Criminalising the Right to Hunt: European Law Perspectives on Anti-Hunting Legislation

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The existence of large hunting/shooting communities across Europe is sufficiently widespread that hunters can be classed as a distinct social group or subculture. Hunters are nevertheless not legally recognized as a distinct protected group even where they are granted considerable recognition within legislative and policy discourse related to their interests. Widespread opposition to anti-hunting legislation across Europe suggests a shared resistance to legislation and public policy detrimental to their 'sport' among hunters and those engaged in animal harm linked to traditional fieldsports and activities such as illegal predator control linked to hunting interests [1,2]. Environmental politics discourse suggests that laws gain legitimacy through public acceptance and engagement with the views of those negatively impacted upon by prohibitive legislation, sometimes necessitating increased public discourse [3,4]. Socio-legal discourse, however, suggests that states have not only a right, but sometimes an actual obligation, to introduce laws that serve a utilitarian purpose; even where these marginalise certain interest groups, e.g. hunters [5-7]. Thus both wildlife trust and public good doctrines are employed to introduce and maintain wildlife protection laws that outlaw (traditional) hunting activities where wildlife protection priorities exist [5,8].

This article examines these conflicts through analysis of the UK's *Hunting Act 2004* and challenges to its introduction via European Court of Human Rights (ECtHR) action; particularly arguments that hunting falls within Article 8 (right to a private life) Article 11 (freedom of association/assembly) and Article 14 (freedom from discrimination). The ECtHR's jurisprudence, via examination of various challenges to anti-hunting legislation, concludes that hunting is an activity that is only protected by human rights law in specific circumstances. It also determines that the hunting community does not represent a distinct ethnic or national minority, nor does the activity of hunting represent a particular lifestyle considered to be indispensable for personal or cultural identity (except in respect of aboriginal or indigenous peoples' subsistence hunting activity). Accordingly, employing a green criminological perspective, this article concludes that European states are entitled to regulate or criminalize hunting where they consider there are legitimate animal protection or moral reasons to do so, even in the face of significant opposition from hunting communities. This being the case, continued resistance to lawful hunting restrictions through illegal hunting can be considered as mainstream criminality subject to criminal justice attention rather than as legitimate resistance.[1] In accordance with green criminological perspectives of species justice [9,10] those engaged in illegal hunting, even with the tacit support of their communities can arguably be treated as members of a deviant subculture. Cooper [11] for example, notes that 'those who hunt with dogs are properly referred to as 'offenders' and also refers to 'the institutionalized

[1] Although the article notes that a range of different hunting practices and cultures exist across Europe and that the UK experience at the centre of this article differs from other hunting cultures. The article discusses these differences while noting that the ECtHR takes a European view not one that applies solely to the UK context.

ethos of violence that hunting can represent, and its possible contribution to a wider abusive culture'. This conception is reflected in the views of judges considering the legal challenges discussed within this article and within legal systems that make distinctions between different types of hunting and the characteristics of different types of hunters.

Contextualizing Hunting: Sport versus Tradition

Separate from traditional, in the sense of socially accepted, animal harm practices, some forms of animal harm are an integral part of cultural and ethnic identity, particularly hunting activities more or less integral to rural lifestyles [12, 13]. Rollin suggests that the closest society has come to an ethical position on the treatment of animals is to not be cruel 'which essentially enjoins us not to maliciously, willfully or sadistically hurt animals for no purpose' [14]. Contemporary species justice and animal rights concerns highlight a difference between the views of rural and countryside dwellers who have historically engaged in traditional forms of sport or recreation where killing of animals is acceptable and specific 'rural' notions of crime may exist [15,16]. The environmental radicalism of town-dwellers is however contributing to the view of many such practices, such as hunting wild animals, as being increasingly problematic [17]. To be sure, in many countries, traditional hunting, shooting, and fishing activities (often defined as fieldsports) are predominantly lawful. But over the years, a number of activities, such as hunting with dogs, animal baiting, and the taking of specific species considered to be endangered or with vulnerable populations, have been criminalized commensurate with legal definitions that implement dominant social norms and values by characterizing certain hunting activities as socially unacceptable. In some cases, activities such as animal baiting and fighting continue as underground 'sports' despite their illegality, while the killing of protected wildlife by hunting communities also represents a contemporary wildlife protection issue [13,18]. Some traditional hunting activity also exists in areas where hunting and its associated activities are carried out for subsistence purposes, particularly in respect of indigenous peoples [19]. In some cases such activities also have a traditional social meaning where groups of rural dwellers participate in the activity as a social gathering. Where this is done unlawfully (i.e. in contravention of regulations) it amounts to poaching [20], the illegal taking of wildlife or game animals for food. Nonetheless, the underlying legality of some fieldsports-related activity does not negate the illegality inherent in or associated with illegal hunting where regulations are disregarded whether deliberately or accidentally.

