

# Legal protection of Foxes in France and England and Wales

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## Abstract

The fox (*vulpes vulpes*) is a one wild mammal species which has historically been persecuted by humans throughout western Europe. The fox remains subject to such persecution even today due to a mixture of supposedly “cultural” traditions and its designation as an undesirable pest. Using the wildlife legal regimes in England and France as a lens, this article analyses how these two different national legal frameworks either restrict or permit acts of cruelty towards the fox.

Beginning with the French legal regime, this article discusses how the different parts of the French legal codes permit the fox to be killed for different reasons before analysing whether such grounds are underpinned by proper justifications and if associated conditions are properly checked and enforced.

The article then evaluates how well in reality the different wildlife welfare laws in the England protect the fox from the persecution permitted by the French legal regime. Such evaluation concludes by criticising the enforcement problems created by the patchwork nature of the English regime and the exceptions to welfare protections before suggesting reforms required to close such issues exposing the fox to unjustified exploitation.

## Introduction

Wildlife in western Europe faces unprecedented levels of persecution. Ever increasing human population expansion and development destroys and alters habitats crucial to species survival. Even ignoring the loss of wildlife through habitat loss collateral to addressing human population needs to satisfy needs for housing, farming or other land use, wild species still face threats through hunting for sport or as part of “pest control”<sup>1</sup> activities.

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<sup>1</sup> The authors of this piece would prefer not to use the word pest (*ravageur in French*) nor not phrases including it, due to its inherent connotations which betrays the intrinsic and inherent value of animals regardless of how desirable of the anthropocentric worth humans bestow to them. We also agree with the suggestions of the Scottish Wildlife Welfare Commission that we should revise our use of language as this negatively influences public thinking and policy development concerning animal welfare.

France and the UK represent two countries with two of the richest mosaics of wild biodiversity yet both countries juxtapose such incredible natural habitats with legal regimes which are questionable as to how effectively they protect wildlife. Foxes (*renards*) (*vulpes vulpes*) are a species emblematic of such a contrast, being sentient beings serving key ecological purposes yet who face persecution stemming from cultural traditions, public misinformation and political conflicts.

This article will examine and compare the legal protections offered to foxes in both in France (see Section 1 below) and England and Wales (See section 2 below)<sup>2</sup> and France including analysis as to how well such laws protect the species in practice (See sections 1(II) and 2(II) below respectively) before recommending how both legal regimes could better protect foxes (See section 3 below).

## **1. The lax of foxes' protection in France**

For a number of reasons, including the transmission of diseases or the damage caused to farm animals, foxes are subjects of permanent persecution in France. Victims of these prejudice stemming from misunderstanding, between 600,000 and 1,000,000 foxes are killed each year in French territory<sup>3</sup>. However, in the light of recent studies and objective data<sup>4</sup>, it is clear that this small, prudent mammal of the canine family doesn't represent a significant threat, proven or substantial to either biodiversity or the sustainability of human activities. Therefore, the continuous massacre of foxes in France finds not practical justification and it appears that it does not meet any of the legal requirements provided by the legislation as well<sup>5</sup>.

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The authors would prefer to use the phrase "wildlife management" or "*gestion de la faune in French*" to address the issues set out above however the words pest or *ravageur* is used in quotes or due to the public understanding of the phrase.

<sup>2</sup> Wildlife welfare is a devolved matter in the four different UK jurisdictions (England, Wales, Scotland and Northern Ireland) Explanation of the UK position will primarily focus on the legal protections of the animals in England, however attention will be given to important differences between the different UK legal regimes itself where appropriate.

<sup>3</sup> « *Pour la protection des renards. #Renards. Nuisibles, Vraiment ?* (For the protection of foxes, #Foxes. Pests, really?) », Association ASPAS, <https://www.aspas-nature.org/renards-nuisibles-vraiment/> accessed 4 March 2023.

<sup>4</sup> See Part II "Analysing the grounds permitting the "destruction" of foxes in France" below.

<sup>5</sup> See Part III "Anomalies related to the "destruction" of foxes" below.

## I. The practice of fox hunting in France

As “wild animals”, foxes do not receive from concrete protection against cruel treatment from humans. Indeed, only “domestic animals” and “tamed or captive wild animals” benefit from an adequate protection regime, in that any ill-treatment against them is prohibited by the Criminal Code<sup>6</sup>, with penalties. Not being a “*protected*” species either within the meaning of the Environmental Code<sup>7</sup>, foxes do not benefit from any standard set out therein aimed at protecting protected species – collectively and individually – against acts of cruelty.

Fox hunting is therefore framed by legislative rules specific to delineating when and how foxes may be hunted<sup>8</sup> yet is not nuanced by protective standards intended to preserve these animals against suffering as a particular and sentient being.

Within this legislative system, foxes can be legally killed in France pursuant to four different grounds.

First of all, foxes can be hunted throughout the national territory from June 1 to March 31<sup>9</sup> as “*sedentary game*”.

Secondly, as a “*non-domestic species*”, foxes can be “destroyed” during administrative hunts for any one of the following purposes: interest in the protection of fauna and flora, prevention of significant damage to livestock or crops, protection of public health and safety, promotion of a major public interest or beneficial consequences for the environment<sup>10</sup>.

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<sup>6</sup> Penal Code Articles L.521-1, R. 653-1, R.654-1 and R.655-1 and Rural Code Articles R.214- 3 and R.214-84 to R.214-86

<sup>7</sup> Environmental Code Article L.411-1.

<sup>8</sup> Arrêté du 26 juin 1987 fixant la liste des espèces de gibier dont la chasse est autorisée (Order of June 26, 1987 establishing the list of game species whose hunting is authorised); Environmental Code Articles L. 427-6, L. 427-9, R.424-8, and R.427-4 ; Arrêté du 3 juillet 2019 pris pour l'application de l'article R. 427-6 du code de l'environnement et fixant la liste, les périodes et les modalités de destruction des espèces susceptibles d'occasionner des dégâts, modifié par la décision n° 432485 et autres du 7 juillet 2021 du Conseil d'Etat (Order of July 3, 2019 for the application of Article R. 427-6 of the Environmental Code and setting the list, periods and procedures for the destruction of species likely to cause damage, amended by the decision no. 432485 and others of July 7, 2021 of the Council of State).

<sup>9</sup> Order of June 26, 1987, *op. cit.*; Environmental Code Article R.424-8.

<sup>10</sup> Environmental Code Article L. 427-6 and R.427-4.

Thirdly, foxes can be "*destroyed*" as "*wild beasts*" where they have caused damage to the properties of "*any owner or farmer*"<sup>11</sup>.

Finally, foxes, after having long been listed as a "*harmful*" species in France, can now be "*destroyed*" as a "*species likely to cause damage*"<sup>12</sup> (known as a "ESOD"). However, it is clear that even if the terminology surrounding what an ESOD is defined as changes, such is not the case with the fate reserved for the animal. Every three years, provided that one of the reasons of "*public health and safety, protection of fauna and flora, prevention of significant damage to agricultural activities (...), prevention of significant damage to other forms of [property] ownership*"<sup>13</sup> are satisfied then pursuant to the Environmental Code and its implementing decree of July 3, 2019<sup>14</sup> subsequently amended by the decree of February 16, 2022<sup>15</sup>, the Ministry of Ecology, on a proposal from the prefectures (who perform administrative duties to ensure the proper functioning of local authorities), draws up a list of the departments (administrative zones determined by national internal boundaries) where foxes may be killed.

This "*right of destruction*" extends all year round, night and day, without any quotas and foxes can be "*trapped anywhere*" within the specified departments and/or be dug up (also known as flushing out) with or without dogs and shot<sup>16</sup>. In 2022, 88 departments listed foxes as ESOD allowing fox hunting to take place throughout great swathes of France.

In the French territory, foxes are therefore killed all year round, whether they are hunted or "*destroyed*". The diversity of possibilities as to when and how people may kill this animal, leaves little room for mercy and reprieve, foxes being the object of the

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<sup>11</sup> Environmental Code Article L.427-9.

<sup>12</sup> Which will be referred to in this article as "ESOD", French abbreviation for "*espèce susceptible d'occasionner des dégâts*".

