

HAS FORAGING GONE TOO FAR?

A number of recent interventions by the environmental authorities have suggested that the ancient practice of gathering wild foods is destructive, and possibly illegal. Foraging is increasingly banned on public land. DANIEL BUTLER of *Fungiforays* investigates.

Man first began collecting wild food in Britain at least 33,000 years ago, well before the last Ice Age. Over the centuries, first agricultural advances and then industrialisation saw its dietary importance steadily decline. Indeed, by the 19th century living on ‘weeds and toadstools’ was a humiliating badge of poverty. Worse, it was frighteningly reminiscent of the starving revolutionary French peasantry.

However, in the 1970s the pendulum began to swing back as Richard Mabey and Roger Phillips wrote pioneering books championing wild produce, notably Mabey’s seminal “*Food for Free*”. John Seymour’s books inspired an alternative culture that aspired towards self-sufficiency in defiance of inescapable urbanisation. And during the 1990s television chefs such as Antonio Carluccio and Hugh Fearnley-Whittingstall popularised the pursuit of wild foods even further.

Whether we are now collecting far more wild produce than ever before is debatable, but many conservation bodies have become increasingly alarmed at what they feel is a growing trend. They fear widespread collection could damage delicate ecosystems and even drive some plants or fungi to extinction. There have been particular issues with mushroom collecting in the New and Epping Forests, for example, while protected Roman snails are apparently being harvested on the North Downs, and seaweeds are being over-exploited along some coasts, on a scale inconsistent with domestic consumption.

Free Food Mongers?

The suggestion of ‘commercialism’ triggers particular sensitivities, reflected, for example, in lurid accounts of gangs of East Europeans damaging delicate ecosystems by stripping woods bare of valuable fungi which are then sold for huge sums to top London restaurants. How much this actually occurs is questionable. Issues of food traceability and food safety mean that few chefs would risk their reputations by sourcing from anywhere other than reputable wholesalers who generally find it far cheaper to import cleaned and graded wild produce. Any such “gangs” are more likely to be picking for home consumption, following the custom of their original countries.

Nevertheless, some bodies such as the Forestry Commission, Natural England and the National Trust are concerned enough at the perceived scale of current “hunting and gathering” to want to impose restrictions on foraging. The problem for the protectionists is that this aim falls between two legal stools – property and environmental legislation. The Theft Act specifically states: “A person who picks mushrooms growing wild on any land, or who picks flowers, fruit or foliage from a plant growing wild on any land, does not (although not in possession of the land) steal what he picks, unless he does it for reward or for sale or other commercial purpose.” This is sometimes cited as prohibiting harvesting for sale, but it is notable that the only successful prosecution on these grounds in the past half century was overturned on appeal (see below). Likewise

the Criminal Damage Act is obstructive. It defines property as: “not including mushrooms growing wild on any land or flowers, fruit or foliage of a plant growing wild on any land.”

Nor is the Wildlife and Countryside Act particularly helpful. This focuses mainly on habitats, although it does give specific protection to threatened animals, plants and a handful of fungi. Other than prohibiting the harvesting of such species, the only specific provision made in environmental law regarding foraging is the prohibition of ‘digging or uprooting any plant without prior consent from the landowner’.

In fact, if anything foraging is a long-established right under common law. Collecting wild plants and mushrooms has been decriminalised since at least the 1217 Charter of the Forest. This laid down that wild plants and mushrooms grew without man’s help, so therefore belong to no one. (Incidentally, it didn’t say the same about deer.)

Sanctions on Seakale

Despite this, last summer problems flared up in Kent. Miles Irving has been collecting the common, abundant and unprotected sea kale on the shingle banks at Dungeness since 2003. His company, Forager Ltd, collects a range of plants to supply top restaurants such as Heston Blumenthal’s Dinner, and Roast in London’s Borough Market. In August 2014 Natural England served a Stop Notice on Irving and his seven employees. This is a civil sanction to prevent activities which risk harming the environment. The notice claims that picking sea kale is harmful because it threatens the ability of other plants to colonise the shingle banks which give Dungeness its status as a Site of Special Scientific Interest (SSSI).

