

Concerning Bird of Prey Populations and some Contemporary Threats

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Soaring at the top of the food chain looks like a glamorous business. Since time now considered ancient and spanning otherwise dissimilar cultures, birds of prey have been emblematic of prestige and some of our most desirable characteristics. Being a fierce apex predator belies the fragility of the raptor though. If you are at the top then any problem elsewhere in the food chain will cause you to suffer. Being top of the food chain also puts you in direct competition with humans. The rising and falling in bird of prey numbers over the past century or so illustrate how the decisions we make concerning how we choose to use and live within our environments and what we consider good and appropriate practice will have consequences. It shows that what we may or may not believe to be decent behaviour at any given time can change for the outcomes of our actions can be, forgivably, unanticipated. Decisions to use pesticides to increase crop yields to feed the increasing post-war population were taken as being necessary to our survival. The fact that the biomagnification of organochlorine pesticides such as DDT led to eggshell thinning in birds of prey was unintended and unforeseen. It was partly falling raptor numbers that indicated that there was an unhealthy problem with our ecosystem.

Records indicate that birds of prey had been flourishing during WWI and WWII as gamekeepers went off to fight; allowing for the peregrine falcon which was persecuted as a distinct threat to the survival of carrier pigeons. A downward trajectory in numbers followed the end of WWII but since the initial liberal - and fatal - use of pesticides in the 1950s, our changing attitudes, legislation and re-introduction projects have meant that, on the whole, the conservation story in relation to birds of prey is an impressive tale. All the same there are continued threats that require close attention, particularly relating to a potential governance gap in the plant protection product market that could open up as the UK ceases to be a part of the EU, as well as certain illegal gamekeeping techniques that continue to be practiced.

Establishing criminal offences for interfering with specified flora and fauna has long been the preferred legal method used to protect them. Statutory legislation has been enacted which prohibits certain behaviours and is generally very successful in doing just that. For example, the once common pastime of egg-collecting is now scarcely pursued at all. This obsessive hobby can (and has) resulted in custodial prison sentences following the Wildlife and Countryside Act 1981 and the Countryside and Rights of Way Act 2000. The Wildlife and Countryside Act 1981 is the go-to piece of legislation in respect of prohibiting certain methods of killing and taking wild animals. Birds of prey have had statutory protection going back to the 1950s with the Protection of Birds Act 1954 but this was strengthened with the Wildlife and Countryside Act 1981. The Act makes it an offence if a person: 'intentionally [or recklessly] (a) kills, injures or takes any wild bird; (b) takes, damages [destroys or otherwise interferes with] the nest of any wild bird while that nest is in use or being built; or (ba) at any other time takes, damages, destroys or otherwise interferes with any nest habitually used by any wild bird included in Schedule A1; (bb) obstructs or prevents any wild bird

from using its nest; (c)takes or destroys an egg of any wild bird'. Honey buzzard, golden eagle, white-tailed eagle, gyrfalcon, goshawk, harriers, hobby, red kite, merlin, osprey, barn owl, snowy owl and peregrine are all Schedule 1 birds and receive the comprehensive protection mentioned above.

Countryside regulars the sparrowhawk, kestrel and common buzzard are notably absent from the list of Schedule 1 birds covered by the higher threshold of protection in the Wildlife and Countryside Act. Anyone, of a certain age - and who knows their buzzard from their blackbird - will tell you that these three raptors are now frequently seen aloft. There is an inevitable debate: how many birds of prey is too many birds of prey? It would be overbold for conservationists to dismiss this question. The subject has already featured in a High Court case. In *McMorn v Natural England* [2015] EWHC 3297 the court ruled that Natural England had unlawfully denied a gamekeeper a licence to kill buzzards. Buzzards had been killing his pheasant poults. Under s16 of the Wildlife and Countryside Act 1981 licences may be granted allowing licensees derogation from the prohibited criminal behaviours mentioned above for various reasons, for example 'for the purposes of falconry' or 'for the purposes of preserving public health or public or air safety'. In *McMorn* the claimant was pursuing a licence to kill buzzards 'for the purposes of preventing serious damage to livestock' and, with the support of the National Gamekeepers Association, challenged NE's decision not to grant him a licence. The Court acknowledged that NE had been inconsistent in granting licences for the destruction of common buzzards in comparison with other birds such as wood pigeon and cormorants, neither of which have any higher level of protection than the buzzard itself. It found that NE had been operating an undisclosed policy of making applications for the killing of birds of prey more difficult to obtain than for other wild birds and that this was unlawful. The reason for this unlawfully undisclosed policy was found to be the perceived public opinion should NE grant licences for the killing of birds of prey. NE was also found to be acting unreasonably as it made the derogation (which originally came from the *Birds Directive* and was transposed into domestic law) excessively difficult. Ousley, J remarked; 'NE used its power in a way which undermined the purpose for which they were given, which was to give effect to the balance struck in the Directive and Act between the protection of wild birds and preventing serious damage to livestock. It was thereby beyond the powers given to it. NE assumed a much broader discretion than it had'. We will need to consider how we move forward in light of the apparent conflicts between humans and nature as addressed in this case.