<sup>13</sup> Environmental Code Article R.427-6.

<sup>14</sup> Order of July 3, 2019, *op. cit.*

<sup>15</sup> The decree of February 16, 2022 was adopted following decision no. 432485 of the Council of State of July 7, 2021 which partially canceled the decree of July 3, 2019 *op. cit.* by removing foxes from the list of species likely to cause damage, known as the "ESOD" list, of the department of Yvelines, of Vosges, of Essonne and of Val-d'Oise, <<https://www.legifrance.gouv.fr/loda/id/LEGITEXT000045799382/2022-05-15/#LEGITEXT000045799382>>.

<sup>16</sup> Article 2-2 of the Order of July 3, 2019, *op. cit.*

cruellest practices, among which are [killing] underground, and cubs not being spared<sup>17</sup>.

However, whilst the hunting of foxes itself raises various questions, whether ethical, social, and legal, its "destruction" on the grounds discussed above as a "non-domestic species", "wild beast", or even "ESOD" is even more problematic in that it acts as a screen of behind which these animals can be killed without any of such grounds provided by the law actually being satisfied.

## **II. Analysing the grounds permitting the “destruction” of foxes in France**

Listing all the reasons which may be invoked to justify the "*destruction*" of certain wildlife including foxes, as "*wild beasts*", "*non-domestic species*" and "*species likely to cause damage*", refer to the needs to: protect public health (A), safeguard fauna and flora (B), prevent major damage caused to various properties and farms (C); and, and promote a major public interest or a situation having beneficial consequences for the environment (D). However when the evidence is examined none of these reasons can be legitimately raised as reasons justifying killing of foxes.

### **A. The alleged health problem posed by foxes**

Considering the alleged threat to public health posed by foxes, in particular because of their potential role as a vector of the disease alveolar echinococcosis (“echinococcosis”), it should be remembered that dogs and cats can also carry the virus<sup>18</sup>. We do not however see preventive campaigns to "*destroy*" our pets on the basis that they may carry disease, instead the focus is on treatment and prevention, showing the cognitive dissonance in the public paradigm in attitudes held toward “*pets*” and “*pests*”.

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<sup>17</sup> Environmental Code Article L.424-10.

<sup>18</sup> « Renard : 4 idées reçues sur un animal utile (Fox : 4 misconceptions about a useful animal) », *op. cit.*

Moreover basic hygiene rules exist to avoid contamination by humans of echinococcosis<sup>19</sup>. Thus, far from being a constant and unequaled danger for public health, foxes are only one vector among others of alveolar echinococcosis, which simple preventive measures can keep away from humans.

Thirdly, and above all, it is important to underline that programs for the distribution of anthelmintics to fox populations have demonstrated their effectiveness in reducing the spread of the disease<sup>20</sup>, whilst mass culling which, far from having allowed any decrease in the virus, studies show has on the contrary tended towards exacerbation of the disease<sup>21</sup>.

## **B. The erroneous attribution of the “disappearance” of “small game” to foxes**

Blaming the decrease in population of “small game” birds (namely partridges and other pheasants which are hunted or shot for sport and consumption) upon foxes is again quite unjustified<sup>22</sup>. Indeed, if there is a scarcity of small game today in France, studies demonstrate that this has been caused by trends including the increasing fragmentation of wild spaces<sup>23</sup>, the intensification of agriculture and urban sprawl disrupting such animals’ habitat. In this sense, it has been demonstrated that habitat protection policies would be much more effective in enabling hare, partridge and

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<sup>19</sup> « Échinococcose : Danger et prévention (Homme, chien et chat) (Echinococcosis : danger and prevention (man, dog and cat)) », conseils-veto.com, <<http://conseils-veto.com/echinococcose-danger-et-prevention-homme-chien-et-chat/>>.

<sup>20</sup>« Echinococcose (Echniococcosis) », WHO, 23th March 2020, <<https://www.who.int/fr/news-room/fact-sheets/detail/echinococcosis>> ; CRAIG P.S., et al., ”Echinococcosis : Control and prevention”, 2017.

<sup>21</sup> COMTE S., et al., ”Echinococcus multilocularis management by fox culling: an inappropriate paradigm”, *Preventive Veterinary Medicine*, 2017.

<sup>22</sup> « Le renard, un auxiliaire de l’agriculture massacré inutilement (The fox, an agricultural auxiliary massacred needlessly), t », *op. cit.*

<sup>23</sup> Decision n°1700584, Tribunal Administratif de Nancy (Administrative Court of Nancy), November 13<sup>th</sup>, 2018 ; MAYOT P., et al., “L’agrainsage intensif : quel impact sur la perdrix grise ?”, *Faune Sauvage*, pp. 32-39, 2009 ; KNAUER F., et al., “A statistical analysis of the relationship between red fox *Vulpes vulpes* and its prey species (grey partridge *Perdix perdix*, brown hare *Lepus europaeus* and rabbit *Oryctolagus cuniculus*) in Western Germany from 1958 to 1998”, *Wildlife Biology*, vol. 16, Issue 1, March 2010, pp. 56-65.

pheasant populations to recover than permitting fox hunting, which has little impact on the recovery of said animals<sup>24</sup>.

The gradual decline of natural habitats is one of the major causes of the disappearance of biodiversity throughout the world<sup>25</sup>. France, which has between 20,000 and 30,000 artificial hectares each year<sup>26</sup> and only 20% of its natural environments assessed as "good state of conservation"<sup>27</sup>, is no exception to this observation, and thus should deplore the decline of many wild species on its territory. Foxes cannot be held responsible for a reality attributable solely to human activities and deep political-economic roots. Only the safeguarding of the natural world would allow the populations of wild species to recover, and this requires the protection of predators such as foxes whose increase in numbers generates a de facto stimulation of prey<sup>28</sup>.

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<sup>24</sup> KNAUER F., et al., "A statistical analysis of the relationship between red fox *Vulpes vulpes* and its prey species (grey partridge *Perdix perdix*, brown hare *Lepus europaeus* and rabbit *Oryctolagus cuniculus*) in Western Germany from 1958 to 1998", *op. cit.*

<sup>25</sup> « Perte de la biodiversité : quelles en sont les causes et les conséquences ? (Loss of biodiversity : what are the causes and the consequences?) », 2021, Actualité Parlement européen (European Parliament News), <<https://www.europarl.europa.eu/news/fr/headlines/society/20200109STO69929/perte-de-la-biodiversite-queelles-en-sont-les-causes-et-les-consequences>> ; « Rapport Planète Vivante (Living Planet Report) », WWF, 2022, <[https://www.wwf.fr/sites/default/files/doc-2022-10/LPR%202022%20VFINAL\\_Page\\_pageBD.pdf](https://www.wwf.fr/sites/default/files/doc-2022-10/LPR%202022%20VFINAL_Page_pageBD.pdf)> ; HADDAD N.M, et al., « Habitat fragmentation and its lasting impact on Earth's ecosystems », *Science Advances*, 1(2), 2015 ; « La nature sous pression. Pourquoi la biodiversité disparaît ? (Nature under pressure. Why is biodiversity disappearing ?) », Office National de la Biodiversité (National Office for Biodiversity) (ONB), 2019, <[https://naturefrance.fr/sites/default/files/2020-05/bilan\\_2019\\_onb\\_compressed.pdf](https://naturefrance.fr/sites/default/files/2020-05/bilan_2019_onb_compressed.pdf)> ; « La destruction des habitats. Comment évoluent les pressions majeures que notre société fait peser sur la biodiversité ? (Habitat destruction. How are the major pressures which our society places on biodiversity evolving ?) », naturefrance.fr, <<https://naturefrance.fr/la-destruction-des-habitats>>.

<sup>26</sup> « Artificialisation des sols (Artificialization of soils) », Website of the French Ministère de la Transition écologique et de la Cohésion des territoires, décembre 2022, <<https://www.ecologie.gouv.fr/artificialisation-des-sols>>. For the period 2006 and 2015, the French national biodiversity observatory estimates that there were nearly 65,758 hectares of artificial soil each year, « Biodiversité, les chiffres clés (Biodiversity. The key figures) », ONB, 2018, <<https://www.statistiques.developpement-durable.gouv.fr/sites/default/files/2018-12/datalab-48-cc-biodiversite-les-chiffres-cles-edition-2018-decembre2018a.pdf>>.

