

## Appendix V

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### Supplementary materials and exercises on Chapters 7–8 and 10

This Appendix begins with a short section on alternative methods of classifying legislation. The sections that follow comprise a sequence of increasingly difficult exercises on legislation and its interpretation. In some instances the texts to be studied are provided; in other cases they will need to be found.

#### 1 Classifying legislation by subject matter (Chapter 7, section 2.7)

There are alternatives to the classification of statutes according to the chronology of their receiving the Royal Assent. *Halsbury's Statutes*, *Halsbury's Laws*, and before it was superseded by the *Statute Law Database*, *Statutes in Force*, employ subject-based systems: subject-based classification assembles legislation that is considered to belong to a common category under a single title, such as agency, agriculture, ancient monuments and memorials, animals, etc., and within each title is further arranged chronologically. The advantage of this system for the user is that she knows that all the provisions relating to a given matter, such as theft or divorce, will be found under one heading. The disadvantage for the legislative process is that a formal system of this kind will result in a large number of statutes, as amendments would have to be separately enacted where they concern separate subjects. An initial difficulty that affects any subject-based classification concerns the choice of categories that are to be used. Although there are many well-established legal categories, they are neither uncontroversial nor immutable. Individual statutory provisions do not present themselves as members of readily defined groupings, and there may be genuine disagreement as to the appropriateness of choosing one category in preference to another. Thus the categories currently employed by the two main subject-based indexing systems vary both in total number and in the criteria upon which their individual subject groupings are based. These include abstract legal categories (e.g. tort), the control of public services (e.g. gas) and activities (e.g. town and country planning), the control of private services (e.g. carriers) and activities (e.g. factories), and institutional arrangements (e.g. local government). Arguably unsatisfactory, these variations may simply reflect the absence of any one classificatory basis to English law.<sup>1</sup>

<sup>1</sup> F. Lawson, 'Analysing a Legal System', *Juridical Review* [1982], 161; J. Jolowicz (ed.), *Division and Classification of Law* (1969).

## 2 Reading and analysing Acts of Parliament

Choose any recent Act of Parliament and examine it with the following matters in mind:

- (a) from the definition section, find examples of an exhaustive and a non-exhaustive definition, connotative and denotative definitions, a definition imported from an earlier Act of Parliament, and a technical definition;
- (b) find examples of the following powers: to make subordinate legislation, to arrest without warrant, to enter premises, and to seize property;
- (c) if the Act amends earlier legislation, does it do so textually or non-textually?;
- (d) to what parts of the United Kingdom does the Act apply?;
- (e) when does the Act come into force?;
- (f) can you identify any instances of poor drafting, as exemplified as condition 13 in the diagnostic model (Chapter 6)?

Not all Acts will contain instances of every matter mentioned above but, for example, the Police and Criminal Evidence Act 1984 (section 5 below) and the Wildlife and Countryside Act 1981 and the Wildlife and Countryside (Amendment) Act 1985 (section 6 below) contain many of them.

## 3 Secondary legislation: prison rules

The Prison Rules made under the Prisons Act 1952 concern the detailed management of a prison and of a prisoner's life. Rule 35 of the Prison Rules 1999 (SI 1999/728) deals with prisoners' personal letters and their visitors.

Personal letters and visits

35. –(1) Subject to paragraph (8), an unconvicted prisoner may send and receive as many letters and may receive as many visits as he wishes within such limits and subject to such conditions as the Secretary of State may direct, either generally or in a particular case.

- (2) Subject to paragraph (8), a convicted prisoner shall be entitled –
  - (a) to send and to receive a letter on his reception into a prison and thereafter once a week; and
  - (b) to receive a visit twice in every period of four weeks, but only once in every such period if the Secretary of State so directs.
- (3) The governor may allow a prisoner an additional letter or visit as a privilege under rule 8 or where necessary for his welfare or that of his family.
- (4) The governor may allow a prisoner entitled to a visit to send and to receive a letter instead.
- (5) The governor may defer the right of a prisoner to a visit until the expiration of any period of cellular confinement.
- (6) The board of visitors may allow a prisoner an additional letter or visit in special circumstances, and may direct that a visit may extend beyond the normal duration.
- (7) The Secretary of State may allow additional letters and visits in relation to any prisoner or class of prisoners.

- (8) A prisoner shall not be entitled under this rule to receive a visit from:
- (a) any person, whether or not a relative or friend, during any period of time that person is the subject of a prohibition imposed under rule 73; or
  - (b) any other person, other than a relative or friend, except with the leave of the Secretary of State.
- (9) Any letter or visit under the succeeding provisions of these Rules shall not be counted as a letter or visit for the purposes of this rule.

