins University Press, 1982.

[53] Wise, S.M., *Rattling the cage: towards legal rights for animals*, Basic Books, 1999.

the ban in that country. Only an EU-wide ban will be effective in sealing our borders to these items and there are signs that any proposal from the European Commission will receive widespread support from the European Parliament and the Council of Ministers.

However, China too can play a role in this campaign. In May I attended a meeting at the State Forestry Administration Headquarters in Beijing. This is the Government Department which deals with all questions of animal welfare and cruelty in China. I met Deputy Chairman Zhao Xuemin and five of his senior officials, including the Secretary General of the China Wildlife Conservation Association Chen Runsheng.

I gave them a copy of the graphic DVD filmed by a Swiss film-maker at an animal market outside Beijing. They were horrified by this evidence and Mr Zhao said: "Chinese law prohibits the barbarian practice of skinning animals alive or indeed any kind of cruelty. We have no tradition in China of wearing fur made from dogs and cats and for centuries we have regarded such animals as our friends and pets. However, we cannot deny that incidents of cruelty do occur, such as those you have brought to our attention. Sadly this barbaric trade is driven by economic factors. But, these cases you have mentioned have made a strong impression on us and we will make renewed efforts to stamp out these barbaric practices."

I was greatly heartened by this reaction and I have now reported to Commissioner Kyprianou that there will be no opposition in China to his proposed directive banning the import, export and trade in cat and dog skins across the EU. Indeed, the senior Government officials in Beijing made it quite clear that they would regard an EU ban as helpful in their fight to stamp out this cruel trade. Commissioner Kyprianou can now proceed with all possible speed to get approval for an outright ban to bring this sickening trade to an end once and for all.

Struan Stevenson is a Conservative MEP from Scotland. He is Vice-President of the EPP-ED Group of 263 MEPs in the European Parliament. He has led the EU campaign to ban the import, export and trade in cat and dog fur for the past six years, working closely with the Humane Society International.

First EU conference on animal welfare

Katherine B. Allan
Senior lecturer, Kingston University Law School

On 26 January 2006, the EU announced an Animal Welfare Action Plan.[54] To publish the plan an international conference was held in Brussels on 30 March.[55] The Commissioner for Health and Consumer Protection, Markos Kyprianou, opened the conference which attracted delegates from a very wide range of interest groups. The conference was organised by the Austrian Government, which held the EU Presidency at that time.

The Austrian Government gave a presentation on its new Federal Act on Animal Welfare Act which combines what were different laws in different federal states. Three areas covered by this Act were then analysed in particular: breeding, farming/husbandry and slaughter. Under the new law, "handbooks" are to be produced for farmers and other interested parties, redolent of the welfare codes in the UK. The so-called "five freedoms" were emphasised. Economist Thom Achterbosch showed how, economically, raising welfare standards on farms made little difference to production costs. Maria Burgstaller of the Austrian Chamber for Labour made the point that consumers are increasingly worried about the way in which food is produced and provided evidence that they are prepared to pay more for food prepared in an animal-friendly manner.

[54] See the April 2006 edition of the Journal. The plan runs until 2010.
[55] For further information, see: ec.europa.eu/food/animal/welfare/conference_30032006_en.htm

European initiatives in relation to animal welfare were presented by Jaana Husu-Kallio from the Commission (Directorate-General Health and Consumer Protection). She also emphasised the power of the consumer in Europe, making accurate labelling and the availability of ethically-produced products very important.

The Director-General of the World Organisation for Animal Health also made a presentation. He described how, at its 73rd general session in May 2005, the International Committee of his organisation adopted four new animal welfare standards to be included in the Terrestrial Animal Health Code, meaning that worldwide animal welfare standards may be in the offing. These cover transport by land and sea, slaughter for human consumption (including ritual slaughter), and killing of animals for disease control.

Producers were represented by Rudolf Schwarzbock of the European Farmers' Organisation. He stressed the concern that if the EU imposed ever higher welfare standards on European farmers, they would not be competitive in a global market, given World Trade Organisation free trade rules.

Sonja Van Tichelen, Director of Eurogroup for Animal Welfare also set out her hopes for the Action Plan, stating that the recent Eurobarometer survey on consumer attitudes towards the welfare of farmed animals showed how important animal welfare now was in the EU.

The conference was very successful in bringing together different interest groups in a common cause and must be built upon.

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 had a central role in law reform. There is also a real need to educate professionals and public alike about the law.

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

What ALAW will do

ALAW will:

- take part in consultations and monitor developments in Parliament and in European and other relevant international institutions,
- 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 mutual support and information exchange for lawyers engaged in animal protection law.

Who can be a member?

Solicitors, trainee solicitors, legal executives, barristers, pupil barristers, judges and legal academics are eligible to join and will receive regular issues of the Journal of Animal Welfare Law. Other interested parties can become subscribers to the Journal and receive information about conferences and training courses. Membership fees: UK and EU – £25.00; overseas – £35.00; concessionary (student/retired etc) – £5.00.

How can you help?

Apart from animal protection law itself, expertise in many other areas is important – for example, public law, civil liberties, environmental health, planning law, freedom of information, civil litigation, media law, company law, charity law and many others.

In addition, lawyers have well-developed general skills such as advocacy and drafting which will be useful in myriad ways. Help with articles and training will also be welcome.

How to contact us

Visit us at www.alaw.org.uk, email info@alaw.org.uk or write to PO Box 67, Ellesmere, Shropshire SY12 9WZ