For the purposes of this article, hunting is defined largely by its legal classification and is differentiated from sport and trophy hunting which is primarily motivated by dominion over rare species and also linked to the illegal trade in animal derivatives such as ivory [21, 22]. Hunting as defined by this article includes 'traditional' hunting, shooting and fishing practices carried out by countryside or rural community dwellers rather than the subsistence hunting of indigenous peoples carried out specifically as an integral part of their cultural identity [23]. However, in addition to the (mainly British) definition of fieldsports as being country sports or blood sports, this article's definition of hunting also includes hunting carried out by rural communities which has a social connotation. Thus this article's definition of hunting includes game shooting in rural areas of Europe, the UK and the United States and

both commercial and traditional (rather than recreational) fishing. Traditional large carnivore hunting such as hunting with dogs specialized to lynx or brown bear hunting in Northern Eurasia would be another example [24]. Eliason [13] defined hunting as performing a traditional role, where the game taken is used and wastage is 'negatively sanctioned'. Bear hunting within the Nordic tradition, for example, considers the brown bear as valued game for its meat and other body parts, but also as a safety threat, or as vermin so that hunting arguable serves several purposes; keeping traditions alive, controlling population numbers and Eliason's notion of legitimate use of the animal [13]. Eliason's definition identifies hunting (and hunting as a fieldsport) as being primarily based around the 'pursuit' of live quarry and representing a way of life where individuals kill animals primarily for the purpose of using them for food or fur [25]. Thus hunters trap and kill animals in order to harvest their meat as food (e.g. bear), or to use their fur (e.g. lynx, bear) for clothing and shelter, anglers catch fish primarily for food, and farmers and others (including animal breeders) may kill predatory animals such as wolves, lynx and foxes in order to protect livestock or for retaliation. Hunting may also be carried out to preserve hunting dog culture and as a social activity.[2]

These distinctions are important because the hunting legislation at the subject of this article's discussion of the 'right to hunt' makes a distinction between subsistence hunting on the one hand and hunting as either recreational pastime or as a form of predator control on the other hand Additionally,legal arguments raised on behalf of hunters make some distinctions between different types of activity. For one,international human rights law explicitly recognizes some forms of hunting as a form of cultural self-expression at odds with accepted notions of animal abuse as inherently criminal or evil, reflecting different cultural notions concerning the acceptability of animal killing [23]. Thus, international human rights law recognizes such difference via its incorporation and classification of the rights of indigenous peoples into a framework of exemptions from certain legislative provisions. Specifically, human rights law provides land rights and rights of cultural preservation that sometimes recognizes that indigenous peoples should be exempt from the confines of animal protection laws where exemptions are considered necessary to give effect to cultural self-preservation and expression [26,27]. As a consequence, some indigenous peoples are allowed to continue with traditional hunting practices that would otherwise be deemed unlawful.

A significant cause of animal harm in fieldsports is masculinities [28,29], allied to the development of a hunting subculture where issues of power, dominance and control predominate and influence anthropocentric attitudes towards animals as existing primarily for human benefit [30, 7, 31]. Traditional countryside activities such as hunting with dogs in the UK, e.g. fox-hunting, mink-hunting, cub-hunting and stag-hunting, and the killing of large carnivores in Europe are frequently an assertion of a particular form of social identity and hunting culture [12,11]. As a result, despite the existence of anti-hunting legislation in different parts of the world there remains

[2] It should be noted that in a wider context there are discussions that consider some fluidity between different types of hunters and hunting activity [50]. However, this article's focus is criminological and legal classifications predicated primarily on the behaviours involved and how they are defined by legal systems. Particularly in respect of the hunting outlawed by the UK's Hunting Act 2004, both sides of the debate seemingly acknowledged hunting as a specific activity with defined characteristics. As this article discusses, the courts also make distinctions between different types of hunting and hunter.

resistance to law enforcement efforts which are rooted in cultural and traditional explanations for these activities that attempt to retain such activities in the face of perceived outsider threats [32, 33]. Sometimes this is presented as the 'town versus country' and attempts to negate the legitimacy of any legal interference, or is exhibited in arguments about the thrill of the chase and the concept of a 'fair chase' which is enjoyed by hunter and hunted alike.

But it also reveals a 'gang' culture and group mentality. This is sometimes manifest in the use of Sykes and Matza's [34] neutralization techniques where the legitimacy of legislation is contested or attempts are made to condemn the condemners and emphasize their lack of understanding of urban ways of life. Hunting activities such as fox-, stag- and mink-hunting (which were all until recently lawful in the UK) have developed from their perceived 'pest' control origins into leisure pursuits, today as much about the sporting connotations of chasing live quarry with hounds as they are about population control of perceived pests. Cohn and Linzey define hunting as 'socially condoned cruelty', arguing that the classification of some species as game is 'arbitrary and thus morally arbitrary' [35]. While the focus of their analysis is official classifications of game, the unofficial classification of 'game' and 'pests' adopted by those involved in illegal activity also requires consideration.

