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# The Shooting of Old Brock

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*Dr Simon Sneddon, Senior Lecturer in Law, and Lillian Flynn, LLM International Commercial Law Student write:*

With the recent announcement of another cull of badgers to halt the spread of Bovine Tuberculosis, we take a dispassionate look at the background, law and science surrounding the subject.

## The Badger.



The badger, or more specifically the European or Eurasian Badger *Meles meles* is, as the name suggests, widely spread across Europe. Various studies<sup>[1]</sup> have shown that the range of the European Badger extends as far West as the River Volga, and as far South as Israel. The IUCN Red List, which is the official list of endangered species, regards the European badger of being “at least concern” in terms of its numbers and habitat. This is the lowest classification for species where data has been collected.

Badgers are widespread, and neither they, nor their habitat is regarded as being at any risk of extinction. The legal and environmental issues around a cull on badgers are not the same therefore as they might be for a cull of Marine Otters (Endangered) or the Venezuelan Leopard Rocket Frog (critically endangered).

In the UK, badgers live in communal groups, called *clans*, in underground lairs called (*setts*). Badger setts can be used by many generations of badger, and some have been measured at being over a century old. Badgers have been persecuted by humans for centuries, indeed the verb “to badger” (as in pester, annoy harass etc.) originates in the “sport” of badger baiting.

Because of this persecution, badgers are the only mammal in the UK to have had several specific pieces of legislation passed to protect them. The Badgers Act 1973, Badgers Act 1991, Badgers (Further Protection) Act 1991 and the Protection of Badgers Act 1992 have made it an offence to do more or less anything in relation to badgers:

- Take, injure, kills (or attempt to) (s1)
- Cruelly ill-treat (s2)
- Damage, destroy, obstruct a sett, or cause (NB not “fail to stop”) a dog to enter a sett (s3)
- Sell or possess a live badger (s4).

Despite their frequency across the UK, you are most likely to see a badger dead, by the side of the road. Some estimates put the number of badgers killed by traffic at 50,000 a year<sup>[2]</sup> (keep this figure in mind as you read on). Anecdotal tales suggest that a significant number of badgers that are seen dead on the roads were killed elsewhere by other (illegal) means, and dumped, but that is impossible to prove.

### **Bovine Tuberculosis**

Bovine Tuberculosis (bTB) is “a serious, chronic, debilitating disease, that is enduring”<sup>[3]</sup> and costly. In 1997, the Ministry for Agriculture, Fisheries and Food (MAFF) spent £16m on bTB control-related issues, and bTB testing.<sup>[4]</sup> The same year, the government was warned in a review on bTB that were bTB “to become more common, these costs would increase and there could be significant trade implications.”<sup>[5]</sup> By the 2012/13 financial year, costs had risen to the extent that Defra paid farmers £46.57m in compensation for bTB.<sup>[6]</sup>

The UK cattle farming industry has had problems with bTB for a considerable time,<sup>[7]</sup> and the incidence of bTB has steadily increased over the past twenty years in England.<sup>[8]</sup> The 2001 foot-and-mouth disease (hereafter FMD) epidemic only exacerbated the problem of bTB, due to a reduction in bTB testing, followed by atypical movements of cattle to replenish FMD-affected farms.<sup>[9]</sup> Large parts of the west and southwest of England are now affected and the disease continues to spread. In areas where bTB is endemic, it is recorded that there is a high presence of badgers, a significant proportion of which are infected.<sup>[10]</sup> However, the widespread and frequent movement of cattle provides a much more convincing explanation of the spread of bTB in the UK, as badgers rarely cover great distances.<sup>[11]</sup> Indeed, a recent report suggests that the movement of cattle “is responsible for eighty-five per cent of newly infected farms.”<sup>[12]</sup>

Badgers can catch bTB (as can several other mammals), and the first infected (but dead) badger was found in Gloucestershire in 1971, long after bTB had existed in cattle. There has been copious writing and commentary on the previous culls, and so they will be bypassed here in the interests of brevity.

### **Law v Science v Politics**

In 1982, the United Kingdom became a signatory to the Berne Convention on the Conservation of European Wildlife and Natural Habitats.<sup>[13]</sup> And, before the Brexiteers leap up and start shouting “A-ha!”, the Berne Convention emanates from the Council of Europe not the European Union (just like the European Convention on Human Rights) so is not impacted by the Brexit vote.

*Meles meles* is included in Appendix III of the Convention as a “Protected Fauna Species” and the UK is required under Article 7 to “take appropriate and necessary legislative and administrative measures to ensure [their] protection.” Killing is allowed under Article 9, provided that “there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned.”

So, in order to decide if the cull is lawful under the Convention, we need to turn to the science.

