

# COMMENT

## *Food Crime and Food Safety: Trading in Bushmeat—Is New Legislation Needed?*

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### **The trade in bushmeat**

Food safety professionals are becoming increasingly concerned about the number of serious food offences carried out by organised criminals.<sup>1</sup> These include the illegal introduction into the food chain of meat that is unfit for human consumption, such as reprocessed chicken sludge that has been bleached and treated to resemble something palatable. Also frequently reported is the flourishing trade in 'smokies'—unhygienic and illegally slaughtered sheep in which the viscera are retained, the skin left on and the carcass treated with a blow lamp to give it the desired smoky flavour. This type of crime produces huge profits for the food criminals and creates a high risk of serious outbreaks of food poisoning and longer-term threats to public health.

The trade in bushmeat poses similar health risks and offers opportunities to entrepreneurs, both at home and abroad, to make large amounts of money illegally, with a very low chance of being caught and then prosecuted. Wild animals killed and then crudely processed in the African forest and scrub land, and ending up on the dining tables of expatriate Africans residing in the USA, Britain and other EU states, present a serious problem for a number of agencies both at home and abroad. This trade covers both relatively common species, such as cane rats and antelopes, and endangered ones, including gorillas, chimpanzees, and giraffes.<sup>2</sup> Enforcement agencies at every stage of the process lag behind the food criminals.

The volume of imports is a sensitive issue for the port health authorities and HM Customs and Excise: the agencies responsible for preventing the entry of illegal meat products into the UK. The customs authorities do not provide information about the extent of seizures at ports of entry.<sup>3</sup> Figures produced by Defra, covering the period from April 2001 to 17 January 2003, indicate that a total of 4,065 kg of bushmeat was seized from ports in the UK, representing 2.5 per cent of all seizures of meat products.<sup>4</sup> But seizures represent only a tiny proportion of illegal imports. Estimates are hard to substantiate and should be

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1 The weekly magazine of the Chartered Institute of Environmental Health, *Environmental Health News*, regularly reports on such cases.

2 *Independent*, 15 January 2004.

3 HM Customs and Excise took over responsibility for monitoring the import of meat products from Defra in April 2003. According to its press office (commenting in June 2004), no statistics are publicly available on seizures of bushmeat or any meat products and there are no plans to provide them in the future.

4 *Hansard*, House of Commons Written Answers for 4 February 2003, Mr Morley.

interpreted with care. The Food Standards Agency has estimated that more than 1 million tonnes of meat products are smuggled illegally into the UK each year, mainly from Africa and the Middle East.<sup>5</sup> This estimate refers, however, to all types of meat products and not solely to bushmeat, and it includes those which do not pose a risk to health.

No estimates are made available to the public by any statutory agency to gauge the volume of bushmeat imports into the UK. It seems inconceivable that HM Customs is not collecting such data because it is under a statutory duty to prevent the importation of endangered species into the UK. Bushmeat production in central African countries is huge, though not all the meat is from endangered species. For example, average annual consumption in Gabon—a relatively rich central African country having a population of only about 1.3 million—was estimated in 1990 to stand at 48,000 tons.<sup>6</sup> Throughout central Africa, bushmeat consumption forms the principal source of protein for much of the population. But its uses are wider, having a cultural significance which helps to explain its importance for Africans living overseas. A report produced under the auspices of the Convention on International Trade in Endangered Species (CITES) thus states:

Regarding the various usages of bush meat, it is worth indicating that game breeding is not common practice or inclination amongst the traditional and cultural customs of the sub-region. About 98% of the meat obtained from unauthorized hunting or poaching is used for consumption, trading of bush meat and other products derived from processing of this resource, medicomagical uses (making of talismans for protection against bewitchment and for success in hunting activities, healing of burns and other wounds, using the hairs of the Bosman Potto) constitute other varied uses.<sup>7</sup>

It is argued here that new legislation is required to encourage joined up and more effective enforcement action. Animal welfare, food safety and public health issues are involved in the bushmeat trade. Regulatory legislation treats these issues as though they were separate (as do the enforcement authorities). This trade depends on cruel methods being used to catch the animals; crude and dangerous processes to preserve the meat; with unsatisfactory methods of storage, further processing and trading being employed in the receiving country. The potential for harm is very serious indeed. There are even reports of people being infected by such serious diseases as HIV and Ebola virus as a result of hunting, butchering or eating bushmeat animals.<sup>8</sup>

A weak enforcement culture prevails in both exporting and receiving countries. In the case of the former, the disproportion between the scale of the problem and the resources available to prevent the transition of wild animals into bushmeat is enormous. The enforcement culture in

<sup>5</sup> *Environmental Health News*, 25 January 2002, p. 1.