Cohn and Linzey suggest that the official classification of species as game refers to 'specific species that somehow are incapable of suffering' or that any suffering involved was 'necessary' [35]. Implicit in their criticism is the notion that anthropocentric notions of animals exist and that the killing or suffering of animals takes place irrespective of whether there are sound pest control or conservation reasons for doing so. This notion of deficient moral culpability has been employed according to the social legal perspective on animal harm [12, 9] where NGOs and policymakers attempt to censure an activity considered as morally wrong and which should not be allowed to continue [13]. In particular, anti-hunting discourse questions the morality of inflicting pain and suffering on animals and decisions to kill or take them for the purpose of 'sport'. The long running UK campaign to ban hunting with dogs in (coordinated by the League Against Cruel Sports [LACS] over more than 60 years) was primarily based on discussions concerning whether it was right to chase and terrify animals if the intention of activities such as fox-hunting was predator control. LACS argued that the purpose of such activities was primarily sport and thus this represented a form of animal harm that should be prohibited by legislation [12]. Hunt supporters argued both that hunting with hounds was, in the case of foxes at least, not only a form of predator control but also a traditional countryside recreational activity enjoyed by a range of individuals. Accordingly, they resisted attempts at legislative control, arguing for the necessity of fox hunting as a form of predator control [36].

Such discussions illustrate that while some hunting is traditional countryside activity carried out for subsistence and game management purposes, the target of contemporary anti-hunting legislation is conservation of species and the prohibition of hunting activities considered to be cruel and contrary to contemporary perspectives on animal control and conservation. Some hunting is, therefore, classified as 'sport' rather than as necessary conservation, wildlife management, or predator control activity. This has a bearing on both its justifiability and the extent to which it may be

interfered with by legislative systems. This is particularly the case in respect of European human rights mechanisms discussed further below.

The Legitimacy of Hunting Restrictions

From a socio-cultural perspective, restrictions on hunting arguably lack legitimacy where conflict exists between rural dwellers and urban legislatures such that anti-hunting legislation imposes an urban viewpoint on a rural populace [37]. However, international law provides nation states with various obligations to conserve natural resources, and states are entitled to decide that wildlife should be conserved in the public interest even where to do so arguably restricts the rights of citizens. Historically wild animals were seen as a *res nullius* public property, or the property of 'no one' [38]. This raises complex arguments about the rights of citizens to claim compensation for losses caused by wildlife. One the one hand, states such as the US and Canada have refused to grant damages against the state on the grounds that the risks and losses caused by predatory wildlife are part of nature, indeed a 'condition of the land', as US law holds [39]. On the other hand, arguments have been raised that by protecting the damage causing species, the state has removed the 'natural' right of people to defend themselves against this risk [40]. Thus the state should be liable for losses caused by protected species.

However, as Schaffner identifies, as law has developed in most countries 'wild animals fell into the common class, meaning they belonged in common to all citizens' [41]sometimes referred to as *res communis*. This distinction is integral to understanding the restrictive nature of wildlife and game laws. Weston and Bollier identify that according to Locke's notion of *res nullius*, 'such resources belong to no one and are therefore free for the taking'[8]. Thus, theoretically, although some wildlife might be protected by law, it could become subject to people exerting property rights over wildlife on or neighbouring their land or might simply be deemed a public resource capable of being exploited by anyone in the absence of any law to the contrary. However, national wildlife laws incorporate the notion of wildlife as something that should be preserved for the public good and held in trust for future generations [5]. Thus natural resource law has historically determined that the rights of man to take wildlife 'may be restrained for reasons of state or for the supposed benefit of the community' (Blackstone's commentaries: 410). The US Supreme Court recognised this principle in *Geer v Connecticut*, 161 U.S. (1896) a case concerning a Connecticut statute regulating game bird hunting where the appellant argued that the state lacked the power to make such a regulation. The Supreme Court, however, ruled that states had the power to control and regulate game 'as a trust for the benefit of the people' and specifically noted wildlife as being in 'common ownership' by the citizens of the state. The Court's decision thus established the 'wildlife trust' doctrine which subsequent court decisions have upheld by allowing states to conserve and protect wildlife even where their right to do so has been challenged. For example, *Hughes v Oklahoma* 441 U.S. (1979) which, while overruling *Geer* on the question of whether a state could actually 'own' wildlife, expressly confirmed that US states could implement in law their legitimate concerns over the need to conserve and protect wild animals within their borders.

