Attributing 'Priority' to Habitats

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ABSTRACT: A close scrutiny of a European Community directive on habitats and of the statutory instrument by which it is implemented in Britain reveals small but nevertheless significant concessions towards an ecocentric approach. Planning law now allows interference in the habitats of protected species only when human interests are demonstrably overriding. Recent decisions of the European Court of Justice have given a very restrictive interpretation of the circumstances in which such interference may be permitted. The implications for further ecocentric influence in environmental law are discussed.

KEYWORDS: Rights, ecocentrism, habitats, priorities

INTRODUCTION

Sameness rarely provokes original thought. A tendency to stress the natural heterogeneity of their chosen area of study afflicts most academic disciplines. Environmental philosophers may therefore be forgiven if they are inclined to emphasise the differences between anthropocentric and ecocentric approaches – to understanding the relationship between humankind and its immediate surroundings – at the expense of describing the common elements. The dangers are that these two world-views come to be seen as mutually exclusive and that it is assumed that any system of environmental law must be underpinned by one alone, and the replacement of that system by one based upon the other must necessarily require some revolutionary struggle, analogous to those which preceded the Bill of Rights in 1689 or, to cite an American example, emancipation of the slaves in 1863. However, even a cursory glance at English law reveals a significant minority of provisions which imply some recognition of the intrinsic worth of non-human species.[1] They may seem few in number when compared with the great majority (viz. those which consider environmental resources, whether animate or inanimate, purely in terms of their instrumental value) but the co-existence has been a peaceful one.

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The fact that society chooses to protect a given species does not mean that it has been endowed with an ecocentric *right*. We may wish to preserve blackbirds, because we particularly enjoy their contribution to the dawn chorus, and sparrows for the sport which their pursuit affords to our domestic cats. We may seek to prevent the extinction of any species of plant or animal, not because of any intrinsic worth we may attribute to it, but for reasons which are undeniably anthropocentric. We may choose to preserve biodiversity in order to maximise the possibility of isolating, perhaps by techniques yet to be realised, genetic material useful in treating human diseases. But on the other hand, it must be remembered that bear-baiting was outlawed in England many years before there was any widespread concern about the possible extinction of bears (or any other European) mammalian species. Many of the statutes by which the causing of suffering to animals incurred criminal penalties predate the abolition of corporal punishment of human offenders. A belief, that other species share with humans the capacity to experience pain, which now forms an important motivation of the animal rights movement,[2] was a driving force in legislation at a time when the notion of intrinsic *human* rights still provoked almost total ridicule.

In this paper, I propose to examine the provenance of a recent addition to the body of English law which is concerned with the conservation of plant and animal species. In June 1992 the United Kingdom was one of 150 signatories of the Convention on Biological Diversity at the United Nations Conference on Environment and Development held in Rio. Since the 1970s, UK policy regarding wildlife has been increasingly subject, at least in theory, to obligations stemming from various conventions[3] concerned with species and habitats. But I shall be concerned, not so much with the texts of international conventions, but more with the minutiae of a piece of domestic legislation[4] by which their lofty aims are translated into effective powers which enable individual colonies of, for example, smooth snakes, crested newts or cirl buntings to be protected at the expense of human interests in all but the most exceptional circumstances. I shall argue that, irrespective of how successfully they come to be implemented and enforced in the future, there are reasons why environmental philosophers as well as lawyers may consider the 'Habitats Regulations' to be a significant step forward.