<sup>27</sup> « Biodiversité en crise : il est urgent d'amplifier les actions (Biodiversity in crisis : It is urgent to increase efforts) », ONB, 2021, <[https://naturefrance.fr/sites/default/files/2021-10/PublicationONB\\_2021\\_VF.PDF](https://naturefrance.fr/sites/default/files/2021-10/PublicationONB_2021_VF.PDF)>.

<sup>28</sup> In Switzerland, for example, in the canton of Geneva, it has been observed that hare populations have increased drastically in parallel with the cessation of fox hunting and the restoration of natural species, RENEVEY B., « Terre de lièvres (land of hares) », *La Salamandre* 244, 2018, pp. 58-60, cited in « Protéger le renard...un enjeu économique et de santé publique ! (Protecting the fox... an economic and public health issue) », Collectif Renard Doubs (Doubs Fox Collective), <[http://www.renard-doubs.fr/tmp/documents/argumentaire\\_renard.pdf](http://www.renard-doubs.fr/tmp/documents/argumentaire_renard.pdf)> ; See also Decision n°1700584, Administrative Court of Nancy, November 13<sup>th</sup>, 2018, which recognizes a correlation between fox populations and hare populations ; See finally Decision n°2001211, 2001563, Administrative Court of Rouen, March 29<sup>th</sup>, 2022, that observes « une meilleure survie des perdrix grises (...) dans les zones où le renard était très présent » (better survival of gray partridges (...) in areas where foxes were very present).

### **C. Avoidable chicken farm visits**

To the extent that foxes hunt in poultry farms, such visits remain *de minimis* in number compared to the number of chickens kept in poultry farms throughout France and the rare damage that occurs is often preventable by poultry breeders. Simple arrangements can be put in place by chicken farmers to avoid predation by foxes, such as the installation of fences with a thick mesh of sufficient height<sup>29</sup>, folded outwards<sup>30</sup> or surrounded by sufficiently high stakes<sup>31</sup>.

### **D. Absence of overriding public interest or motive with overriding beneficial consequences for the environment**

Far from being a major threat to rural biodiversity, foxes provide considerable economic and ecosystem services that benefit the wider environment. Thus, just like badgers, foxes, through feeding on rodents, protects agricultural crops<sup>32</sup>, allow farmers to make substantial savings from having to spend on rodenticides and other “*pest*” prevention measures<sup>33</sup>. Furthermore, foxes play a key role in their ecosystem preventing overpopulation of its species whilst also feeding on plants, leading it to

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<sup>29</sup> « Renard : 4 idées reçues sur un animal utile (Fox : 4 misconceptions about a useful animal) », *op. cit.*

<sup>30</sup> « Note technique du 9 juin 2022 relative à l'élaboration des dossiers de demandes préfectorales de classement ministériel d'espèces susceptibles d'occasionner des dégâts (ESOD) (Technical Note 9 June 2022 on the élaboration of the prefectural dossiers of questions for the classification of species likely to cause damage) », Ministère de la transition écologique (Minister for ecological transition), NOR : TREL2215524J, <[https://www.aspas-nature.org/wp-content/uploads/20220613-Note-technique-2023-2026\\_ESOD\\_2-\\_VF\\_ToutesAnnexes.pdf](https://www.aspas-nature.org/wp-content/uploads/20220613-Note-technique-2023-2026_ESOD_2-_VF_ToutesAnnexes.pdf)>.

<sup>31</sup> « Clôtures de protection en agriculture contre la faune sauvage (Fences of protection in agricultural against wild fauna) », AGRIDEA, 2006, <[http://www.protectiondestroupeaux.ch/fileadmin/doc/Herdenschutzmassnahmen/Z%C3%A4une/BrochureClotureFR\\_08\\_08\\_06.pdf](http://www.protectiondestroupeaux.ch/fileadmin/doc/Herdenschutzmassnahmen/Z%C3%A4une/BrochureClotureFR_08_08_06.pdf)>.

<sup>32</sup> « Note technique du 9 juin 2022 (Technical Note 9 June 2022) », *op. cit.*; « Le renard, un auxiliaire de l'agriculture massacré inutilement (The fox, an agricultural auxiliary massacred needlessly\_ », AVES France, <<https://www.aves.asso.fr/le-renard/>>; « Le renard ou le régulateur des rongeurs (The fox or the rodent regulator) », Office National des forêts (National Office of Forests), <[http://www1.onf.fr/activites\\_nature/sommaire/decouvrir/animaux/faune/20070921-153519-705792/@@index.html#:~:text=Il%20faut%20noter%20qu'il,les%20ans%20dans%20chaque%20d%C3%A9partement](http://www1.onf.fr/activites_nature/sommaire/decouvrir/animaux/faune/20070921-153519-705792/@@index.html#:~:text=Il%20faut%20noter%20qu'il,les%20ans%20dans%20chaque%20d%C3%A9partement)>.

<sup>33</sup> « Argumentaire renard (Fox argument) », Collectif Renard Doubs (Doubs Fox Collective), <[http://www.renard-doubs.fr/documents/argumentaire\\_renard.pdf](http://www.renard-doubs.fr/documents/argumentaire_renard.pdf)>.



contribute to the ecological diversity of forests, by spreading seeds of various species in its droppings<sup>34</sup>.

Foxes diet also reduce the risk of spreading diseases, such as Lyme disease by removing infected prey from the food chain and from preventing them from reproducing<sup>35</sup>. Foxes therefore play a key role in contamination prevention of humans by various infections and contributes to the realization by the State of substantial savings in health matters.

Finally, it should be noted that fox populations are self-regulating. Thus, where hunting and/or destruction of foxes has ceased, such as in Strasbourg, Geneva<sup>36</sup> or Luxembourg<sup>37</sup>, no major increase in populations has been recorded.

It is therefore clear that none of the grounds defined by law for resorting to the "destruction" of foxes, whether as "non-domestic species" or as "ESOD", can be satisfied. Far from being proven threats to public health and safety, to fauna and flora, to agricultural activities, livestock or properties, foxes are on the contrary an ally of farmers and a key link in our health system. and our ecosystem.

### **III. Anomalies related to the "destruction" of foxes**

In the light of the above, it seems inconceivable that foxes could be legitimately “destroyed”. In this sense, the prefectures proposing to list foxes as "ESOD" or authorizing administrative killings should struggle to justify their proposals and

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<sup>34</sup> KUREK P., KAPUSTA P., HOLEKSA J., “Burrowing by badgers (*Meles meles*) and foxes (*Vulpes vulpes*) changes soil conditions and vegetation in a European temperate forest”, *Ecological Research*, vol. 29, issue 1, 2014 ; « Renard », ASPAS, <<https://www.aspas-nature.org/nos-combats/renard/>> ; LOPEZ-BAO J.V., GONZALES-VARO J.P., “Frugivory and spatial patterns of seed deposition by carnivorous mammals in anthropogenic landscapes: A multi-scale approach”, *PloSone*, 2011.

<sup>35</sup> « Renard : 4 idées reçues sur un animal utile (Fox: 4 misconceptions about a useful animal) », France Nature Environnement, 19 janvier 2022, <<https://fne.asso.fr/actualites/renard-4-idees-recues-sur-un-animal-utile>> ; HOFMEESTER T.R., et al., “Cascading effects of predator activity on tick-borne disease risk”, *Proceedings of the Royal Society B: Biological Sciences*, 2017 ; LEVI T., et al., “Deer, predators, and the emergence of Lyme disease”, *Proceedings of the National Academy of Sciences*, 2012.

<sup>36</sup> « Le renard roux : non coupable ! (The red fox : not to blame!) », Collectif renard Grand-Est, <<https://www.renard-roux.fr/en-savoir-plus.html>>.