The decision in *Geer* reflects the fact that most US states had enacted some form of wildlife protection legislation and, in a contemporary setting, states (and States) have developed wildlife and conservation laws to reflect the changing needs of wildlife protection and the public interest in seeing wildlife protected. Thus, when the US enacted the Endangered Species Act 1973, it did so recognizing that various species of wildlife had been rendered extinct and others needed protection. Weston and Bollier state that the law formally recognized the value of fish, wildlife and plant species to the US and its people and that subsequently 'the U.S government has also pledged through various international agreements, to conserve endangered species' [8]. This position is broadly replicated across the 181 countries that are currently signatories to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and who consider that endangered wildlife should be protected by national and international law. It is also reflected in EU wildlife protection law and policy which paternalistically imposes a duty on EU Member States to conserve wildlife and to impose criminal sanctions on those committing serious breaches of environmental law.[3]

Wildlife protection is thus now accepted as an issue on which Governments legislate in the public interest and implement the notion of wildlife trust as integral to animal protection. National wildlife law develops and is often interpreted in the context of the prevailing social conditions and the manner in which society socially constructs the public interest and wildlife trust doctrines. Thus these doctrines may expand to cover a wider range of wildlife protection concerns as wildlife populations are affected or threatened by both natural and human threats, including depletion of species by hunting. For example, in *Barrett v. State* 116 NE. (N.Y.1917) a US court considered a claim against a statute on the grounds that: it protected a destructive animal (the beaver) that was causing timber damage; that the prohibition on molesting beavers prevented people from protecting their property and so was an unreasonable exercise of state police powers; and that the state as owner or possessor of the beavers was liable for the damage they caused. The court concluded that the state was entitled to exercise its police powers wherever the public interest demanded it, and by upholding the state legislature's authority to enact the statute which also specified that no person could molest or disturb a wild beaver or its 'dams, houses, homes or abiding places', also confirmed that wildlife legislation could protect not only the animal itself, but also animal habitats. Similar provisions exist in other wildlife legislation such as the EC Birds Directive and the UK's Wildlife and Countryside Act 1981 which creates offences in relation to 'disturbing' wild birds at or near their nests and to actual nest destruction whilst in use or being built. These reflect the reality of wildlife habitat destruction by economic development and increased human encroachment on wild areas. The importance given to wildlife protection also develops as social concerns turn towards environmental issues and animal protection. For example since at least the early 20th century and *Re Wedgwood, Allen v Wedgwood [1915] 1 CH 113*, a case in which the UK courts accepted the benefit to society from animal welfare; a social context has existed in which animal protection has been enhanced rather than diminished through the development of animal welfare law and the growth of the animal welfare and environmentalist movements. EU law also adopts this principle, recognising that animals, as sentient beings, are deserving of protection. Thus a balancing act sometimes exists between the conflicting priorities of human and animal

[3] See, for example, Directive 2008/99/EC of the European Parliament and of the Council

interests, requiring some delicate deliberations on where and when human activities need to be curtailed. Applied to European hunting activities, courts may well need to balance the interests of hunting communities against the interests of wildlife protection. These are sometimes complex legal (rather than ethical or moral) decisions, as the following discussion illustrates.

The United Kingdom's Hunting Act 2004

Within the UK, hunting is a traditional activity, although arguably the British conception of hunting differs considerably from the European context. For example, the UK does not have large carnivore populations (e.g. brown bear, lynx) and is thus not subject to precisely the same conservation and hunting dog cultural issues experienced by other European countries. Cooper [11] also notes that in the UK 'traditionally, at least, hunting has been associated with the ruling or elite classes, as a means of exerting primacy and influence'. However plural forms of hunting exist in the UK; sport hunting; commercial hunting and recreational hunting. Sport hunting, the chasing of animals for sport, has historically been legal in the UK and consists of a number of activities with fox-hunting perhaps the most well known (discussed further below). But other types such as hare coursing have also existed and illegal types of 'sport', such as badger baiting and badger digging, also continue despite having been made illegal through wildlife protection and animal welfare laws in the 1980s and 1990s [42]. Thus arguably legal and illegal forms of hunting have existed side by side and claims of illegal cruelty as being endemic in sporting practices have been integral to campaigns to ban sport hunting and the attention of green criminologists employing a species justice perspective.

Previous research [12, 29] identifies that offenders involved in the exploitation of wildlife, farm animals or the rural environment within traditional fieldsports, can commit their crimes for the following general reasons:

1. profit or commercial gain;
2. thrill or sport;
3. necessity of obtaining food;
4. antipathy towards governmental and law enforcement bodies;
5. tradition and cultural reasons.