### QUESTIONS

- 1 In what ways could the implementation and interpretation of rules 33 and 34 constitute rewards or punishments?
- 2 Construct an algorithm designed to tell a prisoner what restrictions if any exist upon his sending and receiving letters while in prison.
- 3 Construct an algorithm designed to tell a prisoner what restrictions if any exist upon his receiving visitors while in prison.
- 4 During the 1970s and 1980s a number of prisoners who had been refused access to legal advice successfully sought to show that refusal constituted a violation by the United Kingdom government of rights contained in the European Convention on Human Rights (ECHR). At the same time, the courts became increasingly prepared to subject the decisions of the prison authorities to judicial review. An important judgment was that of the House of Lords in *Raymond v. Honey* [1983] 1 AC 1. Read Lord Wilberforce's speech in that case and answer the questions that follow.
  - (a) Lord Wilberforce refers to a number of rules of varying authority. Place the rules to which he refers in order of ascendancy.
  - (b) Lord Wilberforce discusses the ECHR and the decision of the European Court of Human Rights in *Colder v. United Kingdom*. What authority did this Convention and the decision of the Court of Human Rights have in the law of the United Kingdom at the time of the decision in *Raymond v. Honey*?
  - (c) What would have been the effect of the Human Rights Act 1998 had the facts in *Raymond v. Honey* arisen after the Act came into force?
  - (d) Suppose that a prisoner has a friend outside the prison who happens to be a journalist. Is a prison governor acting *ultra vires* Rule 35 when he requires the friend to give an undertaking that he will not use any communications from the prisoner for the purpose of writing an article in a newspaper? Is such a requirement in breach of Article 8 of the ECHR? See *R v. Secretary of State for the Home Department, ex p Simms* [1998] 2 All ER 491.
  - (e) Rules 38 and 39 of the Prison Rules deal with a prisoner's access to legal advice and correspondence with a legal adviser. Do these rules meet the requirements identified in *Raymond v. Honey*?
- 5 Find a copy of the HM Inspectorate of Probation's inquiry into the management of probation hostels, *Not Locked up but Subject to Rules* (March 2007). Read section 5, and in particular ss. 5.5-5.7. In what ways might the

implementation of the regime described there constitute rewards or punishments of the detained offenders?

#### **4 'Hard' and 'soft law':<sup>2</sup> the Highway Code: safety at zebra crossings**

Two of the rules which motorists must observe when approaching a zebra crossing are (a) to give precedence to pedestrians, and (b) not to overtake any other vehicles. Regulation 25 of the Zebra, Pelican and Puffin Pedestrian Crossings Regulations 1997, SI 1997/ 2400 made under the Road Traffic Regulation Act 1984 reads:

Every pedestrian, if he is on the carriageway within the limits of a Zebra crossing, which is not for the time being controlled by a constable in uniform or traffic warden, before any part of a vehicle has entered those limits, shall have precedence within those limits over that vehicle and the driver of the vehicle shall accord such precedence to any such pedestrian.

(2) Where there is a refuge for pedestrians or central reservation on a Zebra crossing, the parts of the crossing situated on each side of the refuge for pedestrians or central reservation shall, for the purposes of this regulation, be treated as separate crossings.

Paragraph 195 of *The Highway Code* (2007) (which is accompanied by a picture of a zebra crossing not reproduced here) puts the obligation this way:<sup>3</sup>

Zebra crossings. As you approach a zebra crossing

- look out for pedestrians waiting to cross and be ready to slow down or stop to let them cross
- you **MUST** give way when a pedestrian has moved onto a crossing
- allow more time for stopping on wet or icy roads
- do not wave or use your horn to invite pedestrians across; this could be dangerous if another vehicle is approaching
- be aware of pedestrians approaching from the side of the crossing

A zebra crossing with a central island is two separate crossings (see Rule 20)

So far as overtaking is concerned, paragraph 24 of the 19971 Regulations reads:

(1) Whilst any motor vehicle (in this regulation called "the approaching vehicle") or any part of it is within the limits of a controlled area and is proceeding towards the crossing, the driver of the vehicle shall not cause it or any part of it-

(a) to pass ahead of the foremost part of any other motor vehicle proceeding in the same direction; or

(b) to pass ahead of the foremost part of a vehicle which is stationary for the purpose of complying with regulation 23, 25 or 26

(2) In paragraph (1)-

(a) the reference to a motor vehicle in sub-paragraph (a) is, in a case where more than one motor vehicle is proceeding in the same direction as the approaching vehicle a reference to the motor vehicle nearest to the crossing; and

<sup>2</sup> On 'soft law' see Chapter 1, section 8.5(c)

<sup>3</sup> ([www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG\\_070339](http://www.direct.gov.uk/en/TravelAndTransport/Highwaycode/DG_070339))

(b) the reference to a stationary vehicle is, in a case where more than one vehicle is stationary in a controlled area for the purpose of complying with regulation 23, 25 or 26 a reference to the stationary vehicle nearest the crossing.

***The Highway Code says (paragraph 190):***

You MUST NOT park on a crossing or in the area covered by the zig-zag lines. You MUST NOT overtake the moving vehicle nearest the crossing or the vehicle nearest the crossing which has stopped to give way to pedestrians.