<sup>6</sup> *Study on Wildlife Legislation and Policies in Central African Countries*, Final Report, CITES BWG/IUCN, March 2003, p. 21, available at [www.cites.org/common/prog/bushmeat/rep\\_legislation.pdf](http://www.cites.org/common/prog/bushmeat/rep_legislation.pdf) (retrieved 15 November 2004).

<sup>7</sup> *Ibid.* at 10–11.

<sup>8</sup> *Bushmeat Crisis Taskforce*, Fact Sheet, June 2003, available at [www.bushmeat.org](http://www.bushmeat.org) (retrieved 15 November 2004).

the UK is weak for different reasons. In particular, the *Enforcement Concordat* has brokered a timid approach by regulatory authorities in the UK to bringing prosecutions.<sup>9</sup> Local authorities are encouraged to rely on less intrusive and more business-friendly methods of enforcement. This has occurred despite the number of food scares, such as the crisis over bovine spongiform encephalopathy (BSE), that have occurred during the past decade.<sup>10</sup>

An additional factor making enforcement action problematic is the hidden nature of the trade in bushmeat. Complaints made by members of the public are very unlikely to occur. The consumer will usually be aware that he is consuming food that is produced illegally, but may not appreciate the health risks of so doing. Consequently, enforcement action needs to be proactive and cannot rely on complaints being made to the local authorities. Priority needs to be given to targeting points of sale and distribution. Preparation of bushmeat for sale in this country is often carried out in filthy, unhygienic and shabby premises by people with little understanding of the health risks. Community work with African communities based in the UK needs to focus on the health risks to humans as well as on animal welfare considerations.

### **Prosecution for bushmeat sales**

Food premises where bushmeat is being prepared for sale and shops selling such meat are rarely discovered; consequently, the number of prosecutions brought by local authorities is minuscule. In December 2003—in a case in which I acted as prosecuting counsel—Paulina Owusu Pepra<sup>11</sup> received a prison sentence at Haringey Magistrates' Court of three months together with a life ban, which the court can impose under s. 11(4) of the Food Safety Act 1990, to prevent her from preparing food for sale. She was convicted of 23 charges, including breaches of the Food Safety (General Food Hygiene) Regulations 1995<sup>12</sup> and offences under the 1990 Act for running a food business in breach of a prohibition order and for selling food that was unfit for human consumption. To date, this is the heaviest sentence given in an English court for a food safety offence involving the selling of bushmeat. This sentence was reduced on appeal to the Crown Court to community service. The appeal succeeded in part, because the Crown Court found that the local authority had not proved that Mrs Pepra was the proprietor of the food premises—a requirement for breaches of the 1995 Regulations.

The prosecution was brought not for selling bushmeat *per se*, but because of the filthy conditions in which the food was stored, the

<sup>9</sup> *Enforcement Concordat*, Cabinet Office, March 1998.

<sup>10</sup> P. van Zwanenberg and E. Millstone, 'Mad Cow Disease 1980–2000: How Reassurances Undermined Precaution' in P. Harremoes, D. Gee, M. MacGarvin, A. Stirling, J. Keys, B. Wynne and S. Guedes Vaz (eds), *The Precautionary Principle in the 20th Century* (Earthscan: European Environment Agency, London, 2002).

<sup>11</sup> The case was reported in *Environmental Health News*, 9 January 2004; BBC News online, 6 January 2004.

<sup>12</sup> SI 1995 No. 1763.

unhygienic methods of preparation, and the unfitness of the food for human consumption. If similar cases are to be prosecuted more often, then new types of offence need to be enacted, a point which is considered further below.