While these are the primary motivations and others may be involved, certain specific types of offending can only take place in rural areas as they are inherently reliant on countryside and wild species (e.g. hare coursing, badger-baiting, illegal fox-hunting and bushmeat hunting). The UK, through its Hunting Act 2004, sought to ban the traditional practice of hunting with dogs, while separate legislation (the Protection of Mammals [Scotland] Act 2002) banned the practice in Scotland. Hunting in the UK is, however, a primarily social or recreational activity rather than the culturally ingrained hunting of several European countries who have communities living in close proximity to large carnivores such as wolves, lynx and bear. Hunting with dogs and specifically fox-hunting are long-standing UK countryside practices associated with debates around class and, in particular, the right of the middle and upper classes to hunt with dogs. Fox-hunting has particular social connotations and is inextricably linked with the British concept of a right to enjoy and use the countryside and to

exercise freedom to enjoy particular pursuits. Legislation aimed at banning the practice thus raised controversial social issues relating to the treatment of animals and the imposition of legislation by one group on another. The Hunting Act 2004, for example, was introduced by a Labour (socialist) government and was perceived by some as an attack by a liberal town-dwelling elite on a marginalised rural population [36]. The specific legal and moral issue of whether there is a 'right' for humans to hunt non-human animals, whether this right should be protected by law or whether parliament could legitimately interfere with such a right in the public interest (widely construed) also became a matter of debate. The proponents of (mainly) fox-hunting sought to clarify this issue through a serious of legal challenges which invoked the European Convention on Human Rights (ECHR), in particular the notions that hunting fell within Article 8, the right to a private life, Article 11 the right of freedom of association and assembly, and Article 14 freedom of discrimination.

An initial challenge to the Hunting Act 2004 on the grounds that it was invalid because it had been passed by the House of Commons using the Parliament Acts 1911 and 1949 to force the legislation through despite the disagreement of the House of Lords failed. This argument rested on a technical point in UK constitutional law which generally requires both Houses to agree on legislation [43], rather than on the specific merits of state interference with hunting.[4] But the failure of the 'legal validity' challenge was followed by attempts to challenge the Act on human rights grounds as an interference in the 'right' to hunt which hunt proponents argued existed under the grounds outlined above. In *R (Countryside Alliance and others) v. Attorney General* [2007] UKHL 52, the House of Lords was asked to consider the compatibility of the ban on hunting with hounds with the alleged right of hunters to continue with the activity. Most human rights guaranteed under the European Convention can be interfered with where the interference is considered necessary, serves a legitimate purpose, and is proscribed by law. The Hunting Act 2004 raised the question of whether public opinion or prevailing morality were considered sufficient grounds to restrict an activity. In effect, the Act raised the question of whether public opposition to hunting justified the UK parliament in passing a law which prevented a group of individuals from carrying out a particular activity that had previously been lawful, especially where for some individuals (those employed professionally within the countryside with employment directly linked to or dependent on hunting) the law would have a direct effect on their livelihoods. While space does not permit detailed discussion of UK constitutional law, the challenges to the legitimacy of the Hunting Act 2004 failed in the UK courts in part because the House of Commons, the elected chamber, was deemed to have the right to push through legislation it considered appropriate to restrict a practice (fox hunting) that the public generally disapproved of (discussed further below).[5]

[4] The House of Commons is the elected main chamber, the House of Lords is an unelected upper chamber whose powers to delay and scrutinize legislation are a vital part of the legislative process. But in reality the Lords' powers are limited and a constitutional principle exists that the Lords should not 'block' Government legislation.

[5] Arguably the reasons why the public disapprove of hunting are of limited relevance it is the legitimacy of the Government action that is at issue. Indeed in July 2015 a Conservative majority Government, that largely believes hunting is a choice issue rather than an animal protection or wildlife law one, failed in its attempts to amend/repeal the Hunting Act 2004. Parliamentary arithmetic and widespread public protest suggested that the Government lacked the required support and parliamentary votes needed to change the law.

European Human Rights Law and Hunting

As this article identifies; challenges to the UK's Hunting Act 2004 primarily engaged the private life, freedom of assembly and anti-discrimination aspects of the ECHR. While the UK hunting ban relates primarily to a specific legal situation and conflict of interest within the UK's particular hunting context and culture, it is of relevance in a wider European context. First, a number of European countries have legal systems similar to that of the UK, thus the precedence established by UK cases is of interest in identifying how other European legal systems may deal with challenges to anti-hunting legislation. Secondly, decisions of the European Court of Human Rights (ECtHR) are applicable to all 47 Council of Europe states, noting that the ECHR is not an EU measure but a wider European one. Thus, the challenges to UK law were ultimately decided by judges considering hunting in a Europe-wide context which included drawing direct parallels between the claims for protection of their activity made by UK hunters, and claims made by hunting proponents and opponents in other European states. Thus while in one sense, the cases discussed identify how hunting is defined and is being problematized within the UK, some important social and political lessons are also identified in respect of wider European conceptions on hunting. Indeed, these also raise the issue of the extent to which European governments can interfere with traditional and cultural conceptions on hunting.