**QUESTIONS**

- 1 What are the main differences in style and scope between the formulations in the *Highway Code* and the regulations?
- 2 For what purposes were the different formulations intended, and do you think that they succeed?
- 3 What has been lost and what has been gained as a result of the simplification in the *Highway Code*?
- 4 Which formulation do you think is most likely to lead to practical difficulties in interpretation?
- 5 Can you think of any other ways in which the rules contained in the regulations could be set out so as to help drivers and pedestrians understand how to behave at zebra crossings?
- 6 Section 5(1) of the Road Traffic Regulation Act 1984 provides that: '[A] person who contravenes a traffic regulation order, or who uses a vehicle, or causes or permits a vehicle to be used in contravention of a traffic regulation order, shall be guilty of an offence.' Section 38(7) of the Road Traffic Act 1988 provides
 

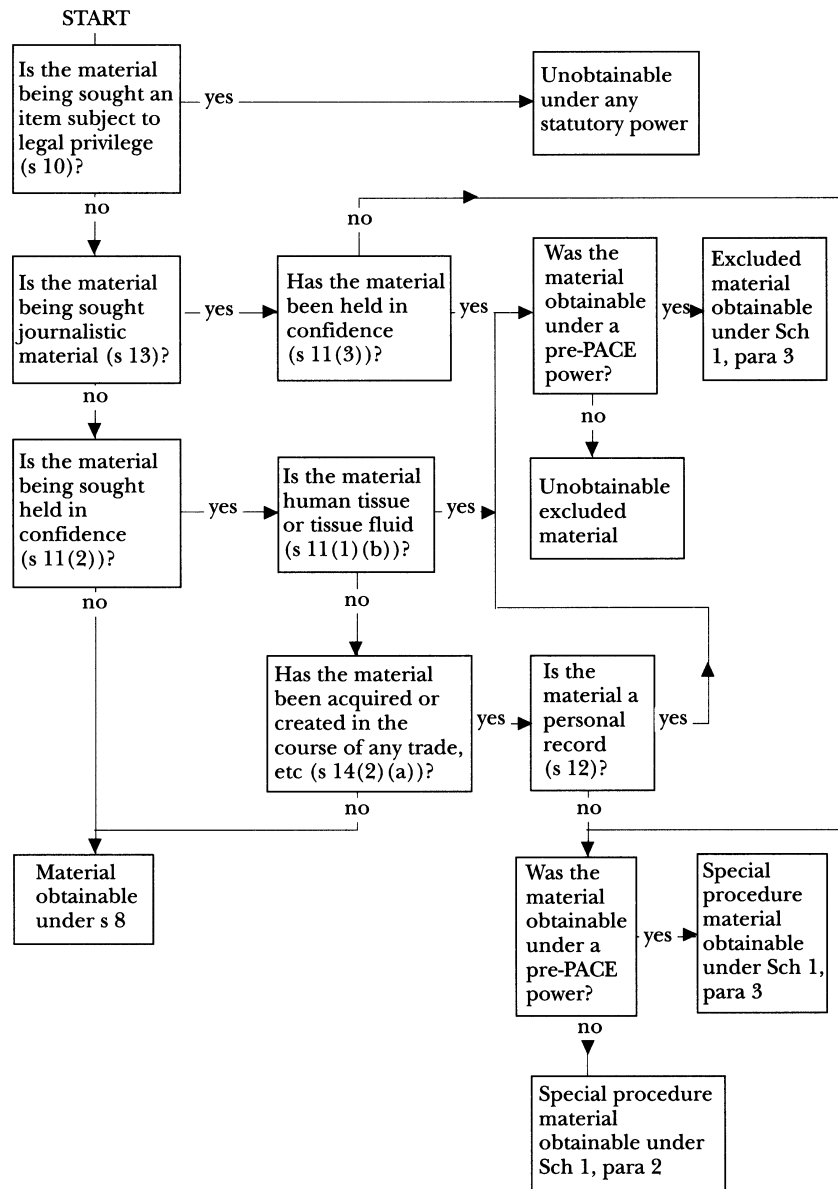
A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under the Traffic Acts, the [1981 c. 14.] Public Passenger Vehicles Act 1981 or sections 18 to 23 of the [1985 c. 67.] Transport Act 1985) be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings.
- 7 In what ways might the Highway Code be regarded as 'soft law'?

**5 Hard law: a complex rule and its interpretation**

Sections 8 to 14 of and Schedule 1 to the Police and Criminal Evidence Act 1984 permit the police to obtain a warrant to search for evidential material relevant to the investigation of an offence. They allow the police access to such material not only on premises occupied by a person suspected of the offence, but also on those occupied by someone who is not under suspicion. For this reason it was considered desirable that as the material became more sensitive to the holder, so the preconditions to the issue of a search warrant should become more onerous

for the police. Find and read these sections and the Schedule and then answer the following questions.

Determining the inter-relationships between the various categories of material specified in these sections, and identifying the correct set of access conditions as set down by Schedule 1, is not a simple task. One way of easing the



Simplified algorithm designed to show the interrelationship of ss. 8-14 of and Sched. 1 to the Police and Criminal Evidence Act 1984

burden is to recast the principles in the form of an algorithm to allow the reader to eliminate more quickly alternatives that do not apply.