Irving appealed against the notice (which applies only to the eight people who work for Forager). He argued there was a lack of scientific evidence and the list describing other plants supposedly present was inaccurate. Most importantly, he claims the notice is incompatible with both UK and EU law. Despite this, the judge ruled against him at the first hearing. Miles is now appealing, but says this is mainly to maintain 800 years of common law which says that wild produce belongs to no one.

The case does, however, illustrate the legal muddle when it comes to gathering wild produce. In theory the Wildlife and Countryside Act confers nominal ownership of plants and animals on the landowner, but the reality is more complicated. A rabbit, flower or mushroom may belong to the landowner and anyone else requires permission to remove them. But doing so is not criminal – in other words it’s not theft. In theory an irate landowner could sue the miscreant for what are effectively damages. To be successful, however, they would have to establish that they had sustained a real loss because wild fungi or fruit have a genuine value to them. Such cases are extremely rare, but as the Forager Ltd. case and recent rumblings from the New Forest demonstrate, once again there is a gathering groundswell of protectionism.

Uncultivated

There are additional legal stumbling blocks for the protectionists. The law changes if one is in a place where one has a right to be. This is because although 19th century legislators made strenuous efforts to exclude the public from their sporting estates, in an 1887 prosecution of a mushroom forager under the Malicious Injuries to Property Act 1861, the court held that, as the mushrooms were not cultivated, they did not constitute property. This is now generally accepted even by major conservation bodies.

Under common law it is not an offence to pick the “Four F’s”; fruit, foliage, fungi or flowers which are growing wild if they are for personal use and not for sale. This provision does not apply if the species in question is specially protected, say by listing in Schedule 8 of the Wildlife and Countryside Act. This means that anyone can pick blackberries, take ivy and holly for Christmas, gather sloes, and pick mushrooms for themselves. However, this right can only be exercised where there is a legal right of access, in other words alongside a public footpath or in a public place.

What makes this particularly awkward for protectionists is that most of the areas they are anxious to protect are in fact open to the public — even those that are not, are frequently criss-crossed by foot- and bridlepaths. In theory collecting in such areas must still be restricted to personal use, but even this proviso was shaken by a case from the New Forest.

This is managed by the Forestry Commission which has long been worried by ‘commercial’ picking. Once again, while there is plenty of anecdotal evidence of heavy exploitation in some areas, there is little proof of actual damage and when pressed, the authorities cite the ‘precautionary principle’ defence. Thus for the past 20 years the Commission has tried to warn off ‘professionals’ by imposing a limit of 1.5kg of mushrooms per person on each visit.

Felonious Fungi

A local woman, Brigitte Tee-Hillman, had been openly picking and selling wild mushrooms gathered from the Forest since the 1970s. In 1998 she was told to stop and, after repeated brushes with wardens, in November 2002 she was arrested for collecting too many trumpet chanterelles. When the case came to court she was convicted under the Theft Act because her activities were ‘commercial’. She immediately appealed. Thirty two court hearings followed before, in 2006, the case was eventually thrown out by a judge who angrily complained that his role was to try cases of grievous bodily harm, not waste public money persecuting elderly ladies for picking mushrooms. Costs were awarded to Tee-Hillman and the Commission was faced with costs of almost £1 million. With considerable ill-grace the Commission issued her a unique harvesting licence, but it still sticks sulkily to its position that commercial mushroom picking is forbidden because it may damage fungal reproduction.

Actually, the only academic study in 50 years to suggest any detrimental impact from mushroom collecting, tentatively suggests this is not from harvesting per se, but from footfalls damaging the delicate mycelia beneath the leaf mould. In other words, harvesting is harmless, but mammalian activity in the woods might — theoretically — be harmful. As a senior advisor to

Natural Resources Wales told me some years ago:

The evidence is very flimsy, but even if it were conclusive, this is not a route we want to go down. Logically we would have to ban all humans and exclude or cull all deer and live-stock too.