While space does not permit exhaustive discourse on the nature of the ECHR, a brief explanation of the ECHR's provisions in respect of challenges to the Hunting Act 2004 is necessary.

> Article 8 of the ECHR states that:
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> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> Article 11 of the ECHR states that:
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

> Article 14 of the ECHR states that:
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The wording of the ECHR makes clear that these are qualified rather than absolute rights [44]**;** thus they can be interfered with by the state for a variety of reasons as long as any interference is considered to be necessary, proportionate and carried out for a legitimate purpose. These qualifiers were the subject of considerable debate and legal argument as the following sections illustrate.

Hunting and the Right to Private Life

In *Friend v the United Kingdom* and The *Countryside Alliance and Others v the United Kingdom*, the ECtHR was effectively asked to consider whether the UK's hunting ban represented an interference with hunters' private lives. The matter had previously been considered by the UK's House of Lords[6] where the Lords determined that hunting was not a traditional culture and lifestyle that was so fundamental to a group (hunters) that it formed part of their identity and required legal protection. The House of Lords concluded that fox-hunting was a public activity and so the question of personal autonomy which underlay the right to respect for private life was not engaged. In *Friend* and *The Countryside Alliance* cases, hunters and their representatives argued that the concept of a private life 'was not limited to a reasonable expectation of privacy nor was it prevented from operating in a public context' (para 36 of the judgment). They argued that while not all activities a person chose to undertake fell within the scope of Article 8, for those for whom hunting was a core or central part of their lives anti-hunting laws interfered with their personal autonomy and also had a negative impact on their community and cultural lifestyle. Friend (the first applicant) argued that 'the hunting community was in fact an ethnic or national minority, which had evolved through the long history of hunting, with its own traditions, rituals and culture or was at least a cultural way of life'. Thus, states who were a party to the ECtHR had an obligation to facilitate such a way of life and to preserve cultural diversity. The second applicants argued that the effect of a ban on hunting also interfered with use of their land and homes and thus was an interference in their private lives. Given that hunting took place over their land and they rented accommodation connected with hunting, it was claimed that the ban on hunting could result in them losing their homes and livelihoods.

The ECtHR dismissed these arguments. It concluded that while hunting wild mammals had a long history in the UK and had even become part of the fabric and heritage of rural communities where it was practised, it remained a public activity rather than one inextricably linked to one's private life. The ECtHR also rejected the idea that the hunting community was a national or ethnic minority of a kind whose activities required protected. The ECtHR specifically noted that mere participation in a common social activity, without something more, cannot create membership of a national or ethnic minority (discussed further below).

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[6] The case predates the setting up of the UK Supreme Court, thus at the time the House of Lords was the highest UK court.

Hunting and Freedom of Assembly

The Article 11 concerns of hunters claimed that bans on hunting and anti-hunting legislation interfere with their right of freedom of assembly. In *Friend* it was broadly accepted by hunters that the Hunting Act 2004 and the Protection of Mammals (Scotland) 2002 Act did not interfere with the right to associate or assemble with the Hunt, but it was argued that by banning the Hunt from hunting with hounds, the right was 'emasculated' because it prohibited the Hunt's *raison d'etre* and therefore the very reason for assembly. Thus, the argument drew on previous case law (*Anderson v. the United Kingdom* no. 33689/96, Commission decision of 27 October 1997) to provide authority for an argument that the right to associate carried with it the right to do so for a particular purpose, namely hunting.

Restricting hunters from gathering together for their preferred purpose of hunting with dogs arguably raises the question of the extent to which the state can interfere with the right of interest group members, in this case hunters, to gather together. The *Anderson* case determines that individuals' right to gather together in order to attain various ends should be protected. But, the Commission concluded that 'there was no indication that freedom of assembly was intended to guarantee a right to assemble for purely social purposes anywhere one wished' (para 49 of the decision in *Friend*, the *Countryside Alliance and Others v the United Kingdom*). The ECtHR concluded that the intention of Article 11 was to protect the right to peaceful demonstration and to participate in the democratic process. The Article has been used, for example, to protect the right of assembly of trade unions and political parties to engage in peaceful assembly [44, 26]. However, while the ECtHR conceded that Article 11 could extend to protection of assemblies of a purely social character, it argued that the ban on hunting did not prevent the right of assembly *per se*, notwithstanding the fact that the act behind the assembly (hunting) was being prevented. The ECtHR concluded:

> The hunting bans only prevent a hunt from gathering for the particular purpose of killing a wild mammal with hounds; as such, the hunting bans restrict not the right of assembly but a particular activity for which huntsmen assemble. The hunt remains free to engage in any one of a number of alternatives to hunting such as drag or trail hunting.
>
> (para 50 of the decision in *Friend, the Countryside Alliance and Others v the United Kingdom*)