RESPECTING RIGHTS: DIRECT AND INDIRECT MECHANISMS

In any state which purports to respect human rights, we should expect to find, within the constitution or the principal legal code, an unequivocal interdiction of arbitrary imprisonment and the wanton taking of human life. Therefore a truer measure, over and above these basic criteria, of the 'humanity' of such a society is the extent to which respect for life and liberty permeates the day-to-day execution of government, the administration of justice and the routine business

of the legislature. Thus it could be argued that the United Kingdom's recognition of an individual's right to liberty is revealed, not so much by the existence of *habeas corpus* but by, for example, the effectiveness of the legal aid system in ensuring that no accused person is remanded simply through ignorance of his or her right to bail, by a refusal to allow commercial interests to influence decisions on aliens seeking asylum, or perhaps by the frequency and diligence with the cases of persons detained under Section 3 of the Mental Health Act 1983 are reviewed. If the abolition of capital punishment signals a certain respect for the right to life, so must – to cite one example – the drafting of strict rules of engagement to be observed by security forces when engaged in counter-terrorism. But among those states which can claim to respect basic human rights, there exists considerable differences in terms of the *policies* which guarantee the provision of those minimal levels of food, shelter, medical services by which life is sustained and maintained.

By the same token, a society's commitment to an ecocentric ethic may be gauged not simply by the number of species, the killing of which is a criminal offence, but by the effectiveness of powers to protect their habitats. In the UK, the relative weight to be given to agricultural, transport, housing or other human needs and to the maintenance of ecosystem integrity has tended to be left to the discretion of ministers, local authorities and other public bodies subject only to *Wednesbury*[5] reasonableness. Until very recently, such notions as 'priority' and 'overriding public interest' have not been prominent.

The first statutory protection of certain species of sea birds dates from 1869, and was followed by gradual extension to other, terrestrial species. Its 860,000 members make the Royal Society for the Protection of Birds the largest conservation charity in Europe. In 1953 it sponsored a private members bill which became the Protection of Birds Act 1954. Nearly twenty years before accession to the Treaty of Rome, the UK maintained a regime whereby birds enjoyed far stronger protection than that which applied to plants and other wild animals. In the late 1970s, pressure from, among others, the RSPB to amend existing statutes might well have led to further legislation even without the need to ensure compliance with EEC Directive 79/409 on the conservation of wild birds. As various Members of Parliament were not slow to point out (Haigh, 1991), a general duty to maintain the population of all 'species of naturally occurring birds in the wild state' had been recognised for longer and honoured more closely in the UK than in any other member state.

This general duty of population maintenance was to be effected by a prohibition on the deliberate killing or capture, or destruction of or damage to nests, and the taking and keeping of eggs. These direct controls largely mirrored deterrents and criminal sanctions already enforced in the UK. Similarly, the special measures to safeguard the habitats of listed species raised no new matters of principle: the power to designate areas of land as 'nature reserves', wherein fauna and flora, could be protected, had been conferred upon local authorities by

the National Parks and Access to the Countryside Act 1949. The first 'sites of special scientific interest' (SSSI) were also designated under the 1949 Act, Section 23 of which obliged the conservancy council[6] to inform the relevant local planning authorities. That provision was replaced by the more stringent requirements of Section 28 of the Wildlife and Countryside Act 1981: where a conservancy council considers land, by reason of any flora, fauna, or geological or physiographical features, merits the protection offered by SSSI status, it must notify the landholder (i.e. an owner or an occupier of the land) as well as the local planning authorities and the Secretary of State. The 1981 Act also imposed an obligation of 'reciprocal notification': while a Section 28 notice remains in force, any landholder commits an offence if he engages in one of the listed operations within three months of his informing the conservancy council of his intention to do so. No offence arises where the activity in question is subject to a management agreement between the landholder and the conservancy council.

The Wildlife and Countryside Act 1981 represented both a strengthening of existing domestic controls and a mechanism for securing compliance with European obligations. The 1981 Act (as amended) remains the principal means by which the UK government implements policies directed towards nature conservation. It has been described in an appeal[7] to the House of Lords as 'toothless'. If landholders (mostly farmers) refuse to enter a management agreement and accept monetary reward for abstaining from activities which might threaten a 'site of special scientific interest' (SSSI), then compulsory purchase is ultimately the only (and rarely used) resort available to the conservancy council. This, in essence, is the 'voluntary principle' which Francis (1994) discussed in an article in this journal and to which HM Government recently reaffirmed its commitment.[8]