### QUESTIONS

- 1 What conditions apply to the following items of relevant evidential material:
  - (a) the patient records of a registered medical practitioner;
  - (b) the client records of a faith healer;
  - (c) the pupil records of a school;
  - (d) the client records of the probation service;
  - (e) the client records held by an accountant;
  - (f) the video tape held by a journalist recording his interviews with members of an animal liberation group suspected of acts of arson;
  - (g) a piece of blood-stained clothing sent anonymously to a journalist by someone alleging that it belongs to a man suspected of rape;
  - (h) pieces of glass taken from the body of a man suspected of being involved in the rape of a young girl which are held by a doctor who has been struck off the medical register;
  - (i) pieces of human skin held by the same person as in (h), taken from under the fingernails of a man suspected of being involved in the rape of a young girl;
  - (j) the same two items as in (h) and (i) held by the man's solicitor?
- 2 Section 10(2) says: 'Items held with the intention of furthering a criminal purpose are not items subject to legal privilege'. Suppose you are a solicitor. Over the past few years you have been giving advice to a client concerning the purchase and sale of some houses. Some of the client's funds have been supplied to her by one of her relatives. It now appears that, wholly unknown to your client, the funds were the proceeds of a series of frauds committed by the relative and some accomplices, who have been looking for ways in which to invest their gains in order to hide them from the police, known as money laundering. Because the police have been conducting their enquiries in secret and do not wish to alert the suspects, whom they believe are engaged in another crime, they successfully applied for a production order under para. 12 of Schedule 1 to compel you to disclose to them all the documents concerning your client's property transactions. Do you think that these documents are 'items subject to legal privilege'?
- 3 When you have given this some thought, read the speeches of Lord Bridge and Lord Goff in *R v. Central Criminal Court, ex p Francis & Francis (a firm)* [1989] AC 346. This case illustrates firstly the difficulties to which complexity in legislation can lead – in particular the use of the passive voice, and second, two of the most common arguments that courts (and other interpreters) use when interpreting rules, especially statutory rules: arguments concerning the language of the rule, and arguments concerning its purpose. Now answer the following questions.

- (a) What would be the scope of s. 10(2) if it had been worded as follows: 'Items made with the intention of furthering a criminal purpose are not items subject to legal privilege'?
  - (b) Redraft s. 10(2) so that it more clearly indicates (i) what the majority concluded that it meant; and (ii) what the minority concluded that it meant.
  - (c) Do you think that Lord Bridge's distinction between positive and negative absurdity is one that properly differentiates legitimate from illegitimate interpretation by a court?
  - (d) When rejecting Lord Goff's argument that because it would be absurd if legal privilege were to extend to an item once the holder had effected his criminal purpose, the words must be interpreted as including anyone holding the items so long as someone once had a criminal purpose, Lord Bridge does not regard the temporal implication ('entertained ... at any time') as illegitimate, but does regard the implication that this can be held by anyone as being so. Is he being consistent when he accepts one implication and rejects another?
  - (e) In what ways does Lord Goff differ from Lord Bridge in his analysis of the relationship between s. 10(2) and the case *R v. Cox and Railton*?
  - (f) Can you see any danger to civil liberties in the majority's view that the police's efforts to investigate crime will be hampered if legal privilege should extend to items in respect of which the client has a criminal purpose, but where the solicitor is innocent?
  - (g) Analyse the speeches of Lords Bridge and Goff in terms of Summers's distinctions between authority, substantive and institutional reasons for decisions (see Chapter 11, p. 111ff.).
- 3 In dismissing the appeal by a majority of 3:2, their Lordships' speeches in *ex p Francis & Francis* also illustrate a second perennial debate concerning the proper role of the judiciary when interpreting legislation whose language does not meet the task for which it was apparently intended; as Lord Oliver (who was in the minority with Lord Bridge) put it (at p. 390 of the Law Report), the question whether the courts should fill a lacuna 'involves stepping outside the judicial role and assuming, without the benefit of public discussion or debate, that mantle which is properly reserved to the legislature alone'
- What assumptions about the role of the courts in a democracy does this remark make?
- 4 In an extrajudicial comment on *ex p Francis & Francis*, Lord Oliver disclosed that, following the decision, he had checked Hansard to see whether the interpretation reached by the majority was the one that the government had intended. He concluded that the Minister's replies to questions about s. 10(2) were 'consistent only with its having been inserted to cover the case of a holder who himself was a party to the criminal purpose. So the draftsman clearly did exactly what he was instructed to do...'. ('A Judicial View of Modern Legislation', *Statute Law Review*, 14 (1993) 1, 7); in other words, that the minority's understanding of the section's purpose and scope was right.



Suppose that this information had been before the House (it heard *ex p Francis & Francis* before the decision in *Pepper v. Hart*): would the majority, if it wished to pursue its interpretation of s. 10(2), have been bound to adopt the Minister's replies?