But back to the New Forest case: the repercussions have been far-reaching because it set a damaging precedent. Tee-Hillman was undoubtedly helped by the fact that picking mushrooms is almost certainly harmless, but she was still flagrantly breaking a bye-law by openly picking for sale. Despite this, she could not be stopped.

For the next ten years the protectionists remained relatively subdued. There have been a few successful prosecutions in Epping Forest, but most of the miscreants have been foreign nationals who pleaded guilty and just paid the fine.

Can of Worms

Then came the 2015 Stop Notice served on Forager Ltd. last summer. This leaves Miles with a major headache, but actually the authorities may be opening up their own nasty can of worms. The reasons given for banning Miles and his team from collecting sea kale seem based in part on questionable assertions of damage to the ‘succession of vegetation’, but it also suggests that foragers venturing onto the shingle banks could cause damage. If this is a serious threat, why can anyone else wander around on the same banks? More importantly, if harvesting sea kale threatened the banks, why did Natural England raise no objection to a planning application (since granted) to extract 560,000 cubic metres of shingle from one end of the banks?



Sarah van Niekerk

Beachcombers Beware

Turning back to focus just on the principles involved in blanket restrictions on foraging, stopping the collection of plants and fungi presents complex legal problems. How can it be illegal to pick with a view to selling, yet permissible for a professional botanist to collect samples? There are dozens of foragers who lead educational forays, but in most it is the participants that pick the produce, not the group leader. Is this commercial? Certainly the tutor may charge for their expertise, but a teacher taking pupils to collect materials for a science or art class is also paid. Meanwhile scores of Womens' Institutes collect blackberries to make jams to raise money for charity. Can this be legal while the small business next door is barred from selling bilberry liqueur or elderflower champagne? Is it possible to draft legislation banning the active harvesting of seaweed while allowing the public to pick up flotsam along the tide line? And what about a parent who plucks a dock leaf to rub on their child's nettle sting?

It is certainly possible that foraging may cause genuine problems in some particularly delicate ecosystems and with a handful of identifiable species, but credible scientific proof of such damage is rare. As Dr Jennifer Lee of Liverpool University¹ and author of several studies on foraging law points out:

The theme of ambiguity is one that permeates the application of all law surrounding foraging - and I maintain this is intentional. The judicial system (both in its civil and crimi-

nal forms) does not want to set precedent on any issue surrounding foraging if it can avoid doing so and would rather leave the resolution of such matters to negotiation at the lowest level possible. Politicians are, as ever, pretty slow at figuring this out and continuously draft legislation without fully thinking through the consequences. We cling to our fissiparous and faintly ridiculous ancient laws because, through application and sometimes benign neglect - they seem to have worked (as for Brigitte Tee-Hillman).

In the wake of the Stop Notice against Forager Ltd, the informal national network of foray-leaders and other foragers which has been communicating with the authorities since at least 2006 has now cohered into the Association of Foragers (AoF) and is working on a Code of Conduct to counteract efforts by Natural England to introduce its own. Apparently NE has also commissioned five universities to embark on a five-year study of the impacts of hunter-gatherer activities in Britain. Meanwhile, Miles Irving has now been given leave to appeal against the Stop Notice - but any ensuing court case may take years to come to fruition. It is probably safe to assume in the meantime that picking the Four Fs for home consumption on publicly accessible land will continue to be a healthy, sustainable and practical way to enjoy the bounty of nature, as has been the custom in common law for centuries past.