### **Regulations on the products of animal origin and on endangered species**

Food products imported into the UK from non-EU countries are subject to veterinary checks carried out by port authorities at points of entry. The regulations currently in force in England are the Products of Animal Origin (Third Country Imports) (England) Regulations 2002.<sup>13</sup> Another set of regulations made under CITES provides the grounds for customs officers to seize and dispose of meat from endangered species that is imported illegally. The powers of customs officers are provided by the Customs and Excise Management Act 1979. Their forfeiture powers under s. 49(1) of the 1979 Act complement those enabling officers to prosecute persons involved in the importation of endangered species. Where there is improper importation with intent to defraud or to evade a prohibition or restriction, the penalties rise to a maximum of seven years' imprisonment.<sup>14</sup>

Although there are 38 separate offences specified under the 2002 Regulations—including such general ones as reg. 15, which makes it illegal to introduce products into England from a non-EU country which do not conform to the regulations—very few prosecutions have been commenced using this type of legislation. Neither are the regulations much utilised by local authorities to seize and destroy illegal meat products which have been moved from ports inland and nearer to the point of sale to the final consumer. The evidence suggests a lackadaisical approach to prosecution. Up to 4 February 2003, there had been one successful prosecution of a bushmeat case brought by a local authority and six cautions issued by the London Port Health Authority. HM Customs and Excise had prosecuted nobody under the CITES provisions in 2002<sup>15</sup> and three people in 2001.<sup>16</sup>

### **Food crime and the Food Safety Act 1990**

The Food Safety Act 1990 is the primary legislation dealing with food safety matters in the UK. Domestic and European regulations are also enforced under the Act.<sup>17</sup> Enforcement action undertaken by local authorities under the Act is generally based on the investigation of consumer complaints and on the inspection of premises where food is prepared, stored or offered for sale. The Food Safety Act 1990 creates

13 SI 2002 No. 1227. These regulations have been further amended in 2003 and 2004.

Similar regulations are in force for the rest of the UK.

14 Customs and Excise Management Act 1979, s. 50(2) and (3).

15 See above n. 4.

16 *Hansard*, House of Lords Written Answers for 10 May 2002, Lord Whitty.

17 Food Safety Act 1990, ss 16 and 17.

three substantive offences. A person may be prosecuted where there is evidence of:

- rendering food injurious to health, by adulteration;<sup>18</sup>
- selling food not complying with the food safety requirements due to adulteration, or because it is unfit for human consumption, or because it would not be reasonable to expect it to be used for human consumption in that state;<sup>19</sup>
- selling to the purchaser's prejudice any food which is not of the nature, or substance or quality demanded.<sup>20</sup>

The 1990 Act creates offences of a regulatory kind as distinct from those acts which could be described as 'truly criminal' or as 'real crimes'.<sup>21</sup> Regulatory offences involve breaches of acceptable norms of trading and need not involve dishonesty, although this may be an aspect in some offences. In practice, some form of culpability is usually required for the decision to prosecute to be made.<sup>22</sup> An intention to commit a wrongful act is required for certain offences under the Act, such as obstruction, and breach of an emergency prohibition order, or of a prohibition order. Further, to succeed with an adulteration offence under s. 7, the prosecution needs to prove that the adulterated food was intended for sale, but not that the accused intended to render the food in an adulterated state. Section 3(3) of the Act provides that any food commonly used for human consumption shall be presumed, unless the contrary is proved, to be intended for sale if found on premises used for the preparation, storage or sale of that food. Whether this presumption applies in a bushmeat case is arguable since it would need to constitute food that is *commonly* used for human consumption. Another problem for prosecuting authorities is that the seizure will not always take place on premises, but may be made in transit, whilst the meat is being transported.

Offences that require the prosecution to prove intention form a secondary arm of food safety enforcement. The majority of charges brought under the Food Safety Act 1990 are based on crimes of strict liability. A due diligence defence is normally available to the accused, so that liability for the particular offence should fall on the person or persons who are truly responsible. These strict liability offences include breaches of the food regulations as well as of ss 8 and 14 of the 1990 Act. The problem with strict liability offences is that they tend to be treated very leniently by the courts and even serious offenders receive custodial sentences extremely rarely. It has been argued that Parliament intended them to be of lesser seriousness by not requiring a mental element to be proved by the prosecutor.<sup>23</sup>

18 Food Safety Act 1990, s. 7.

19 *Ibid.* s. 8.

20 *Ibid.* s. 14.