HABITATS: DIRECTIVE AND REGULATIONS

The voluntary principle stems from the aversion, deeply rooted in English common law, to any interference in rights which derive from the ownership of land. Such interference, whether or not concerned with fauna and flora, tends to be a recent phenomenon effected via statute. Of course, it was the right to *develop* land (i.e. to change its use) which was 'nationalised' (Cullingworth, 1964) with the enactment of the Town and Country Planning Act 1947; but agricultural land was largely excluded from the provision of this act and its successors. Securing the objectives of the Habitats Directive[9] (92/43/EEC) requires the review of certain licences, authorisations and consents for certain activities which could lead to the deterioration of certain protected areas. The Conservation (Natural Habitats &c.) Regulations 1994, which implement the directive in Great Britain, involves *inter alia* certain modifications to the town and country planning system. Details of these modifications in England and Wales are contained in a

document (DOE, 1994) in the 'planning policy guidance' series. It could be that compliance with the Directive may come to entail an erosion of that immunity from UK planning control which agricultural activities have long enjoyed.

Each member state of the European Community will contribute to 'Natura 2000', a network of 'special areas of conservation' (SAC) required by the Habitats Directive (and embracing the 'special protection areas' (SPA) required by the 1979 Wild Birds Directive). Annex I of the directive lists habitat types whose conservation demands consideration for SAC designation; Annex II lists those animal and plant species requiring similar attention by member states. By February 1996, some 355 sites in England and Wales (of which ten related to aquatic species or habitats) had been notified to the Commission[10]. The great majority of the British contingent proposed for designation as 'sites of Community importance' will also be SSSIs, but the planning controls over sites eventually designated will be far stricter than those which apply to sites outside Natura 2000.

The Habitats Regulations 1994 impose a number of restrictions on the discretion of planning authorities when considering applications for planning consent for development which, following an assessment, is adjudged to 'adversely affect the integrity' of an SAC. The planning authority must first satisfy itself that no alternative solution exists. If no alternative is identified and the site does 'not host a priority natural habitat type or species', then permission may be granted only for 'reasons of overriding public interest, including those of a social or economic nature'. Regulations 60-63 ensure that proposals likely to have a significant effect on a European site and which would normally constitute 'permitted development'[11] are not begun without the approval of the local planning authority. In addition, planning authorities are required to conduct a review of extant planning permissions which could have a significant effect on an SAC and, if necessary, revoke, modify or discontinue such permissions.

Natural habitat types and species which carry 'priority' status are identified in Annex I and II of the Habitats Directive; they include, in the UK, the limestone pavements (which were the subject of specific protection under Section 34 of the 1981 Act) and the Caledonian forests. Where development is proposed, for which no alternative is apparent and which would adversely affect the integrity of such a priority site, then Regulation 49 makes clear that the only reasons which can justify the grant of planning permission are:

- human health or public safety;
- beneficial consequences of primary importance to the environment; or
- other reasons which in the opinion of the European Commission are imperative reasons of overriding public interest.

The 'overriding public interest' proviso may derive from the European Court of Justice's strict interpretation of Article 4(4) of the Birds Directive: in the

Leybucht Dykes case, it was argued that the duty 'to take appropriate steps to avoid pollution or deterioration of habitats affecting the birds...' was not subordinate to 'economic or recreational interests' (to which Article 2 of 79/409/EEC referred) but might, in exceptional circumstances, be limited by 'a general interest superior to the ecological objective envisaged by the Directive'.[12]