## 6 Implementing a European directive

The examples in this section are drawn from a complex legislative regime, substantially the product of European Community initiatives, designed to protect the environment (see further Jane Holder and Maria Lee, *Environmental Protection, Law and Policy* (2nd edn, 2007). They deal in particular with the protection of wild fauna. The legislative chronology is that in 1981 the United Kingdom Parliament enacted the Wildlife and Countryside Act whose broad purpose was to establish a legal framework for environmental protection. Sections 9–11 created offences of killing wild animals, together with some defences. In 1992 the European Community, building on an earlier initiative, adopted Directive 92/43/EEC on the conservation of the habitats of wild fauna and flora. Article 12 of the Habitats Directive imposes an obligation on Member States to establish a system of strict protection for specified animal species, to which Article 16 allows for some exceptions (called derogations). This Directive was transposed into United Kingdom law by statutory instrument – the Conservation (Natural Habitats, etc.) Regulations 1994 (SI 1994/2716). Regulation 39 creates offences of harming wild animals, regulation 40 creates some exceptions to those offences, while regulation 41 prohibits particular methods of taking or killing wild animals. Further reference is made to these provisions in Chapter 10, section 1.1(a).

### 6.1 Sections 9–11 of the Wildlife and Countryside Act 1981

Protection of certain wild animals

9.(1) Subject to the provisions of this Part, if any person intentionally kills, injures or takes any wild animal included in Schedule 5, he shall be guilty of an offence.

(2) Subject to the provisions of this Part, if any person has in his possession or control any live or dead wild animal included in Schedule 5 or any part of, or anything derived from, such an animal, he shall be guilty of an offence.

(3) A person shall not be guilty of an offence under subsection (2) if he shows that—

(a) the animal had not been killed or taken, or had been killed or taken otherwise than in contravention of the relevant provisions; or

(b) the animal or other thing in his possession or control had been sold (whether to him or any other person) otherwise than in contravention of those provisions; and in this subsection “the relevant provisions” means the provisions of this Part and the Conservation of Wild Creatures and Wild Plants Act 1975.

- (4) Subject to the provisions of this Part, if any person intentionally—
  - (a) damages or destroys, or obstructs access to, any structure or place which any wild animal included in Schedule 5 uses for shelter or protection; or
  - (b) disturbs any such animal while it is occupying a structure or place which it uses for that purpose, he shall be guilty of an offence.
- (5) Subject to the provisions of this Part, if any person—
  - (a) sells, offers or exposes for sale, or has in his possession or transports for the purpose of sale, any live or dead wild animal included in Schedule 5, or any part of, or anything derived from, such an animal; or
  - (b) publishes or causes to be published any advertisement likely to be understood as conveying that he buys or sells, or intends to buy or sell, any of those things, he shall be guilty of an offence.
- (6) In any proceedings for an offence under subsection (1) (2) or (5) (a) the animal in question shall be presumed to have been a wild animal unless the contrary is shown.

#### Exceptions to s. 9

10. (1) Nothing in section 9 shall make unlawful—
  - (a) anything done in pursuance of a requirement by the Minister of Agriculture, Fisheries and Food or the Secretary of State under section 98 of the Agriculture Act 1947, or by the Secretary of State under section 39 of the Agriculture (Scotland) Act 1948; or
  - (b) anything done under, or in pursuance of an order made under, the Animal Health Act 1981.
- (2) Nothing in subsection (4) of section 9 shall make unlawful anything done within a dwelling-house.
- (3) Notwithstanding anything in section 9, a person shall not be guilty of an offence by reason of—
  - (a) the taking of any such animal if he shows that the animal had been disabled otherwise than by his unlawful act and was taken solely for the purpose of tending it and releasing it when no longer disabled;
  - (b) the killing of any such animal if he shows that the animal had been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering; or
  - (c) any act made unlawful by that section if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided.
- (4) Notwithstanding anything in section 9, an authorised person shall not be guilty of an offence by reason of the killing or injuring of a wild animal included in Schedule 5 if he shows that his action was necessary for the purpose of preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.
- (5) A person shall not be entitled to rely on the defence provided by subsection (2) or (3) (c) as respects anything done in relation to a bat otherwise than in the living area of a dwelling-house unless he had notified the Nature Conservancy

Council of the proposed action or operation and allowed them a reasonable time to advise him as to whether it should be carried out and, if so, the method to be used.

(6) An authorised person shall not be entitled to rely on the defence provided by subsection (4) as respects any action taken at any time if it had become apparent, before that time, that that action would prove necessary for the purpose mentioned in that subsection and either—

- (a) a licence under section 16 authorising that action had not been applied for as soon as reasonably practicable after that fact had become apparent; or
- (b) an application for such a licence had been determined.