The ECtHR further concluded that even if the hunting ban was considered an interference with a right of freedom of assembly, the ban was justified as being lawful, in the sense of being the subject of appropriately passed law. In addition the ECtHR concluded that the bans brought about by the Hunting Act 2004 served the legitimate aim of 'protection of morals' allowed for under the ECHR. The ECtHR concluded that such laws were legitimate 'in the sense that they were designed to eliminate the hunting and killing of animals for sport in a manner which the legislature judged to cause suffering and to be morally and ethically objectionable' (para 50 of the judgment.) In respect of the question of necessity and proportionality the ECtHR concluded that:

> by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the

> international judge to give an opinion on the exact content of those moral and ethical restrictions as well as on the ‘necessity' of a 'restriction' intended to meet them. Furthermore a wider margin of appreciation must be accorded to State authorities in regulating a particular assembly the further that assembly moves from one of a political character to one of a purely social character.

In a wider European context, hunters would not be prevented from being members of a hunting association or from carrying out legitimate predator control. But, the cases make clear that it is for the state to decide, first,what activities can and cannot be carried out and, second, the extent to which activities can be restricted. In some respects, the arguments for hunting with dogs as a form of sport worked against hunt enthusiasts. This was because the ECtHR concluded that the hunting activity ofriding to hounds and the social gathering and competition of the hunt could be carried out without the element of animal killing that the law sought to ban. Indeed, hunting could be carried by following a false trail rather than pursuing an actual animal, and legitimate predator control could still be carried out through other means such as shooting 'pest' animals. Thus the interference with certain rights is arguably minimal and proportionate because the law does not constitute an outright ban on hunting activities nor does it ban necessary predator control that protects livelihoods and farming interests.

Anti-Hunting Law as Discrimination

The complaints made by UK hunters and their representatives under Article 14 were dismissed by the ECtHR in *Friend, the Countryside Alliance and Others v the United Kingdom* but are worth exploring in respect of questions that hunters are being persecuted by anti-hunting legislation. The question of discrimination and Article 14 was considered by the UK Court of Appeal which concluded that Article 14 could not apply because fox hunting was considered to be a common activity engaged in by a heterogeneous group of individuals. When considered by the UK’s House of Lords, the Article 14 claims were dismissed because the applicants were not considered to have any characteristics that could be described as an ‘other status’ under that Article.

Arguably in the European law context, hunters are not accepted as being a distinct group of ethnic, national or ‘other’ status that requires protection under international law. Accordingly they have no specific characteristics that are being discriminated against by banning them from hunting and are, legally, the same as any other group whose activities are regulated by the state despite their opposition. Indeed later in *Herrmann v Germany* (application no.9300/07 decision of 26 June 2012) the ECtHR considered a complaint that compulsory membership of a hunting association and an obligation to tolerate hunting on his property violated the rights of an applicant who was ethically opposed to hunting. This case raised Article 14, Article 9 and Article 11 issues and confirmed the widespread social reality of hunting; underlining its status as a public activity rather than one integral to a specific subculture or distinct subgroup of society. The [then] German Federal Hunting Act in this case made *all* owners of hunting grounds with a surface area of less than 75 hectares *de jure* members of a hunting association and the hunting authority’s rejection of the applicant’s request to terminate his membership of the association on the grounds of his opposition to hunting ultimately led to his claim before the ECtHR.

These cases illustrate that while hunting may be indicative of certain characteristics and behaviours that individuals may wish to claim as being a necessary part of their private and cultural lives, the law (or at least European law) does not generally recognize a distinct right to hunt except in the particular case of indigenous peoples or others constituting a distinct ethnic minority (discussed further below). Crucially it also endorses the view that state authorities can intervene in hunting activities on moral grounds where considered necessary (by the state) to do so. The state can base its legislation on the judgment of elected representatives and legislative authorities that such activities should be restricted in order to protect public morals. The moral imperative of outlawing animal harm [12], while being a matter of judgment that might be disputed by some, clearly is one that public authorities are entitled to take into account as forming a valid basis for legislation. The ECtHR explicitly observed this by noting that the hunting ban was introduced 'after extensive debate by the democratically-elected representatives of the State on the social and ethical issues raised by the method of hunting in question' (para 50 of *Friend*). The ECtHR also observed that

> ...the 2004 Act was preceded by extensive public debate, including the hearings conducted by the Burns Committee. It was enacted by the House of Commons after equally extensive debate in Parliament where various proposals were considered before an outright ban was accepted. In those circumstances, the Court is unable to accept that the House of Commons was not entitled to legislate as it did or that the refusal of the Burns report to draw any conclusions as to the suffering of animals during hunting substantially undermined the reasons for the 2004 Act. The judgment that it was in the public interest to ban hunting was, as Lord Hope observed in the context of the proportionality of the hunting ban in Scotland, pre-eminently one for the House of Commons to make.
>
> (Para 56 of *Friend, The Countryside Alliance and Others v The United Kingdom*)