Committed ecocentrists might criticise the degree of discretion enjoyed by the Secretary of State in preparing the list of sites to be considered by the Commission. They might express their resentment at the use of that discretion to exclude Cardiff Bay and Lappel Bank from the list of areas sent to Brussels for consideration for 'special protected area' status. The latter exclusion was the subject of a judicial review brought by the Royal Society for the Protection of Birds. In the High Court (and on appeal to the Court of Appeal and then the House of Lords), RSPB argued that Lappel Bank provided good quality feeding grounds for a number of species of waders and wildfowl and was a small but important part of the total eco-system. On the proper construction of Directive 79/409 and in the light of recent European case law[13] only ornithological considerations were pertinent at the designation stage. This contention was rejected by the Divisional Court and by the Court of Appeal (but with Hoffman, LJ dissenting); the House[14] resolved to refer the matter to the European Court of Justice. In March 1996, the Advocate General gave an opinion which, following the *Leybucht* precedent, held that economic considerations were not relevant. The Lappel Bank opinion, recently[15] upheld by the ECJ, is clearly very important and could have implications for the designation of other habitats, not simply those of birds. Together with the earlier rulings, it builds a body of case law which establishes that, in designated areas, species and habitat conservation takes precedence over human interests except in those cases where the latter are demonstrably overriding.

According to one theorist, a human right 'is a conceptual device.... that assigns priority to certain human or social attributes' (Freeden, 1991: 7). If there are circumstances in which *priority* is assigned to the protection of non-human species rather than the pursuit of human interests, then even if that assignment does not amount to the recognition of a clear ecocentric right, it does represent some erosion of the anthropocentric hegemony. The Habitats Regulations represent a small step forward but they are not insignificant; they clearly state the *priority* to be attached to the protection of the most important habitats – below that of human health and public safety but above that of economic efficiency. Habitats have therefore acquired something of that 'trump' quality which Dworkin (1977) argues is characteristic of rights.

Ecocentrists should therefore hesitate before dismissing the Habitats Directive as pusillanimous and the Regulations as another less than enthusiastic British compliance with a European obligation. This specification of priorities stands in marked contrast to the traditional UK reliance upon voluntarism and

pragmatism to conjure up a compromise in which no one party feels unduly aggrieved. There are reasons why this contrast merits closer attention.

1. To anyone familiar with the history of town and country planning in Britain, the Habitats Regulations cannot be easily reconciled with the reluctance to intervene in agricultural land uses and with the pro-development ethos (DOE, 1985) which central government sought to impose in the early 1980s. Given the de-regulatory rhetoric which characterised that period and the perceived need to 'roll back the frontiers of the state', the planning system would seem, with hindsight, to have emerged largely unscathed. Urban Development Corporations and simplified planning zones reduced the role of local councils in certain areas. Outside these areas, planning circulars were used, if not exactly to limit local discretion, to influence it in a direction more consistent with the policies of central government. Circular 22/80, issued in the first flush of Thatcherite zeal for efficiency in planning as in any other governmental functions, reminds local planning authorities that planning consent should be withheld only 'when this serves a clear planning purpose and economic effects have been taken into account'; however, it goes on to indicate that no change is envisaged in 'the policies in the national parks, areas of outstanding natural beauty and conservation areas' (DOE, 1980). A recent study casts doubt on the ability of the planning system to protect the National Parks from development (Curry, 1992).

2. In the late 1970s, rural landowners would have paid little attention to the de-regulation of the planning system. They were far more concerned with the possibility of increased state intervention in agricultural land use which the Wildlife and Countryside Bill (and a similar Countryside Bill which fell with the Labour administration in 1979) presaged. In view of the 'toothless' reputation the 1981 Act subsequently acquired, it is difficult now to comprehend the unrelenting hostility which it faced in all stages of its passage through Parliament. Lowe et al. (1986) describe the success of the National Farmers Union and the Country Landowners Association in ensuring that their interests were continually represented in the several hundred hours of debate, and the record-breaking 2300 amendments, in both the Lords and Commons. Some indication of the earnestness of the lobbying may be gauged from the fact that 'reciprocal notification' (see above) was presented as evidence of the government's abandonment of the voluntary principle. This 'success' for the environmental lobby (led by the Council for the Protection of Rural England) had to be offset by a number of concessions including a three-months period for landowners to lodge objections against designation. When this appeal period was subsequently used by landowners to destroy newly proposed SSSIs, the repeal of this disastrous provision became the primary motivation of a private member's Bill which, with Government support, became the Wildlife and Countryside (Amendment) Act 1985.