#### Prohibition of certain methods of killing or taking wild animals

11. (1) Subject to the provisions of this Part, if any person

- (a) sets in position any self-locking snare which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal coming into contact therewith;
- (b) uses for the purpose of killing or taking any wild animal any self-locking snare, whether or not of such a nature or so placed as aforesaid, any bow or crossbow or any explosive other than ammunition for a firearm; or
- (c) uses as a decoy, for the purpose of killing or taking any wild animal, any live mammal or bird whatever,

he shall be guilty of an offence.

(2) Subject to the provisions of this Part, if any person—

- (a) sets in position any of the following articles, being an article which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal included in Schedule 6 which comes into contact therewith, that is to say, any trap or snare, any electrical device for killing or stunning or any poisonous, poisoned or stupefying substance;
- (b) uses for the purpose of killing or taking any such wild animal any such article as aforesaid, whether or not of such a nature and so placed as aforesaid, or any net;
- (c) uses for the purpose of killing or taking any such wild animal—
  - (i) any automatic or semi-automatic weapon;
  - (ii) any device for illuminating a target or sighting device for night shooting;
  - (iii) any form of artificial light or any mirror or other dazzling device; or
  - (iv) any gas or smoke not falling within paragraphs (a) and (b);
- (d) uses as a decoy, for the purposes of killing or taking any such wild animal, any sound recording; or
- (e) uses any mechanically propelled vehicle in immediate pursuit of any such wild animal for the purpose of driving, killing or taking that animal,

he shall be guilty of an offence.

- (3) Subject to the provisions of this Part, if any person—
- (a) sets in position any snare which is of such a nature and so placed as to be calculated to cause bodily injury to any wild animal coming into contact therewith; and
  - (b) while the snare remains in position fails, without reasonable excuse, to inspect it, or cause it to be inspected, at least once every day,

he shall be guilty of an offence.

(4) The Secretary of State may, for the purpose of complying with an international obligation, by order, either generally or in relation to any kind of wild animal specified in the order, amend subsection (1) or (2) by adding any method of killing or taking wild animals or by omitting any such method as is mentioned in that subsection.

(5) In any proceedings for an offence under subsection (1)(b) or (c) or (2)(b) (c) (d) or (e), the animal in question shall be presumed to have been a wild animal unless the contrary is shown.

(6) In any proceedings for an offence under subsection (2) (a) it shall be a defence to show that the article was set in position by the accused for the purpose of killing or taking, in the interests of public health, agriculture, forestry, fisheries or nature conservation, any wild animals which could be lawfully killed or taken by those means and that he took all reasonable precautions to prevent injury thereby to any wild animals included in Schedule 6.

## 6.2 Articles 12 and 16 of the Habitats Directive 1992

### Protection of species

#### Article 12

(1) Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

- (a) all forms of deliberate capture or killing of specimens of these species in the wild;
- (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;
- (c) deliberate destruction or taking of eggs from the wild;
- (d) deterioration or destruction of breeding sites or resting places.

(2) For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this directive is implemented.

(3) The prohibition referred to in paragraph 1(a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

(4) Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation

measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

#### Article 16

(1) Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

- (a) in the interest of protecting wild fauna and flora and conserving natural habitats;
- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

### 6.3 Regulations 39-41 of the Conservation (Natural Habitats, etc.) Regulations

Protection of wild animals of European protected species

39. (1) It is an offence—

- (a) deliberately to capture or kill a wild animal of a European protected species;
- (b) deliberately to disturb any such animal;
- (c) deliberately to take or destroy the eggs of such an animal; or
- (d) to damage or destroy a breeding site or resting place of such an animal.

(2) It is an offence to keep, transport, sell or exchange, or offer for sale or exchange, any live or dead wild animal of a European protected species, or any part of, or anything derived from, such an animal.

(3) Paragraphs (1) and (2) apply to all stages of the life of the animals to which they apply.

(4) A person shall not be guilty of an offence under paragraph (2) if he shows—

- (a) that the animal had not been taken or killed, or had been lawfully taken or killed; or
- (b) that the animal or other thing in question had been lawfully sold (whether to him or any other person).

For this purpose 'lawfully' means without any contravention of these Regulations or Part I of the Wildlife and Countryside Act 1981.

(5) In any proceedings for an offence under this regulation, the animal in question shall be presumed to have been a wild animal unless the contrary is shown.

(6) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

#### Exceptions from regulation 39

40. (1) Nothing in regulation 39 shall make unlawful—

(a) anything done in pursuance of a requirement by the agriculture Minister under section 98 of the Agriculture Act 1947 or section 39 of the Agriculture (Scotland) Act 1948 (prevention of damage by pests); or

(b) anything done under, or in pursuance of an order made under, the Animal Health Act 1981.

(2) Nothing in regulation 39(1) (b) or (d) shall make unlawful anything done within a dwelling-house.

(3) Notwithstanding anything in regulation 39, a person shall not be guilty of an offence by reason of—

(a) the taking of a wild animal of a European protected species if he shows that the animal had been disabled otherwise than by his unlawful act and was taken solely for the purpose of tending it and releasing it when no longer disabled;

(b) the killing of such an animal if he shows that the animal has been so seriously disabled otherwise than by his unlawful act that there was no reasonable chance of its recovering; or

(c) any act made unlawful by that regulation if he shows that the act was the incidental result of a lawful operation and could not reasonably have been avoided.