<sup>37</sup> « Le renard au Luxembourg (The Fox in Luxembourg) », Le Gouvernement du Grand-Duché de Luxembourg, Ministère de l’Environnement, du Climat et du Développement durable (The Government of the Grand Duchy of Luxembourg, Minister for the Environment, climate and sustainable development), 2019, 72 p., <[https://environnement.public.lu/dam-assets/fr/conserv\\_nature/publications/2020/ANF-renard.pdf](https://environnement.public.lu/dam-assets/fr/conserv_nature/publications/2020/ANF-renard.pdf)>.

decisions, and, as such, taint the former with a patent inconsistency and the second manifest error of law and fact.

### **A. The inconsistency of the classification of foxes among the “ESODs”**

As we have seen, to register foxes for the purposes of their elimination as "ESOD", certain reasons must be given under article R.427-6 of the Environmental Code. However, these reasons, far from simply having to be stated as satisfied by the relevant prefectures, should be demonstrated to be satisfied through the production of robust evidence. The administrative judge does not accept a "*presumption of harmfulness*"<sup>38</sup>, in legitimising the classification of animals as ESODs so the administration must rely on data to justify a proposal to register animals as ESOD. The applicable ministerial technical note of June 9, 2022<sup>39</sup>, along with the associated 2012 circular, refer to the obligation to provide "*sufficient evidence*" in support of such proposals for animals to be classed as ESODs. The updated ministerial technical note 2022 note also refers to the need to provide "*quantified elements and significant, reliable and conclusive technical data*", in particular relating to the distribution of foxes in the department and the damage it is likely to cause. To do so, "*compilations of declarations of damage with recording of their number and their unit amount*", must be presented, it being recalled that are considered as "*significant*" attacks having caused, for information purposes, nearly 10,000 euros in damage<sup>40</sup>. over a period of three years.

In light of the elements discussed above (I), it seems undeniable that foxes cannot legitimately be classified among the "ESOD", the arguments aimed at justifying this approach necessarily come up against the material absence of tangible evidence, evidence as prescribed by the circular of 2012 and the ministerial note of 2022.

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<sup>38</sup> Circulaire du 26 mars 2012 relative à des modifications du Code de l'environnement et à la procédure de classement des espèces d'animaux (Circular of March 26, 2012 relating to amendments to the Environmental Code and the procedure for classifying animal species) <[https://www.bulletin-officiel.developpement-durable.gouv.fr/documents/Bulletinofficiel-0025738/met\\_20120008\\_0100\\_0024.pdf](https://www.bulletin-officiel.developpement-durable.gouv.fr/documents/Bulletinofficiel-0025738/met_20120008_0100_0024.pdf)>.

<sup>39</sup> « Note technique du 9 juin 2022 », *op. cit.*

<sup>40</sup> Decision n°393045, Conseil d'Etat (Council of State), sixth chamber, June 14th, 2017.

However, decisions n° 2001211, 2001563 of the Administrative Court of Rouen dated March 29<sup>th</sup>, 2022 recently highlighted that the damage attributable to foxes generally did not exceed, in the department, 152 euros. This sum, not so much in its amount as in its low level, can be generalized to all the departments, as the attacks of foxes on the farms are, as we have seen, marginal.

In addition to the prefectural proposals, maintaining foxes among the "ESOD" can be seen as nonsensical in that it does not respond to any health, environmental, economic and legislative logic. It is (alas) to bet that a thorough study on numbers of other animal species victims of these destructions would reveal similar conclusions. In this sense, we endorse the words of Jean-Jacques Gouguet in the *Revue Semestrielle de Droit Animalier* who observed that "*the harmful animal ["ESOD"] is not a scientific category, but a political position defined according to various interests (such as agriculture) and games of lobbies (such as hunting)*"<sup>41</sup>.

## **B. Errors of law and fact characteristic of orders authorizing foxing**

To "destroy" foxes as a "non-domestic species" through administrative hunts, the prefectures must justify the reasons mentioned in article L. 427-6 of the Environmental Code. However, the criteria necessary for the justification of the act are rarely – if ever – satisfied<sup>42</sup>, the prefectures taint their decrees with a patent error of law and fact. Indeed, far from the provisions provided for by the regulatory framework, the prefectures do not bother with significant and verified data to authorize the "destruction" of foxes.

However, in recent years, the French courts have shown themselves to be more and more open to environmental and animal issues and are growing more committed to rigorously enforcing the legal provisions in this area. Relatively recent decisions have thus come to condemn the use of general terms by the prefectures in their decrees authorising hunts and have deconstructed, using objective data, the reality and/or the extent of the reasons invoked in the abstract to justify the "destruction" foxes. Thus, the Administrative Court of Melun have declared, in its decisions as of May 2021, that "*by merely stating, in general terms, (...) that the proliferation of foxes and the resulting inconveniences have long been recognized in Seine-et-Marne and that the*

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<sup>41</sup> English translation by the author of this article.

« *L'animal nuisible* [A synonym for the term « ESOD »] *n'est pas une catégorie scientifique, mais une prise de position politique définie en fonction d'intérêts divers (comme l'agriculture) et de jeux de lobbies (comme celui de la chasse) (The harmful animal is not a scientific category but a political position defined through different interests (such as agriculture) and the work of lobbying (such as hunting)*», GOUGUET J-J., « *L'Animal nuisible utile : les leçons d'un paradoxe (The harmful useful animal : the lessons from the paradox)* », *Revue Semestrielle du Droit Animalier (Biannual Review of Animal Law)*, 1/2012.

<sup>42</sup> See Part I "The practice of fox hunting in France" above.

*presence of this species remains at a significantly high level, the Prefect of Seine-et-Marne has not provided, in support of his defense, any evidence to specifically justify why it would be necessary to authorize night shooting to destroy foxes”* <sup>44</sup>.

Many of such decisions cited that the elimination of foxes was not a relevant response to the fight against echinococcosis, which is otherwise rare in the territory<sup>45</sup>, and that in addition the mammal plays an important role in prevention of other infections<sup>46</sup>.

Some decisions have also highlighted the lack of recent and conclusive data on the damage supposedly attributable to foxes in the departments concerned<sup>47</sup>, and, at the very least, the absence of substantial damage, the average cost of these, when existing, being estimated at 152 euros per year<sup>48</sup>. In addition, the absence of a substantial threat from foxes to the populations of hares, partridges or poultry farms has constantly been recalled by the courts seized<sup>49</sup>. Finally, it has often been indicated that the kilometeric index of abundance of foxes was, in many of the departments having adopted a “*destruction*” decree, lower than the national average<sup>50</sup>, its presence therefore not being “*significant*”.

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<sup>44</sup> « *by limiting itself (...) to arguing in general terms that (...) the proliferation of foxes and the disadvantages which result from it are a situation proven for a long time in the department of Seine-et-Marne and that the presence of this species remains at a significantly high level, the prefect of Seine-et-Marne does not provide, in support of his defense briefs, any element likely to specifically justify why it would be necessary to authorize night shooting to allow the destruction of the fox*», Decisions n°1908847, 1908850, Administrative Court of Melun, May 3<sup>rd</sup>, 2021.

<sup>45</sup> Decision n°2002507, Administrative Court of Châlons-en-Champagne, June 23<sup>rd</sup>, 2022; Decision n°2001211, 2001563, Administrative Court of Rouen, March 29<sup>th</sup>, 2022 ; Decision n°2003119, 2003194, Administrative Court of Rouen, June 25<sup>th</sup>, 2021; Decision n°2002813, Administrative Court of Amiens, May 27<sup>th</sup>, 2021; Decision n°1700293, Administrative Court of Starsbourg, January 10<sup>th</sup>, 2018.

<sup>46</sup> Decision n°2002507, Administrative Court of Châlons-en-Champagne, June 23<sup>rd</sup>, 2022.

<sup>47</sup> Decision n°2003119, 2003194, Administrative Court of Rouen, June 25<sup>th</sup>, 2021; Decision n°2002813, TA Administrative Court of Amiens, May 27<sup>th</sup>, 2021.

<sup>48</sup> Decision n°2001211, 2001563, Administrative Court of Rouen, March 29<sup>th</sup>, 2022. We are therefore very far from the 10,000 euros in damage retained by the case law (decision n°393045 *op. cit.*) to consider as “significant” the damage caused by the mammal.