3. Since the Habitats Regulations were introduced under the authority of Section 2(2) of the European Communities Act 1972, they required a resolution of both Houses of Parliament before coming into effect. It would not be correct to say that the 90 minute Commons debate on the draft regulations and the two hour debate in the Lords were mere formalities. But in both cases, discussion tended to be dominated by individual concerns such as subsidiarity (see below) and apprehension over the 'Henry VIII clauses'[16] contained in the regulations. Front bench speakers were repeatedly required to give assurances that voluntarism remained the guiding principle of HM Government's policy on conservation and rural land use. But the readiness with which these assurances were given does not alone account for the absence of a more determined opposition to these proposals.

Although the major protagonists of the struggles which accompanied the passage of the 1981 Act were again represented, no desire to resume hostilities in earnest was apparent. The intervening period has seen a marked 'greening' of the Community's common agricultural policy especially following the advent of 'set aside'. Notwithstanding the inclusion of the 'polluter pays' principle in the Single European Act (see below), farmers in the UK and elsewhere in Europe are compensated for profits foregone by abstaining from practices which increase nitrate pollution. In the 'environmentally sensitive areas', farmers receive further financial rewards for agreeing to desist from certain activities. In short, conservation of wildlife and the economic interests of farmers are no longer antagonistic.

The relatively muted response may also stem from an awareness that, apart from the Caledonian forests, the United Kingdom has few priority habitats (the limestone pavements, some raised bogs and perhaps some of Dorset's few remaining heaths) and species which necessitate the highest level of protection.

THE PROSPECTS FOR PROGRESS AND REGRESS

The preamble to the 1979 directive on the conservation of wild birds refers to the protection of migratory species as 'a trans-frontier environment problem entailing common responsibilities' – a phrase normally reserved for pollution of rivers and the atmosphere. It also claimed that the directive's aims are necessary for the attainment 'within the operation of the common market, of the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion'. A concern at the loss through hunting of various bird species and a desire to ban the import of products made from whales, seals and other marine mammals had existed in the Community long before the adoption of the first Community Action Programme on the Environment in 1973.

These contrived and unconvincing rationales, included in the recitals preceding various directives and regulations, were necessary because the original (1957) Treaty of Rome made no reference to the environment in general or wildlife in particular.

It was only when the Single European Act in 1987 added three Articles (Arts 130 r,s &t, comprising Title VII 'Environment') to the EEC Treaty that the Community's environmental legislation – now comprising nearly two hundred directives through which the policy objectives of five Community Action Programmes were implemented – was placed upon a legitimate and unequivocal basis. The Treaty of Maastricht 1992 reinforced this basis by ensuring that an unashamedly *green* concept – 'sustainable and non-inflationary growth respecting the environment' – was cited as one of the aims of the European Community. But the inclusion of this phrase (even if inferior to the 'sustainable development' formulation used by the Brundtland Commission in 1987) on a par with the Community's economic objectives is eloquent testimony to the growth of environmental concerns since 1957. But the Single European Act of 1987 represented, for the mechanics of environmental policy, the more important breakthrough; Maastricht built upon these secure foundations. Article 130r.1 (as amended) now reads:

> Community policy on the environment shall contribute to pursuit of the following objectives:
> - preserving, protecting and improving the quality of the environment;
> - protecting human health;
> - prudent and rational utilisation of natural resources;
> - promoting measures at international level to deal with regional or worldwide environmental problems.

The Habitats Directive (as may any other promulgated after Maastricht) refers directly to the objective of 'maintenance of biodiversity' and justifies that reference by its contribution to the 'general objective of sustainable development'. The legislative basis of the preservation of priority habitats and species can therefore be traced back to the very aims of the Community. The hierarchy – in which habitat preservation is situated below human health and safety above economic and social concerns which fail the 'overriding public interest' test – is not to be taken lightly. If the Community's institutions were to interpret its environmental objectives in terms of 'strong sustainability' and insist upon a vigorous protection of biodiversity and similar forms of 'natural capital' (Pearce et al., 1989) for the benefit of subsequent generations, then ecocentric concerns could become even more deeply embedded within European Community law. The Court of Justice could frustrate that process if it were to question the legitimacy of Community legislation which was not anthropocentric in motivation. But in view of some of its rulings, such a stance now seems unlikely.