(4) A person shall not be entitled to rely on the defence provided by paragraph (2) or (3) (c) as respects anything done in relation to a bat otherwise than in the living areas of a dwelling-house unless he had notified the appropriate nature conservation body of the proposed action or operation and allowed them a reasonable time to advise him as to whether it should be carried out and, if so, the method to be used.

(5) Notwithstanding anything in regulation 39 a person—

(a) being the owner or occupier, or any person authorised by the owner or occupier, of the land on which the action authorised is taken, or

(b) authorised by the local authority for the area within which the action authorised is taken,

shall not be guilty of an offence by reason of the killing or disturbing of an animal of a European protected species if he shows that his action was necessary for the purpose of preventing serious damage to livestock, foodstuffs, crops, vegetables, fruit, growing timber or any other form of property or fisheries.

(6) A person may not rely on the defence provided by paragraph (5) as respects action taken at any time if it had become apparent before that time that the action would prove necessary for the purpose mentioned in that paragraph and either—

(a) a licence under regulation 44 authorising that action had not been applied for as soon as reasonably practicable after that fact had become apparent, or

(b) an application for such a licence had been determined.

(7) In paragraph (5) 'local authority' means—

(a) in relation to England and Wales, a county, district or London borough council and includes the Common Council of the City of London, and

(b) in Scotland, a regional, islands or district council.

## Prohibition of certain methods of taking or killing wild animals

- 41.(1) This regulation applies in relation to the taking or killing of a wild animal—
- (a) of any of the species listed in Schedule 3 to these Regulations (which shows the species listed in Annex V(a) to the Habitats Directive, and to which Article 15 applies, whose natural range includes any areas of Great Britain), or
  - (b) of a European protected species, where the taking or killing of such animals is permitted in accordance with these Regulations.
- (2) It is an offence to use for the purpose of taking or killing any such wild animal—
- (a) any of the means listed in paragraph (3) or (4) below; or
  - (b) any form of taking or killing from the modes of transport listed in paragraph (5) below.
- (3) The prohibited means of taking or killing of mammals are—
- (a) blind or mutilated animals used as live decoys;
  - (b) tape recorders;
  - (c) electrical and electronic devices capable of killing or stunning;
  - (d) artificial light sources;
  - (e) mirrors and other dazzling devices;
  - (f) devices for illuminating targets;
  - (g) sighting devices for night shooting comprising an electronic image magnifier or image converter;
  - (h) explosives;
  - (i) nets which are non-selective according to their principle or their conditions of use;
  - (j) traps which are non-selective according to their principle or their conditions of use;
  - (k) crossbows;
  - (l) poisons and poisoned or anaesthetic bait;
  - (m) gassing or smoking out;
  - (n) semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition.
- (4) The prohibited means of taking or killing fish are—
- (a) poison;
  - (b) explosives.
- (5) The prohibited modes of transport are—
- (a) aircraft;
  - (b) moving motor vehicles.
- (6) A person guilty of an offence under this regulation is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

**QUESTIONS**

- 1 Compare reg. 40 of the statutory instrument with section 10 of the 1981 Act. Do they have the same legal content? In what ways do their structures differ?
- 2 Compare reg. 41 of the statutory instrument with section 11 of the 1981 Act. Which is easier to read, and why?
- 3 Analyse s. 11(1) of the Wildlife and Countryside Act 1981 and Article 12 of the Habitats Directive and regulation 39 of SI 1994/2716 in terms of their protasis and apodosis.

- 4 Construct algorithms designed to show (a) under what circumstances a person commits an offence of killing, injuring or taking a wild animal, and (b) the prohibited means by which a wild animal may be taken or killed?
- 5 Read *R (on the application of Boggis and another) v. Natural England* [2008] EWHC 2954, [2009] 3 All ER 879. What issue concerning the interpretation of the Habitats Directive arose in that case, and how were they resolved?

### 7 Plain language: Gobbledygook Test

The Gobbledygook Test is devised by the Plain English Campaign as a rough and ready way of rating the difficulty an untutored reader might experience when trying to comprehend a text. It measures the approximate level of difficulty of a piece of writing. It is a rough measure because it deals only with word length and sentence length: many other variables, like sentence structure and size of print, help to make reading easy or difficult. Never write just to please the test: a low score does not guarantee simplicity or clarity. Follow the instructions to work out the level of difficulty of the text, remembering that:

- numbers and symbols are counted as short words;
- hyphenated words are counted as two words; and
- a syllable, for the purpose of the test, is a vowel sound. So *advised* is two syllables, *applying* is three.