<sup>49</sup> Decisions n°2001211, 2001563, Administrative Court of Rouen, March 29<sup>th</sup>, 2022; Decisions n°2003119, 2003194, Administrative Court of Rouen, June 25<sup>th</sup>, 2022; Decision n°2002813, Administrative Court of Amiens, May 27<sup>th</sup>, 2021.

<sup>50</sup> Decision n°2001211, 2001563, TA de Rouen, 29 mars 2022; Decision n°2002813, TA d’Amiens, 27 mai 2021; Decision n°2003119, 2003194, TA de Rouen, 25 juin 2021.

### C. Hunting/destruction in opposition to the principle of environmental democracy

The hunting and “*destruction*” of foxes continues in France despite the overwhelming opposition of contributors to public consultations. Thus, foxes are still listed as likely to cause significant damage, despite all scientific and objective considerations, but also in the face the opposition of 60% of French people to this classification<sup>51</sup>.

Furthermore, it should be noted that the prefectures proposing draft decrees authorising fox shooting pursuant to Article L.427-6 of the Environmental Code often flout the required public consultation process<sup>52</sup> via imprecise project presentation notes<sup>53</sup> or even the absence of a reasonable period between the date of the closing of the consultation and that of the adoption of their order<sup>54</sup>.

Moreover, in the majority of cases, the results of these consultations, despite the relevance of the arguments put forward, do not change anything in the drafting of the orders. The prefectures disregard the majority of voices rising against fox shooting<sup>55</sup>,

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<sup>51</sup> Summary of the public consultation of the draft decree modifying the decree of July 3<sup>rd</sup>, 2019 taken for the application of article R.427-6 of the environment code and fixing the list, periods and methods of destruction species likely to cause damage, January 10, 2022, <[https://www.consultations-publiques.developpement-durable.gouv.fr/IMG/pdf/synthese\\_cp\\_arrete\\_esod\\_modificatif.pdf](https://www.consultations-publiques.developpement-durable.gouv.fr/IMG/pdf/synthese_cp_arrete_esod_modificatif.pdf)>.

<sup>52</sup> Decision n°1908847, 1908850, Administrative Court of Melun, May 3<sup>rd</sup>, 2021; Decision n°1903049, Administrative Court of Amiens, May 17<sup>th</sup>, 2021.

<sup>53</sup> Decision n°2001211, 2001563, Administrative Court of Rouen, March 29<sup>th</sup>, 2022; Decision n°2002813, Administrative Court of Amiens, May 27<sup>th</sup>, 2021.

<sup>54</sup> Decision n°2001211, 2001563, Administrative Court of Rouen, March 29<sup>th</sup>, 2022.

<sup>55</sup> A few obvious examples: despite 100% of the votes being expressed against (674 votes) the decree fixing the procedures for night shooting of foxes in Moselle (Summary of public observations, Moselle prefecture, September 27, 2016, <<https://www.moselle.gouv.fr/content/download/7149/60376/file/synth%C3%A8se%20consultation%20public%20arr%C3%AAt%C3%A9%20tir%20renard.pdf>>), it was still adopted (Motivations de l'arrêté préfectoral 2016-DDT-SERAF-UC n°52 du 26 septembre 2016 fixant les modalités de tir de nuit du renard, (Reasons For the prefectural stop of 26 September 2016 establishing the methods for hunting the fox by night) <<https://www.moselle.gouv.fr/content/download/7148/60372/file/motifs%20C3%A0%20l'arr%C3%AAt%C3%A9%20tir%20de%20nuit%20renard%202016.pdf>>). Similarly, despite a majority of 98% of the votes against the draft decree relating to the 2022-2023 hunting season, of which 24% was in opposition to the early opening of fox hunting (Synthèse des observations sur les projets d'arrêtés relatifs à la saison de chasse 2022-2023 (Synthesis of observations on the draft orders of the 2022-2023 hunting season), <[https://www.var.gouv.fr/IMG/pdf/20220518\\_synthese\\_des\\_observations.pdf](https://www.var.gouv.fr/IMG/pdf/20220518_synthese_des_observations.pdf)>), the Prefect of Var nevertheless adopted his project (Motifs des décisions concernant les projets d'arrêtés relatifs à la saison de chasse 2022-2023, 18 mai 2022, <[https://www.var.gouv.fr/IMG/pdf/20220518\\_motifs\\_de\\_la\\_decision.pdf](https://www.var.gouv.fr/IMG/pdf/20220518_motifs_de_la_decision.pdf)>).

Again, despite 99% of the votes opposing the project authorizing the shooting of foxes by the lieutenants of wolfing in 2021, the prefect of Cher adopted his decree (Arrêté n°DDT-2021-207 portant autorisation de tir du renard, y compris la nuit, par les lieutenants de louveterie, dans 124 communes du

demonstrating the lack of sincerity with which public consultations are conducted and obscuring the credibility of their decree. Thus, the hunting/destruction of foxes also puts into perspective the difficulty that the constitutional principle of participation in the development of public decisions<sup>56</sup> and the objectives of the Aarhus Convention have in being fully and effectively illustrated on French territory.

In the light of these developments, it seems inconceivable that respect for legal provisions, democratic principles and the search for both normative and modern coherence should be sacrificed on the altar of a cruel leisure which only satisfies a derisory fraction of the population<sup>57</sup>, leaving the majority in insecurity<sup>58</sup> and indignation<sup>59</sup>. Therefore the continuity of the systematic "*destruction*" of foxes, despite the normative inconsistencies and the lack of motivation and foundations of the acts authorising these practices, highlights the disproportionate power of the hunting lobby in France and raise questions about the real existence of the concept of environmental democracy in the territory.

From a legal point of view, it is now crucial to put an end to the arbitrary "*destruction*" of foxes. Foxes must therefore be removed from the list of "ESOD", none of the reasons provided for by law being generally met. Similarly, administrative beats and other night shots of foxes, which do not meet the criteria imposed by law and in fact struggle to be justified by the prefectures, must now be prohibited.

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département du Cher, 13 août 2021 (Order n°DDT-2021-207 authorizing fox shooting, including at night, by wolf hunting lieutenants, in 124 municipalities of the Cher department, August 13, 2021), <[https://www.cher.gouv.fr/contenu/telechargement/30206/201766/file/Arrete\\_2021\\_207\\_tir\\_renard\\_nuit\\_124\\_communes\\_25\\_septembre\\_2021.pdf](https://www.cher.gouv.fr/contenu/telechargement/30206/201766/file/Arrete_2021_207_tir_renard_nuit_124_communes_25_septembre_2021.pdf)>).

<sup>56</sup> Environmental Code Article 7.

<sup>57</sup> Hunters represent only 1.6% of the French population, DURAND A-A., « Sur 1,1 million de chasseurs, moins de 10 % possèdent un permis national (Of 1.1 million hunters, less than 10% possess a national permit) », lemonde.fr, 2018, <[https://www.lemonde.fr/les-decodeurs/article/2018/08/29/sur-1-1-million-de-chasseurs-moins-de-10-possedent-un-permis-national\\_5347594\\_4355770.html](https://www.lemonde.fr/les-decodeurs/article/2018/08/29/sur-1-1-million-de-chasseurs-moins-de-10-possedent-un-permis-national_5347594_4355770.html)>.

<sup>58</sup> 87% of French people consider that hunting poses a serious safety problem for walkers, Sondage IPSOS, 2022, <<https://www.ipsos.com/fr-fr/les-francais-et-la-chasse-2022>> and 78% of French people declared themselves in favor of the implementation of the "Sunday not hunted", Sondage IFOP, 2022, <<https://www.ifop.com/publication/les-francais-et-la-chasse-4/>>.

<sup>59</sup> Thus, whether for ethical, environmental or security reasons, 4 out of 5 French people are against hunting, Sondage ISPOS, 2021, <<https://www.ipsos.com/fr-fr/seul-1-francais-sur-5-est-favorable-la-chasse>>.

Finally, in order to be progressive it is important that France position itself in a reflection on the status of the wild animal which is in line with contemporary ethological knowledge, the evolution of mentalities and the wishes of most of its citizens.