21 C. Wells, *Corporations and Criminal Responsibility*, 2nd edn (Oxford University Press: Oxford, 2001) ch. 1.

22 R. Malcolm and J. Pointing, *Food Safety Enforcement* (CIEH: London, 2005) ch. 5.

23 A. Ashworth, 'Towards a Theory of Criminal Legislation', *Criminal Law Forum*, 1989, 1, 41.

Academic lawyers often draw a distinction between crimes of social and economic regulation.<sup>24</sup> The purpose is to distinguish between regulatory crimes which damage the economy from those limited to harming the interests of consumers.<sup>25</sup> The latter are seen as less significant because breaches of consumer rights, unlike major fraud, do not challenge the capitalist system of production.<sup>26</sup> This analysis is helpful in explaining the lack of effective legislation to tackle very serious food crimes. Considering the routine level, since the Food Safety Act came into force in 1990, offenders have been liable to broadly similar penalties to those convicted of such economic regulatory crimes as trading standards offences. It is true that trading standards legislation also provides for some very serious offences. For example, s. 92 of the Trade Marks Act 1994 makes it an offence punishable by an unlimited fine and/or up to 10 years in prison—if tried in the Crown Court—for the unauthorised use of a trade mark in relation to goods. One can appreciate that breaches of trade marks and similar offences, if left unregulated or where the controls were ineffective, could pose a threat to the economic system.

However, food safety offences can be quite severely punished and attract similar penalties to many trading standards offences. Offences under ss 7, 8 and 14 of the Food Safety Act 1990 attract maximum sentences in the magistrates' courts of six months' imprisonment and/or a maximum fine of £20,000. Breaches of regulations enforced under the Act are generally imprisonable, with fines limited to the statutory maximum of £5,000 being available in the magistrates' courts.

Most food safety offences, whether for breaches of regulations or of ss 7, 8 or 14 of the Act, are triable either way. Crimes of greater seriousness or complexity can be tried in the Crown Court, which may impose sentences of up to two years in prison and/or an unlimited fine. This first became a possibility with the enactment of the Food and Drugs (Amendment) Act 1982 and reflects a shift in opinion as regards the increasing seriousness of food safety offences.<sup>27</sup> But this has been a small movement. The vast majority of cases are tried in the magistrates' courts and it is very rare even for serious and recidivist food offenders to be jailed, even where there is evidence of a flagrant disregard for the law or where there has been a pattern of negligent acts or omissions.<sup>28</sup> A similar position applies in other social regulatory fields. For example, it was only in 1995—more than 20 years since the Health and Safety at Work, etc.

24 G. Slapper and S. Tombs, *Corporate Crime* (Longman: Harlow, 1999) 195.

25 A. Ashworth, 'Defining Offences without Harm' in P. Smith (ed.), *Criminal Law: Essays in Honour of J. C. Smith* (Butterworths: London, 1987) 8.

26 W. Friedmann, *Law in a Changing Society*, 2nd edn (Penguin: Harmondsworth, 1972).

27 See Malcolm and Pointing, above n. 22 at ch. 1.

28 The Food Standards Agency has done little to promote changes in sentencing going beyond encouraging the exchange of views between enforcement officers and magistrates. See the report, *Food Law Offences*, available at [www.foodstandards.gov.uk/aboutus/ourboard/boardmeetoccasionalpapers/foodoffencesentencing](http://www.foodstandards.gov.uk/aboutus/ourboard/boardmeetoccasionalpapers/foodoffencesentencing) (retrieved 15 November 2004). Recently, there has been evidence of taking matters more seriously, see *Illegal Meat: Enforcement Guidance for Local Authority Officers in England* (Food Standards Agency: July 2004).

Act 1974 was brought into force—when a convicted person was first jailed for an offence against that Act.<sup>29</sup>

Whether a greater willingness by the courts to send serious food offenders, including directors and managers of registered companies, to jail would have a deterrent effect on potential offenders is problematic. The publicity effect of a successful prosecution, combined with appropriate financial penalties, close monitoring of the company post-conviction and imaginative forms of community service for guilty directors are argued by some US commentators to be effective.<sup>30</sup> However, where the corporate structure is simple and the name of the company unmemorable, the 'shame' factor of conviction is unlikely to be significant. Food producers who commit serious food offences are not usually very visible: 'back street' producers and retailers maintain a low profile and can close down an operation only to set up another relatively easily.