Conquering and overcoming the wild is often reported on in nature writing as being a western behaviour (i.e. man v nature as opposed to man is nature or man within nature). It is better that this whole area of thought is left for discussion elsewhere. Whatever position one takes it is interesting to consider the implications of how we choose to behave going forward. The use of pesticides is an issue which now requires redress as does the question of how farmers and gamekeepers might be able to thrive alongside birds of prey. They cannot be ignored in the hope that they will conveniently disappear like a hen harrier over a grouse moor. In Scotland for example trials are being run by Scottish Natural Heritage to deter the UK's largest raptor the

white-tailed eagle from taking lambs. At one time extinct in the UK, there is evidence that this proficient hunter will occasionally take a lamb. This is leading to innovative attempts and collaborative work between farmers and SNH to divert the birds including lasers, balloons and diversionary feeding techniques. It appears that the need for a new specialism could be required: diverting birds of prey from livestock. Who will carry out this work, how it will be paid for and to what extent it could be required is not yet known but one could certainly envisage job creation in this area.

Monitoring pesticides (also known as plant protection products) is a big job and the regulation is carried out by both UK and European institutions. Their work involves authorising pesticide licences, creating the rules for how and where they can be used and setting limits on how the products affect the food that we eat. As it stands the key EU law regulating the authorisation of the active substances in pesticides is the *Placing of Plant Products on the Market Regulation 1107/2009*. EU institutions carry out the initial authorisation of active substances and monitor them at regular intervals thereafter. The process must be transparent, independent, scientific, protect humans and the environment and still enable farmers to work. Once the active substance has been authorised by the EU each Member State decides which pesticide formulations to authorise and in the UK this work is carried out by the Health and Safety Executive under the *Plant Protection Regulations (2011)*. The second part of this process need not change once the UK leaves the European Union. There is certainly good reason to be concerned about the initial stage as this is carried out entirely by the EU which leaves us with a governance gap (i.e. no one to apply the rules) once we leave. The governance gap would certainly be exploited to the detriment of British biodiversity and this would have a strong chance of costing raptors again.

The rules pertaining to how and where pesticides can be used come from the EU and include important matters such as training and the equipment required to use them, how to store them and how to protect water from contamination. This area is less of a concern as the work is also carried out by the Health and Safety Executive, as well as DEFRA, since the UK has transposed the key EU Directive (*Directive on the Sustainable Use of Pesticides (SUD) 2009/128/EC*) into UK law (*Plant Protection Products (Sustainable Use) Regulations 2012*). It is worth noting that the UK is also currently governed by *EU Regulation 396/2005 on Maximum Residue Levels of Pesticides in or on food and feed of plant and animal origin* which concerns how pesticides affect our food and sets Maximum Residue Levels of pesticides permitted to be found in our food (including imports). There is no UK law in place in this area and it is difficult to be competitive in agriculture. As with authorising active substances, therefore, the UK is currently susceptible to reduced protection levels which would have consequence for both us and the environment. The gap will be filled like an untreated wound colonised by bacteria.

It is the fate of birds of prey whose territories expand moors maintained for the purpose of driven grouse shooting that tend to make the most headlines in Britain. The merits of field sports polarise opinion when viewed without nuance and the subject is inextricable from the issue of class: a sure-fire way to carve up any group of people and generate antipathy. During the summer a report is due from the Grouse

Moor Management Review Group, commissioned by the Scottish Government, which will look at licencing grouse moors. Licencing is the option the RSPB is advocating. It appears that a small proportion of estates are carrying out illegal killing and tampering which is causing certain areas to become sink holes for birds of prey; in particular the hen harrier and golden eagle. These sink holes are occurring in Scotland in the central and eastern highlands but they are also evident in places like the Peak District. The Scottish National Heritage commissioned report *Analyses of the fates of satellite tracked golden eagles in Scotland 136/285* concluded that, "There was a pattern of suspicious activity surrounding the 'disappearance' of many satellite tagged golden eagles, from many lines of evidence. There were many such disappearances. The high number was inexplicable without excepting that they were largely due to human intervention: at least many or most of the tagged birds which 'disappeared' were probably killed by people. These high numbers of likely killings were significantly associated with some grouse moor areas and contemporaneous evidence of confirmed prosecutions". In Scotland s24 of the *Wildlife and Natural Environment (Scotland) Act 2011* introduced a vicarious liability provision which enables a landowner to be prosecuted when an employee or agent (such as a gamekeeper) illegally kills a bird of prey. The RSPB is also advocating for a UK-wide rollout of this type of law as they suggest it is helping in Scotland. However, the evidence for this remains unconvincing. Firstly, estate owners tend to have deep pocket protection and secondly, taking the vicarious liability approach appears to say: don't hate the player, hate the game or rather don't hate the gamekeeper hate gamekeeping. It removes the element of personal autonomy that is so integral to how and why we write our criminal laws. There are an evident majority of gamekeepers who have a profound respect for the world in which they work. The SNH report quoted above goes to show how golden eagles are still being destroyed by a minority. Using the law in an innovative way to solve the persecution problem has to be welcomed but bird numbers continue to be artificially constrained in Scotland. Much of the difficulty appears to be in enforcing the law that already exists. Much like the concern over the potential governance gap with pesticides, the problem arises when there is nothing in place to ensure that the law is followed - as the incentive to break the rule far outweighs the concern for the consequence of flouting it.

The National Wildlife Crime Unit advises that if you witness the suspected persecution of a bird of prey, which could include poisoning, trapping, shooting or nest disturbance taking place then you should call 999 immediately and ask for the police.