## **2. Protection of foxes in England and Wales**

### **I. Legal protection of foxes in England and Wales**

Unlike the position maintained by France's codified legal regime seeing restrictions primarily arising from the Environmental Code, the piecemeal nature of the UK wildlife welfare regime means that foxes draw protection against welfare abuses from various different pieces of legislation.

#### **A. General protection from wildlife welfare Legislation**

The most generic wildlife welfare law applicable to the fox is the Wild Mammals (Protection) Act 1996 ("WMPA"). WMPA makes it a criminal offence if any person "*mutilates, kicks, beats, nails or otherwise impales, stabs, burns, stones, crushes, drowns, drags or asphyxiates*" any wild mammal with intent to inflict unnecessary suffering<sup>60</sup>. There are certain exceptions to the general prohibition set out in WMPA for acts such as mercy killings or trapping and taking animals<sup>61</sup>.

The Wildlife and Countryside Act 1981 ("WCA") is another piece of wildlife welfare legislation which provides some general protection to foxes as wild animals. The WCA criminalises certain methods of taking or killing wild animals including using self locking snares, decoys or bows or crossbows on trapped animals<sup>62</sup>. Foxes are not however listed in Schedule 6 WCA meaning that persons using methods such as automatic weapons, gas and smoke to take foxes do not face the same penalties as they would if they captured or killed other species, such as badgers, using these methods.

In addition to the wildlife welfare legislation foxes may receive some protection from the provisions of the Animal Welfare Act 2006 ("AWA"). The AWA provides

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<sup>60</sup> WMPA s 1

<sup>61</sup> *Ibid*, s 2

<sup>62</sup> WCA s 11

protections to “*protected animals*” which it defines as including animals “*under the control of man*” (even temporarily) and not living in a wild state<sup>63</sup>. This means that AWA does not apply to foxes living free in the wild, however if a fox was captured and held by a person then the provisions of the AWA would instead apply. Given this will not be the case for the vast majority of foxes the authors of this article do not intend to focus on AWA, however it is worth noting that foxes in captivity receive wider protections against deliberate and negligent unnecessary suffering<sup>64</sup> and failures to actively promote the “five freedoms”<sup>65</sup> for fox welfare, than foxes in the wild.

Offences against foxes under the WMPA are punishable with a prison sentence of up to 6 months or an unlimited fine<sup>66</sup> whilst the offences discussed above under the WCA may again be punished by 6 months in prison or an unlimited fine<sup>67</sup>.

It should be noted that the legal regimes in Scotland and Northern Ireland differ to England and Wales as set out above. Where these differences show how the English and Welsh regimes could better protect foxes, the authors explore these below.

## **B. Specific protection for foxes against hunting with dogs**

Readers not from the UK may be unaware of the controversial practice of fox hunting in the UK along with its cultural and class history. Fox hunting in its modern form traces its roots back to the 18<sup>th</sup> century as a form of “sport” pursued by members of the aristocracy when deer numbers became scarce and foxes were seen as a potential replacement having previously considered to only be vermin<sup>68</sup>. In its contemporary form, fox hunting consists of groups of people, the majority of which on horseback wearing a country uniform, pursuing foxes behind a trained pack of trained dogs (usually a form of foxhound), which are flushed out from underground dens<sup>69</sup>.

The legitimacy of fox hunting encountered pressures for reasons including animal welfare concerns given the immense suffering endured by foxes whilst being chased

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<sup>63</sup> AWA s 2

<sup>64</sup> *Ibid*, s 4

<sup>65</sup> *Ibid*, s 9

<sup>66</sup> Above n.56, s 5

<sup>67</sup> Above n.58 s 21(1)

<sup>68</sup> A.N. May “*The Fox Hunting Controversy: 1781-2004*” (2016) Routledge, p.1-2

<sup>69</sup> *Ibid*, p. 2



and after being caught and killed<sup>70</sup>. Animal welfare concerns were not the only force against fox hunting however as arguments of class<sup>71</sup> and conservation<sup>72</sup> were also levelled against the sport. These pressures culminated in passing and coming into force of the Hunting Act 2004 (“HA04”) in an attempt to ban fox hunting in England and Wales.

The main prohibition of the HA04 is brief in that any person who hunts a wild mammal with a wild dog commits an offence, unless that hunting is exempt<sup>73</sup> or they reasonably believe the hunting is exempt<sup>74</sup>. It is worth noting that wild mammals would include but would not be limited to foxes and would also protect other wild mammals against hunting.

A wild mammal is defined widely as including wild animals which have been kept in captivity and then released as part of the hunt<sup>75</sup>. The HA04 also makes it an offence for a person to assist hunting by allowing their lands or dogs to be used in hunting<sup>76</sup>. Anyone found guilty of fox hunting faces up to an unlimited fine upon conviction<sup>77</sup>.

The general prohibition provided by the HA04 is subject to nine (9) grounds on which hunting of wild animals may be exempt from punishment<sup>78</sup>. Five of those grounds may be used by persons hunting to justify hunting foxes, whilst the rest are specific to other species of animals which are not the focus of this article.

The first of these basis for justified hunting is that foxes may be stalked or flushed out of cover through hunting with dogs provided that persons meet certain conditions, including that a person does this for a specific purpose. These purposes, which

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<sup>70</sup> C.Philo and C. Wilbert “*Animal Spaces, Beastly Places: new geographies of human-animal relations*” Taylor and Francis (2005) p.194  
<[https://books.google.co.uk/books?hl=en&lr=&id=B1eFagAAQBAJ&oi=fnd&pg=PA185&dq=fox+hunting+suffering&ots=weDw1BHwtf&sig=BRLiCkUjI\\_OK7a3QcyHwGvCTVj8&redir\\_esc=y#v=onepage&q=fox%20hunting%20suffering&f=false](https://books.google.co.uk/books?hl=en&lr=&id=B1eFagAAQBAJ&oi=fnd&pg=PA185&dq=fox+hunting+suffering&ots=weDw1BHwtf&sig=BRLiCkUjI_OK7a3QcyHwGvCTVj8&redir_esc=y#v=onepage&q=fox%20hunting%20suffering&f=false)>

<sup>71</sup> Above, n.64 p.9

<sup>72</sup> Department for the Environment, Food and Rural Affairs advice proposed better protection of stock rather than hunting of foxes would better guard against farmer’s animals being killed  
<<https://www.discoverwildlife.com/people/do-we-really-need-to-control-foxes-in-the-uk/>>

<sup>73</sup> HA04 s 1

<sup>74</sup> Ibid, s 2

<sup>75</sup> Ibid, s 11(1)

<sup>76</sup> Ibid s 3

<sup>77</sup> Ibid, s 6

<sup>78</sup> Ibid, schedule 1

includes protecting livestock and game birds<sup>79</sup>, and are analogous to those explored above for the position in France to justify killing foxes as ESODs.

The second potentially applicable exemption is relevant where a person is sending dogs underground into fox borrows or other dens to flush them out<sup>80</sup>. This may only be done for the purpose of protecting wild and game birds which are being preserved to later themselves be shot in game drives. The other exemptions include using dogs to recapturing wild animals released from captivity<sup>81</sup>, rescuing injured wild animals (and generally then euthanising them)<sup>82</sup> and for research and observation<sup>83</sup>.

## **II. Analysis of the English and Welsh position and comparison to French lack of protection for foxes**

### **A. General protection from wildlife welfare Legislation**

Taken together, the provisions of WMPA and WCA can be seen to protect foxes against the worst forms of deliberate human cruelty and associated suffering without significant exemption. This considered, unlike in France where hunts should at least in theory comply with conditions on when and on what grounds they can be conducted against either killing or capturing foxes , as long as a prohibited method is not used. This implicitly legitimises people killing or capturing foxes without any justified reason which places foxes at the whim of human designs to treat foxes largely as they wish.

Such a position is in contrast to the case for animals protected pursuant to the AWA which are commonly domesticated animals and pets. for Animals protected pursuant to the AWA, persons are prohibited from deliberately or negligently causing unnecessary suffering and are charged with positive duties to promote such animal's welfare. It is unclear as to why animals "under the control of man" should be given much greater protection than wildlife when persons who wish to could easily cause the latter suffering equivalent to that suffered by domesticated animals.