A further penalty which may be imposed along with a fine, imprisonment or other type of sentence, in either the magistrates' court or the Crown Court, is a prohibition order made under s. 11(4) of the Food Safety Act 1990. The effect of such an order is that the proprietor of a food business, on conviction for the breach of any regulation that involves a risk of injury to health, may be prohibited from participating in the management of any food business. Section 11 provides the court with a power to impose such an order if it thinks it proper to do so after taking into account all the circumstances of the case. This would appear to be a draconian measure, particularly since the duration of the order is indefinite, that also requires the subject to apply to the court to have it lifted. It is very rarely imposed to control the activities of the directors or managers of larger, established businesses and seems to be used where it is least effective: with respect to those running small 'fly-by-night' concerns.

### **'Real' crime**

Food safety legislation is geared to controlling legitimate businesses which have failed to deliver adequate quality or standards with respect to food at some stage of the production process. It is premised on enforcement officers being able to exert a positive influence upon well-run businesses as well as on those found to be deficient in some way. The legislation is also targeted on businesses whose proprietors and managers are found to be incompetent, or wanting in some significant respect. Even though the Food Safety Act 1990 increased the powers available to the courts, it has not proved effective in regulating those food crimes which may be described as being truly of a criminal nature. Such crimes are 'beyond regulation' and are likely to occur when the system of

29 Slapper and Tombs, above n. 24 at 220.

30 A. Etzioni, 'The US Sentencing Commission on Corporate Crime: A Critique' in G. Geis and P. Jesilow (eds), *White-Collar Crime. Special Issue of the Annals of the American Academy of Political and Social Science* (Sage: Newbury Park, CA, 1993) 525; Wells, above n. 21 at ch. 2.

control, based on persuading and educating persons who are often well known to enforcers, is found to be ineffective or has broken down.<sup>31</sup> 'Beyond regulation' cases occur where:

1. there is a deliberate flouting of the law;
2. offences are committed for financial gain, stimulated by the prospect of making huge amounts of money;
3. the crimes indicate a high degree of planning and organisation;
4. little or no consideration is given to risks to public health.

The preparation for sale of bushmeat has all these characteristics, as does the trade in 'smokies' and offences that introduce condemned meat into the food chain. Offences of a truly criminal nature have sometimes been prosecuted using conspiracy and fraud charges rather than those founded on breaches of food law. General criminal charges requiring proof of intent have been preferred by prosecutors because these reflect the reality of the offence more accurately than those based on the Food Safety Act. The maximum sentences available on conviction for fraud and conspiracy to defraud are considerably higher, with prison sentences being likely to be handed down to convicted persons. But such offences are difficult to prove, particularly those based on conspiracy charges. Understandably, local authority prosecutors are extremely wary of using them and the Crown Prosecution Service tends to see them as only rarely applicable to food crime.<sup>32</sup>

At present there is a gap in the law because existing food safety legislation does not truly engage with 'beyond regulation' offences. The importation, supply and preparation for sale of bushmeat need to be considered as specific and more serious offences, as does the sale itself. Stringent financial penalties, prohibition orders giving powers to close down businesses and to prevent directors and employees from further engagement in the food industry, powers to give substantial prison sentences—such as up to 10 years—are required. Such penalties should be available in respect of importers, processors and retailers and should be applied to companies as well as to individual directors.<sup>33</sup> For these more serious offences, proof of criminal intent will be necessary to avoid the limitation with crimes of strict liability—that sentencers will rarely impose penalties to match culpability.<sup>34</sup> To leave things as they are will jeopardise public health and make the extinction of non-human primates in central Africa more likely.

31 Malcolm and Pointing, above n. 22 at ch. 9.

32 See S. Spear, 'Stamping Out Meat Crime', *Environmental Health Journal*, August 2004, pp. 236–9.

33 This could include financial penalties based on a percentage of annual turnover as can apply in the USA; see Slapper and Tombs, above n. 24 and Wells, above n. 21 for further discussion of corporate penalties.

34 In *R v Sandhu* [1997] Crim LR 288 it was held that culpability with respect to strict liability offences was relevant to mitigation though not to liability.