Eurosceptics might, at this point, feel an urge to stress that species protection in the UK long predates accession to the Treaty of Rome and that legislation comparable, if not stricter than that required by the Habitats Directive, could have been passed by Westminster if, as many wished, subsidiarity had been applied or, indeed, if the European Communities Act 1972 had never been passed. A UK Parliament, with its erstwhile sovereignty restored, could impose measures as strict as it chose, irrespective of their implications for free trade[17] or any other external policy objective. It would not be forced to accept those compromises necessary to secure a qualified majority vote in a Community expanded by member states with a far less distinguished tradition in conservation. In particular, it could choose to extend the protection associated with 'priority' status to far more species than are currently listed in the Directive. But rather than compare the potential for further advances, the ecocentrists might more usefully consider the chances of regress.

Environmental policy has hardly been immune from the friction which has characterised recent relations between the UK and the European Community. But it is rarely found among those weighty issues (such as a common currency, defence and foreign policy) which tend to be cited when 'loss of sovereignty' is discussed. If the United Kingdom were to secede from the Community, the constitutional principle – that no Parliament can bind its successors – would regain its former, unequivocal validity. Regardless of the chorus of disapproval from NGOs, there would be no constitutional obstacle to environmental measures becoming caught up in a zealous purge of all Brussels-inspired legislation and not simply measures which implemented the single market, the common agricultural and fisheries policies. But for the Community to abandon its current commitment (as evidenced by the various principles: integration of environmental dimension in all Community policies; polluter pays; high level of protection; precaution; control at source; etc) to sustainability, it would require amendment of the Treaty of Rome – a process requiring the unanimous agreement of an intergovernmental conference, followed by ratification by all member states. And while it is possible to imagine an anti-environmental backlash[18] in certain member states, which might slow the progress of the Community's use of 'hard law' to defend biodiversity, it is difficult to conceive of hostility sufficiently widespread and intense as to put it into reverse.

NOTES

I am grateful for the constructive criticism of the first draft of this paper offered by two anonymous referees and by Prof. W. Haworth, whose generous offer of further advice I readily accepted.

[1] Much of the early literature in this area followed from Christopher Stone's (1974) essay: 'Should trees have standing'? It is instructive to recall that his question was prompted, not by a hypothetical, but by an actual case viz. *Sierra Club v Morton* 401 US 907 (1971) in which the Supreme Court of the United States of America (like England, a common law jurisdiction) came close (4-3) to conceding that standing.

[2] This reference to animal rights is simply to demonstrate the recognition that English law has long given to one non-anthropocentric concern. I do not suggest that a concern for animal welfare is invariably ecocentric in origin. However, I recognise that the work of animal rights theorists like Singer(1975) and Regan(1983) is often cited by those opposed to the exclusion of non-human species as well as landscapes and ecosystems from moral discourse.

[3] For example: Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention); Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention); Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention).

[4] Conservation (Natural Habitats &c.) Regulations (SI 1994, No. 2716) which implements, in Great Britain, the EC Council Directive on the Conservation of Natural Habitats and of Wild Flora and Fauna (Directive 92/43/EEC) [1992] *Official Journal of the European Community* L206/7.

[5] The criterion of reasonableness most often used in English public law is that articulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All England Law Reports 680.

[6] I use the generic term 'conservancy council' to refer to the Nature Conservancy Council, established in its final form by the Nature Conservancy Act 1973 and responsible for nature conservation throughout Great Britain, and, following changes contained in the Environmental Protection Act 1990, to its three successors viz. English Nature, the Countryside Council for Wales, Scottish Natural Heritage. Each of these three councils consists of about twelve members all appointed by the relevant Secretary of State. Coordination and a common voice on issues of shared concern is attempted by a Joint Nature Conservation Committee. Since 1991 the Countryside Commission's remit has been confined to England.