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<sup>79</sup> Ibid, schedule 1 paragraph 1.

<sup>80</sup> Ibid, schedule 1 paragraph 2

<sup>81</sup> Ibid, schedule 1 paragraph 8

<sup>82</sup> Ibid, schedule 1 paragraph 9

<sup>83</sup> Ibid, schedule 1 paragraph 9

The chasm in protection for wild animals and domesticated animals reaches as far as the punishments available to judges sentencing those guilty of offences against the two different categories of animals established by law. The maximum six-month jail terms already cited above for contravention of the WMPA and WCA in offences against foxes is inconsistent with the wider trend in England and Wales of imposing tougher sentences for animal welfare offences, such a trend being embodied by the enactment of the Animal Welfare Sentencing Act 2021 (AWSA) and the increase of maximum penalty for AWA offences from 6 months to 5 years<sup>84</sup>.

As no evidence establishes that wild living foxes (or any wild mammal for that matter) are capable of suffering less than any domesticated animal which would receive protection under the AWA, it is unclear why the maximum penalty under AWA is ten times more stringent than pursuant to the wildlife welfare laws. This issue has been identified and addressed in Scotland, another UK jurisdiction, with the Scottish legislator enacting the Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 (WPPPSA). The effect of WPPPSA is to increase the maximum penalty available for the offences discussed above pursuant to the WCA and WMPA to prison sentences of up to 5 years<sup>85</sup>. Given such a difference exists between two bordering nations which have fox populations who will cross between borders, it is unjustifiable that such a drastic delta exists between those jurisdictions.

## **B. Prohibition against hunting with dogs**

On face value an advantage of the HAO4 is its simplicity in interpreting the ban, as on a reading of section 1 HAO4 any hunting of foxes with dogs in a traditional British way is criminalised. This is regardless of whether the fox is caught or not and can catch a wider group of persons facilitating the blood sport through the prohibition of people lending dogs or land towards any hunt.

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<sup>84</sup> AWSA s 1(2)

<sup>85</sup> WPPPSA s 7(6)(c) and 11

## **i. Exemptions**

Whilst the HAO4 has its advantages, the effectiveness of the prohibition is significantly diluted by the exemptions explored above pursuant to which hunting of wild animals may be exempt from punishment<sup>86</sup>.

## **ii. Justification of exemptions**

The existence of any exemption creates a question of principle as to whether the purpose of exemption outweighs the suffering endured by the foxes pursuant to hunting for that exempted purpose. The first exemption opens up this issue given the wide array of purposes, including to “prevent serious damage to game birds”.

The perverseness of this exemption can clearly be seen as it justifies a person partaking in an otherwise outlawed blood sport (fox hunting), to protect game birds which are themselves being kept for the purpose of being shot and hunted. It is interesting to note further that the words “*serious damage to game birds*” are used in the legislation which exemplifies the unfortunate paradigm of English law that animals, including wild animals, are ultimately property<sup>87</sup>. This is also reflected in the use of the word “*destruction*” in the French Environmental Code for killing of foxes and further demonstrates how legislation would better be rephrased to better reflect animals’ status as sentient beings as is progressively being reflected in statute<sup>88</sup>.

For any exemption to welfare protections to be justified (if this is possible) any hunting must be at least effective, if not necessary, for the desired purpose. As already discussed for the French administrative orders and fox classification as an ESOD, this can be seen to not be the case considering the permitted purposes for the first exemption for permitting hunting of protecting livestock or wild biodiversity. 2005 Guidance from DEFRA has admitted that “*killing [foxes] to reduce numbers [to protect livestock] is often not successful or cost-effective*”<sup>89</sup> and International Fund for Animal Welfare (IFAW) reports demonstrate that “*there was no evidence killing*

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<sup>86</sup> HAO4 Schedule 1

<sup>87</sup> Francione GL “*Animals, property, and personhood, In People, Property, or Pets?*” Purdue University Press (2006) p. 77.

<sup>88</sup> see for example section 2(2) of the UK Animal Welfare (Sentience) Act 2022

<sup>89</sup> Above n.68

*foxes had any effect on fox populations, other than locally. Culling in one area results in other animals moving into the vacated territory, and if numbers are suppressed it results in more cubs being born in the spring.”<sup>90</sup>.*

If hunting fails to even reduce fox numbers then it cannot be seen to offer any more protection to cattle or local wildlife than if the hunting had not been carried out at all. Unlike in France, where NGOs commendably bring disputes to tribunals where they have adequate evidence and resources there is no overview (judicial or otherwise) scrutinising the effectiveness of the justifications cited by those wishing to be exempted from the general fox hunting prohibition as NGOs in England and Wales would need to instead try to surmount private prosecutions, a notoriously complex and difficult procedure, against those purporting to carry out exempted fox hunting. This complete lack of oversight makes it incredibly difficult to enforce whether persons hunting foxes with dogs are actually doing so for the permitted purposes, let alone whether they are achieving such purposes.

### **iii. Application of exemptions**

The exemptions themselves contain conditions which must be satisfied for the hunting to be permitted, albeit it can be seen as almost impossible for law enforcement agencies to verify that these are being strictly complied with for each hunt. For example, hunting with dogs to flush out or stalk foxes will only be justified if done with a maximum of two dogs and conditional upon the hunter keeping the dogs under close control so that hunters can quickly shoot dead caught foxes<sup>91</sup>. This is also true for hunting with dogs to protect game, as only one dog may be sent underground at any one time<sup>92</sup>.

Whilst quantitative restrictions should necessitate definitive assessment as to whether these conditions have been met, a pack of hounds used to hunt may number up to 40 dogs and freely chase foxes all over the hunted territory running at speeds at over 22 miles per hour<sup>93</sup>. This makes it practically impossible for these conditions to be

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<sup>90</sup> Ibid

<sup>91</sup> Above n.74 para 1(5) and (7)

<sup>92</sup> Ibid, paragraph 2(5)

<sup>93</sup> American Kennel Association <<https://petcalculator.com/how-fast-can-american-foxhound-run/>>

monitored let alone enforced. This is coupled with the fact that wildlife crime police officers are rarely (if ever) present at hunting events in time for the hunting to be taking place.

#### **iv. Exemptions and inconsistency with other wildlife welfare laws**

The exemptions themselves can also be utilised by anyone undertaking fox hunting for the permitted purposes without the need for a licence to be issued. This is a notable departure from the position under the Conservation Habitat and Species Regulations 2010 (CHSR) as pursuant to the CHSR certain species which are deemed to be endangered are threatened receive special protection against persecution including killing, taking and habitat disturbance<sup>94</sup>. Like the HAO4 the CHSR contains exemptions pursuant to which persons can take actions against protected species for limited permitted purposes which would otherwise be criminalised, however under the CHSR a person needs a licence to justify any such activity<sup>95</sup>.

This means that a person must first be granted a licence by the licensing body (in this case Natural England) action for any action against protected species of wildlife to potentially be justified. There is no reason why this should or could not be the case for fox hunting, indeed many of the permitted purposes for exempted actions against protected species under the CSHR are the same as for the HAO4. Furthermore the CSHR contains a requirement that a licence for exempted persecution of protected species can only be issued if the licensing body is satisfied that there is no “satisfactory alternative” to address the issue at hand other than the requested exemption<sup>96</sup>.

This places an evidential burden on persons requesting the exemption to justify why there is no other way to address the relevant problem caused by the protected species without recourse to otherwise illegal persecution. Even though the fox is not an endangered species, there is again no reason why this could not be adopted for the exemptions made available under the HAO4 and this would safeguard against persons

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<sup>94</sup> CHSR regulation 41.

<sup>95</sup> Ibid, regulation 53

<sup>96</sup> Ibid regulation 53(9)(a)

hunting to resolve issues which either do not in reality exist or are exaggerated, or could be resolved in another way without recourse to a hunt with dogs.

#### **v. Trail hunting and convictions**

The severity of these enforcement issues is keenly illustrated by the practice of “trail hunting” which is supposed to involve the substitution of foxes with a scented rag which is then “hunted” by the hound packs followed by hunters on horseback. This is purported to represent a cruelty-free way to allow people to recreate a traditional practice<sup>97</sup> however work by UK based animal welfare organisations has demonstrated that often trail hunting is instead used as an alibi for illegal fox hunting<sup>98</sup>.