The ECtHR's judgment drew on its previous case law in relation to hunting in other countries (and contexts) and how it defined ethnic groups/subcultures and property rights in other contexts. Thus its approach, while based in assessing a country-specific problem, examines the issue of hunting within a European context. Accordingly, its judgment touches on the principle that democratically elected governments are entitled to outlaw certain animal harm activities even where dissenting voices exist. Crucially, by implication it identifies that the public interest can be well served by decisions that implement the public good. Such wildlife trust doctrines and contemporary perspectives on animal welfare partially reflect Donaldson and Kymlicka's [45] notion that wild animals are also deserving of some form of rights, in this case in the form of protection from unnecessary harm.

Illegal Hunting Resistance and the perception of a right to hunt.

The decisions of the ECtHR on challenges to the UK's Hunting Act 2004 clarify the perception that hunters may have a right to hunt that exists based on the existence of hunting communities and traditional participation in hunting within particular communities. The ECtHR clearly distinguishes between hunting as a subsistence

necessity and hunting as a predominantly social or recreational activity, even in those farming and rural communities where hunting might be considered an integral aspect of the rural way of life [12, 13]. The ECtHR endorses the right of legislatures in contemporary western societies to prohibit sporting and traditional activities that harm animals as unacceptable and unlawful, even though to do so may frustrate communities both culturally and socially. While, in the UK at least, the majority do not hunt or carry out animal harming recreational activities, those that do represent a vocal minority. Protests against the introduction of the UK's *Hunting Act 2004* were widespread with the major protest attracting around 400,000 people, many of whom initially vowed to carry on the activity after the law made hunting with dogs unlawful. Cooper suggests that 'the obvious inference is that those individuals were prepared to become offenders' [11]. The numbers also indicate that the hunting/shooting community is sufficiently large to be classed as a distinct social group or subculture, albeit not one that might be legally recognized as such.

Similarly, in Europe, resistance to anti-hunting legislation and to the criminalization of certain hunting practices has resulted in resistance [33]. Despite legislation in various parts of the world that makes much traditional fieldsports activity either unlawful or places strict controls on what may be carried out, illegal fieldsports activity and unlawful predator control in the name of hunting and farming interests continues in a number of countries. In the UK in particular (and to a certain extent also in the United States) animal harm linked to the activities of economic offenders [12] continues, especially where protected animals are killed in support of traditional fieldsports activities which have now become commercialized. In these cases the perceived economic benefits of predatory and large carnivore animal killing, in terms of increased animal stocks for commercial exploitation, outweigh the available legal sanctions such that offenders have a strong motivation to commit their animal harm.

European Human Rights Law and Hunting: A Green Criminological View

Skidelski [46] argues that 'a law supported by a majority will still be considered illegitimate by a minority if it lacks moral or rational justification', further suggesting that the pro-ban argument of the UK Hunting Act 2004 was based on prejudice. However, what the ECtHR cases achieve is underlining the legitimacy of animal protection laws as endorsing societal and Europe-wide ideals on wildlife protection, even where these impact on 'minority', or vocal majority, interests. While there are undoubtedly conflicts between hunting and wildlife protection interests, the ECtHR is clearly saying that the 'right to hunt' is, at best, narrowly construed. In doing so, its conception on the necessity of hunting is also a narrow one indicating that hunting and wildlife management issues are not immune to regulation. Thus while those who continue to hunt illegally may identify themselves as resisting an 'unjust' law, they fall foul of socio-legal perspectives which define crime as being that defined as such by the criminal law [47]. Thus offenders are those who breach the law irrespective of the moral dimensions of their claim against the legitimacy and necessity of the law [34].

The reality of illegal hunting thus becomes one in which the killing of protected wildlife, even that wildlife considered socially and culturally to be 'fair game' in a local setting, is one of wildlife crime [12]. Both species justice concerns, and mainstream criminological ones would argue that such rational-thinking individuals [48] who choose to hunt illegally and kill protected wildlife, should be the subject of

criminal justice attention even where arguments about interference with traditional activities might be raised. Accordingly, resistance against anti-hunting legislation through continued illegal hunting is itself denied legitimacy on human rights and species justice grounds. Even though in some European countries hunting may be socially accepted activity such that it represents a significant part of the culture and is perceived as a way of life, the right to hunt is extremely limited. Arguably the ECtHR's judgments are consistent with a species justice perspective that considers that justice systems need to consider the needs of all victims of crime not just human ones [5, 10]. From a critical criminological perspective, the ECtHR's decisions illustrate how deviance such as illegal killing of wildlife can (and should) be the interest of more than just criminal law consideration. Scrutiny by the ECtHR has clarified the legitimacy of laws in this important area of wildlife protection.

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