Instructions	Sample A	Sample B	Sample C	
1 Count a 100-word sample.				
2 Count the number of complete sentences in the sample and note the answer in the Sample A column.				2
3 Count the total number of words in all the complete sentences and note it in the Sample A column.				3
4 Find the average sentence length by dividing the answer for instruction 3 by the answer for instruction 2.				4
5 Count the number of words of three or more syllables in the full 100 words. This gives the percentage of long words in the sample.				5
6 Add the answers for instructions 4 and 5. This gives the test score for the sample.				
7 Repeat with two more samples, B and C.				
8 Add the three test scores.	Test scores A + B + C =			
9 Divide by three to get a final average score.	Average of A, B & C =			
10 Compare your score with the results below. (The lower the score, the more comprehensible the material is likely to be.)				



Woman magazine	25
Sun	26
Tit Bits	28
Daily Mirror	28
Daily Express	29
Daily Mail	31
Standard letter, BF 405 (Dept of Health and Social Security)	33
Morning Star	34
Daily Telegraph	34
The Times	36
The Guardian	39
'Cars' (Office of Fair Trading leaflet)	40
Notes to British Visitor's Passport Application Form	45
Standard letter (Dept of Employment)	49
'Conditions of Use' (Application for an ACCESS credit card)	49
(The calculations on newspapers were made on 14 July 1980.)	

\* Adapted from R. Gunning's FOG (frequency of gobbledygook) formula. The formula is considered the best for testing material for adult readers.

(The Gobbledygook Test is reprinted with the permission of the Plain Language Campaign, PO Box 3, New Mills, High Peak, Derbyshire, SK22 4QP.) First apply the test to some texts with which you are familiar. Then apply it to:

#### EXERCISE

- the Zebra crossing regulations and their explanation in the Highway Code in section 4 above;
- section 14 of the Police and Criminal Evidence Act 1984;
- the Prison Rules on letters;
- s 57 of the Offences Against the Person Act 1861; and
- s 1 of the Domestic Violence and Matrimonial Proceedings Act 1976.

### 8 Interpretation and *Pepper v. Hart*

Suppose (i) that an Act authorizes the deportation of persons described as being of class A; (ii) that during the debates on the scope of persons within class A, the Minister was specifically asked whether persons in sub-class A1 were included, to which she said, yes; (iii) that in its enacted form, there is some ambiguity in the formulation of A, so that it does not, on a straightforward interpretation, extend to persons in sub-class A1; (iv) that the immigration authorities are seeking to deport a person within that class; and (v) that you are representing A1's interest in not being deported. In a judicial review application, the immigration authorities cite the Minister's words in support of their proposed deportation of your client. What arguments can you put forward as to the limits to be placed on *Pepper v. Hart*?

## 9 The European dimension

### 9.1 Lotteries and the internal market

Read the decision of the CJEC in *Her Majesty's Customs and Excise v. Gerhart Schindler and Jorg Schindler*, Case C-275/92 [1994] ECR I-1039 and answer the following questions:

- (a) What was the Act of Parliament that was in issue before the Court?
- (b) What actions had the Department of Customs and Excise taken to which the Schindlers objected?
- (c) What in the Advocate-General's Opinion were the issues for the Court to decide?
- (d) How did the other Member States that submitted arguments think those issues should be decided?
- (e) What was the CJEC's decision?

### 9.2 Witness anonymity and Article 6 ECHR

On 1 January 2002 two persons were shot and killed following an all-night New Year's Eve party. In the subsequent trial for murder the trial judge permitted three witnesses to give their evidence against the defendants anonymously, from behind a screen so that the defendants could not see them, and with their voices modulated. The court also ordered that none of their personal details should be disclosed to the defendants or otherwise made public. Without their evidence, the defendants could not have been convicted. The defendants appealed, arguing that the judge's restrictions were contrary to the common law and inconsistent with article 6(3)(d) of the ECHR. The Court of Appeal (Criminal Division) rejected these submissions but certified the following point of law of general public importance as involved in its decision:

Is it permissible for a defendant to be convicted where a conviction is based solely or to a decisive extent upon the testimony of one or more anonymous witnesses?

The House of Lords upheld the appeal. This raised the immediate prospect of the collapse of a number of other trials for serious offences, which prompted the enactment of the Criminal Evidence (Witness Anonymity) Act 2008, re-enacted in Part 3, Chapter 2 of the Coroners and Justice Act 2009.

- (a) Read the judgement of the Court of Appeal in *Davis Ellis and others*[2008] EWCA Crim 1155 and write a summary the court's decision concerning the application of the European Court of Human Rights' interpretation of Article 6 to the facts of this case
- (b) Read the judgement of the House of Lords in *Davis Ellis and others*[2008] UKHL 36, [2008] 1 AC 1128 and write a summary of their Lordships' decision concerning the application of the European Court of Human Rights' interpretation of Article 6 to the facts of this case

- (c) Find the Report of the House of Lords Constitution Committee that scrutinized the Criminal Evidence (Witness Anonymity) Bill in 2008. What criticisms did the Committee make of the Bill?
- (d) Read sections 86–97 of the Coroners and Justice Act 2009. In what ways does the Act seek to ensure that the procedure for making a witness anonymity order complies with Article 6?