[7] Lord Mustill in *Southern Water Authority v. Nature Conservancy Council* [1992] 3 All England Law Reports 481 at 485.

[8] House of Commons Official Report [Session 1993-94] Volume 247, 19 July 1994, cols. 239-261 at 242.

[9] op. cit., ref. 4.

[10] [1996] *Journal of Planning and Environmental Law* 199.

[11] Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No.418) lists in Schedule 2 those 'agricultural buildings and operations' which normally constitute 'permitted development'. But article 3 makes it clear that this designation is contingent upon the Regulations 60-63 of the Habitats Regulations 1994.

[12] *Commission v. Federal Republic of Germany* [1991] European Court Reports 883.

There is some concern that the protection offered to bird habitats by the strict ruling over the Leybucht Dykes may prove short-lived. Under Article 7 of the Habitats Directive, obligations arising under Articles 6(2-4) of that directive replace those arising under Art. 4(4) of the Wild Birds directive. Therefore, 'imperative reasons of overriding public interest, including those of a social or economic nature' could now justify the implementation of a plan or project, for which no alternative is apparent and in spite of a negative assessment of its implications for the site. Since no bird species is listed in Annex II, none has 'priority' status and therefore none can enjoy the extra protection accorded to priority species. Resolution of this matter did not emerge when the European Court ruled on an Article 177 referral from the House of Lords over RSPB's challenge of the Secretary of State's grounds for refusing to designate Lappel Bank (in the River Medway) as a 'special protection area' under the Birds Directive (see note 15 below).

[13] Leybucht Dykes, ibid., and also the Santona Marshes case *Commission v. Spain* [1993] European Court Reports I-4221.

[14] *R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds* (1995) 7(2) *Journal of Environmental Law* 245.

[15] (1997) 9(1) *Journal of Environmental Law* 139.

[16] The Statute of Proclamations 1539 empowered the sovereign to legislate by decree; the term 'Henry VIII clause' is now applied in a derogatory sense to any statutory instrument which empowers a minister to amend primary legislation. The Habitats Regulations amends neither statute nor statutory instrument. But in the Lords, the term was used by Lord Williams of Elvel because he felt that, with its 75 pages and its provisions for the Secretary of State to make special conservation orders and the conservancy councils to make byelaws, the Regulations should have been a Bill (House of Lords Official Report [Session 1993-94] Volume 558, 17 October 1994, cols. 85-116 at 106). In the Commons, the member for Cardiff West used the term when deprecating the absence of guidelines to assist the determination of 'overriding public interest' by the Secretary of State and, in regard to priority sites, the European Commission (op. cit. ref. 8 above). There is a convention that neither House amends a statutory instrument; nevertheless, to apply the term 'Henry VIII clause' to any provision in an instrument which could (albeit in its entirety) be *voted* out at the end of a debate seems, at very least, an historical solecism.

[17] Council Regulation 91/3254/EC ([1991] *Official Journal of the European Community* L308/1 9.11.91) bans the use of leghold traps within the Community and the importation of fur pelts from animals caught by such means. It is interesting to note that, notwithstanding the reference in its preamble to continuing research into 'humane trapping methods', this measure was still introduced under the authority of Articles 130s (environment) *and* 113 (common commercial policy) of the Treaty of Rome.

[18] Reports of the hostile reaction to the United States Supreme Court ruling in a recent case (*Bruce Babbitt, Secretary of the Interior, et al., Petitioners v Sweet Home Chapter of Communities for a Great Oregon et al.* (1996) 8(1) *Journal of Environmental Law* 158) forced me to give deeper thought to this opinion. The Court held that a regulation, promulgated under the US Endangered Species Act of 1973, 16 USC § 1531 and prohibiting 'significant habitat modification or degradation where it actually kills or injures wildlife', was lawful. Without underestimating the strength of the US anti-environmental lobby, the unanimity requirement (of the Council of Ministers) still seems sufficient to frustrate comparable demands for repeal of European legislation.

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