In 2012, the Coalition government issues a call for evidence on the “Balance of Competences between the United Kingdom and the European Union in relation to Animal Health and Welfare and Food Safety. In their response to this call, the Agriculture and Horticulture Development Board submitted that even though legislation on animal and human health, feed, food and welfare is “intended to be drafted on the application of scientific principles”<sup>[14]</sup> this does not always happen. The Board further submits that “It usually starts with the intention to control risks but consumer and political preferences may influence the final legislation without regard to, *or even contrary to*, scientifically justifiable provisions.”<sup>[15]</sup>

The science is pretty clear on the necessity of the cull as a means of stopping transmission of bTB from badgers to cattle. Even before the first pilot cull, the Independent Scientific Group reported that:

“Scientific findings indicate that the rising incidence of disease can be reversed, and geographical spread contained, by the rigid application of cattle-based control measures alone”[16]

Lord Krebs, who devised the original (1980) Randomised Badger Culling Trials was damning in his comments in 2012, when he said:

“Defra has said it wishes its policy for controlling TB in cattle to be science-led. There is a substantial body of scientific evidence that indicates that culling badgers will not be an effective or cost-effective policy. The best informed independent scientific experts agree that culling on a large, long-term, scale will yield modest benefits and that it is likely to make things worse before they get better. It will also make things worse for farmers bordering on the cull areas.”[17]

So, the science shows that the badger cull is not “the only satisfactory solution.” There is evidence too that the risk of bTB transmission from deer to cattle is higher than that from badgers to cattle[18] and that this may particularly be true in areas of South West England,[19] for example (ironically, one of the new cull sites).

What we have shown here is that the forthcoming badger cull is not only unlikely to be effective, but that it may also breach the UK’s obligations under the Bern Convention.

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[1] See Kranz, A., Abramov, A.V., Herrero, J. & Maran, T. 2016. Meles meles. The IUCN Red List of Threatened Species 2016: e.T29673A45203002. <http://dx.doi.org/10.2305/IUCN.UK.2016-1.RLTS.T29673A45203002.en>. Downloaded on 24 August 2016.

[2] <http://www.independent.co.uk/environment/50000-badgers-are-killed-on-britains-roads-every-year-6231851.html>

[3] *R (Badger Trust) v The Welsh Ministers* [2010] EWHC 768 (Admin) 2 per Lloyd Jones J

[4] John Krebs, Roy Anderson, Tim Clutton-Brock, Ivan Morrison, Douglas Young, Christl Donnelly, Simon Frost, and Rosie Woodroffe, ‘Bovine Tuberculosis in Cattle and Badgers’ (1997) 6 <http://www.research.ed.ac.uk/portal/files/10845557/KrebsReport.pdf>

[5] Ibid.

[6] DEFRA, ‘Request for Information: Various Bovine TB Costs’ (2008-2013) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/239443/DOC120913-12092013094820.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/239443/DOC120913-12092013094820.pdf)

[7] Patrick Bishop, ‘Badgers and Bovine Tuberculosis: The Relationship Between Law, Policy and Science’ (2012) *Journal of Environmental Law*, 145-154, 146.

[8] Ellen Brooks-Pollock, Gareth O. Roberts & Matt J. Keeling, ‘A dynamic model of bovine tuberculosis spread and control in Great Britain’ (2014) *Nature*

[9] Gopal, R., Goodchild, A., Hewinson, G., de la Rua Domenech, R. & Clifton-Hadley, R, ‘Introduction of bovine tuberculosis to north-east England by bought-in cattle.’ (2006) *Vet. Rec.* 159, 265–271

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

[11] Team Badger ‘Backing Badgers: Why the Cull will Fail’ (no date)

<<http://www.rspca.org.uk/ImageLocator/LocateAsset?asset=document&assetId=1232733090260&mode=prd>>

[12] Brooks-Pollock, Roberts and Keeling, n8 at p229

[13] <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/104>

[14] Animal Health and Welfare and Food Safety ‘Review of the Balance of Competences between the United Kingdom and the European Union’ (no date)13

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/224724/ALL\\_evidence.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224724/ALL_evidence.pdf)> accessed 23<sup>rd</sup> June 2015

[15] Ibid. Our emphasis.

[16] 2007, Bovine TB: The Scientific Evidence A Science Base for a Sustainable Policy to Control TB in Cattle An Epidemiological Investigation into Bovine Tuberculosis, Final Report of the Independent Scientific Group on Cattle TB [http://www.bovinetb.info/docs/final\\_report.pdf](http://www.bovinetb.info/docs/final_report.pdf) p5

[17] Bow Group, 2012, Bow Group urges Government to scrap badger cull plans, <http://www.bowgroup.org/policy/bow-group-urges-government-scrap-badger-cull-plans>

[18] See Ward et al, 2009, Estimating the risk of cattle exposure to Tuberculosis posed by wild deer relative to badgers in England and Wales, Journal of Wildlife Diseases, 45(4):1104-1120. DOI: <http://dx.doi.org/10.7589/0090-3558-45.4.1104>

[19] See Delahay, et al, 2007, Bovine tuberculosis infection in wild mammals in the South-West region of England: A survey of prevalence and a semi-quantitative assessment of the relative risks to cattle, The Veterinary Journal 173 (2007) 287–301, <http://dx.doi.org/10.1016/j.tvjl.2005.11.011>

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