The scope of such a problem is keenly demonstrated by a first level conviction of the former director of the Masters of Foxhounds Association<sup>99</sup> for encouraging illegal foxhunting in a webinar when trail hunting was labelled as a “smoke screen” for hunting prohibited under the HAO4<sup>100</sup>. The former master huntsman admitted saying *“it’s a lot easier to create a smoke screen if you’ve got more than 1 trail layer operating [...] that is what it’s all about, trying to portray um, to the people watching that you’re going about your legitimate business”*<sup>101</sup>. On appeal such a conviction was overturned as an appellate court could not find that such words could be said to encourage others to undertake illegal hunting<sup>102</sup>.

Taking the undue width of the exemptions to fox hunting in England and Wales into account along with practical examples, it is evident that it is severely difficult to secure successful prosecutions establishing a precedent with deterrent even for detected cases brought before the law. These difficulties are reflected in the successful conviction rate for prosecutions under the HAO4 as the Wildlife and Countryside Link

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<sup>97</sup> Countryside Alliance “*Guide to trail hunting*” (2023) <<https://www.countryside-alliance.org/our-work/campaign-for-hunting/trail-hunting-q-a>>

<sup>98</sup> J. Casamitjana and IFAW “*Trail of Lies: Report on the role of trail hunting in preventing successful prosecutions against illegal hunters in the UK*” (2015) p.5

<sup>99</sup> the governing body for registered packs of foxhounds and represents 170 packs.

<sup>100</sup> R v Hankinson (2022) Unreported

<sup>101</sup> Ibid

<sup>102</sup> Ibid, Crown Court July 2022

reported<sup>103</sup> that the rate for 2021 sat over 30 per cent below the national conviction rate for all crimes.<sup>104</sup>

During the course of the authors writing this article, the Scottish legislature addressed the issue caused by acting by passing the Hunting with Dogs (Scotland) Bill 2023 (“HWDB”). The HWDB will replace the existing provisions addressing fox hunting under the Protection of Wild Mammals (Scotland) Act 2002 and amongst other things makes it an offence for a person to commit trail hunting<sup>105</sup> unless they can demonstrate that they were properly doing this to train the animal to track scent (e.g. for police dog training exercises)<sup>106</sup>. It is yet to be seen how effective the HWDB will be in stopping trail hunting from screening persecution of foxes in <sup>107</sup>Scotland, however it is notable that another legislature in the UK has moved to address the issue which remains unresolved in England and Wales.

## **vi. Penalties and deterrents**

For the cases which are successfully convicted under the HAO4, the penalties available for judges sentencing the guilty pale in comparison to even the other wildlife welfare offences which these authors have already questioned the effectiveness of. As persons convicted can only be punished by fines, there is a risk that groups of individuals organising illegal fox hunting simply “price in” the consequences of detection of their hunting given the lack of custodial sentences. There is a complete lack of reasoning underpinning such weak penalties for conviction of an offence which requires deliberate wrongdoing.

This fallacy is greater illustrated by examining case study example convictions, with a huntsman convicted in 2019 pursuant to the HAO4 for using foxhounds to hunt and kill a fox on New Year's Day<sup>108</sup>. The original conviction saw the defendant fined £1,000

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<sup>103</sup> “Wildlife Crime in 2021: A report on the scale of wildlife crime in England and Wales” (2022) <[https://www.wcl.org.uk/docs/assets/uploads/WCL\\_Wildlife\\_Crime\\_Report\\_2021\\_29.11.22.pdf](https://www.wcl.org.uk/docs/assets/uploads/WCL_Wildlife_Crime_Report_2021_29.11.22.pdf)>

<sup>104</sup> The national conviction rate for 2020/2021 was reported as 84.3 per cent by the crown prosecution service <<https://www.cps.gov.uk/publication/cps-data-summary-quarter-4-2020-2021>>

<sup>105</sup> HWDB s 11(1)

<sup>106</sup> Ibid s 12

<sup>107</sup> Ibid s 1(2)(b)

<sup>108</sup> R v Adams (2019) Unreported <<https://www.7br.co.uk/wp-content/uploads/2019/09/George-Adams-Cambridge-CC-Ruling-on-appeal-20190509.pdf>>



with a £100 victim surcharge<sup>109</sup>. The weakness of available penalties for those convicted of fox hunting is another point recently addressed in Scotland within the HWDB, as the maximum penalty for conviction for fox hunting is set at 5 years in prison on indictment.

### **3. Conclusion**

This article has presented two very different legal approaches concerning fox's hunting.

In France, the legal regime allows the hunt of foxes, structuring how and when to kill. In this legal framework, there is no provisions intended to protect wild animals against cruel treatments and protections norms (may it be regarding the animal status as endangered or the prohibition of some killing methods) are quite the exception (in the fox's case, there is almost none). In England and Wales, it is quite the opposite, the rule is the ban of cruel methods of fox' hunting, including hunting with dogs subject to some exceptions. In this light, the French perspective appears quite problematic and highlights the strong lagging of the country in its perception and treatment of wild animals, however it is questionable how effective the English and Welsh protections are in safeguarding foxes against cruel treatment and illegal hunting.

Whilst there are differences, both these two regimes suffer from illogical and unprincipled exemptions justifying hunting. Indeed, it has been demonstrated that criteria used in France and UK to legitimize fox hunting hinge on biased standards and illegal/incoherent provisions. Thus, both regimes suffer from significant weaknesses and are riddled with inconsistencies which in reality means that foxes hunting are never justified in each jurisdiction.

In this, it appears that the continuity of fox hunting in France and the UK has little legitimacy.

To better protect foxes at law, it is recommended, for France, to adhere to more a rigorous understanding of the terms of the laws, and draw objective conclusions from

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<sup>109</sup> Ibid

observation of the abuses committed by hunters and prefectures. Since none of the justifications provided for by law – may they be sanitary, economic or environmental - are sufficiently substantial to justify their virtually uninterrupted slaughter on French territory, whether as ESODs or as a non-domestic species subject to administrative hunt, it would appear that foxes need to be urgently reconsidered in the domestic legal order.

Furthermore, the patently inadequate justification of prefecture orders authorizing fox hunting in the light of the criteria set out in article L. 427-6 of the Environmental Code and of the public consultation process, adds to the total incoherence of maintaining provisions that indiscriminately authorize the shooting of foxes as a “non-domestic species”.

In the light of these considerations, and in order to build momentum towards the creation of a legal system that is concretely in line with its own criteria, it would appear that foxes must legitimately be removed from the list of ESODs, just as specific legislation must be drawn up to eliminate the possibility of their administrative hunt, which is subject, in practice, to far too much abuse.

It has been clearly underlined that in both jurisdictions there are no (in France) or at best inadequate penalties (in England and Wales) as a consequence for those who inflict suffering on foxes and/or breach fox hunting prohibitions. Strengthening (in England and Wales) or even in the first instance creating such penalties (in France) would go some way to create a deterrent against breaching the protections afforded to wild living foxes and, where present, creating consistency with welfare offences for commonly domesticated animals.

This paper has shown that the killing of foxes in either jurisdiction does not meet the existing legal criteria imposed by the French and English and Welsh systems, and alternatives can easily be deployed<sup>110</sup>. The European Union’s Habitats Directive (Council Directive 92/43/EEC) (the “Habitats Directive”)<sup>109</sup> is commonly reserved for endangered species which cannot be said of foxes in either France or England and

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<sup>110</sup> See Part I “Analysing the grounds permitting the “destruction” of foxes in France”, sections A and C, above.

Wales and therefore would legally and politically represent an inappropriate vehicle through which to better protect foxes. Legislators in both countries should create *separate yet mirroring* protections for foxes as endangered species receive pursuant to the Habitats Directive. Restricting the persecution of foxes to situations where it has been evidenced that there is no satisfactory alternative to such action and the acts against foxes are strictly limited to achieving a tightly defined list of purposes (as per the Habitats Directive) would stop the unnecessary killing of or cruelty to foxes on a mass scale.