1. Lee, Jennifer Lane and Garikipati, Supriya. 'Negotiating the Non-negotiable: British Foraging Law in Theory and Practice.' *Journal of Environmental Law*. 2011

Good King Henry & The Old Fat Hen

As edible wayside weeds go, few can match the ubiquity and succulence of these two members of the Chenopodium, or Goosefoot family. Fat Hen (*Chenopodium album*) and Good King Henry (*C. bonus-henricus*) are nowadays unthinkingly regarded by many gardeners as mere bumptious weeds, but for much of human history they have been the mainstay of rural diets all over the world. Ever since the pre-Roman Iron Age, around 400 BC, when Tollund Man was buried in a bog (hence his nickname - Pete Marsh) with a stomach full of the millet-like seeds, to the present day, when every language of India gives it a popular name - this common and unfussy plant has come in useful for hungry peasants and discerning foragers alike.

The Goosefoot family - so called from the shape of their leaves - includes the amaranths, and quinoa, both nowadays deliberately cultivated as highly nutritious pseudo-cereals. Some are annuals, some perennials, but all (except Stinking Orache, *C. vulvarium*) are edible. Strip the young leaves and boil as spinach, steam the stalks as "Poor Man's Asparagus",

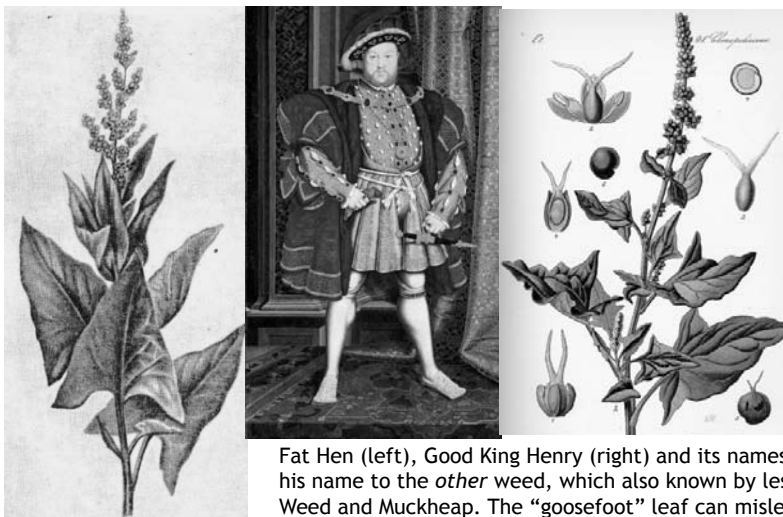
and cook* the seeds as millet, which was the staple food of the ancient Britons, according to the Greek explorer Pytheas, writing in 320 BC.¹

So much for the facts, but a mystery remains. The names are odd, and there is some speculation about their origins. The literal explanation given for "Fat Hen" is that the seed is good for plumping up poultry. No doubt it is. But an oral tradition amongst Travellers recounts a different history. In the days of *Bad King Henry* - he who dissolved the monasteries and threw countless thousands of their poor dependents out onto the highways and byways of Britain, along with all the other wretched itinerants of Tudor times - a fine sense of irony prevailed. Huddled round the smoky campfire on the wasteland, peering into a bubbling potful of murky greens, someone would be bound to ask: "and what's for dinner tonight?". "A fine fat hen!" would be the sarcastic reply, as all raised an imaginary glass to their well-upholstered royal benefactor.

True or not, Fat Hen is still the Gypsy's spinach. It appears in early spring, in the "hungry gap", on disturbed ground such as demolition sites, rubbish tips and ploughed field-edges close to laybys and other such "no-man's lands" and its abundance ensures that no officious quango is likely to put it on a protected species list. When it springs up spontaneously in the garden, as it surely will, treat it as a crop, and enjoy a historic repast that links you to the adventurous harvesters of the peasant tradition, past and present.

* Leaves and seeds contain oxalic acid and saponins which are bad for you and must be removed by soaking before cooking; Eating chenopodiums raw, or in excessive quantities, is unwise.

1. Cunliffe, Barry: *The Extraordinary Journey of Pytheas the Greek..* Penguin 2002.



Fat Hen (left), Good King Henry (right) and its namesake (centre). Although both fat and cocky, Henry VIII lent his name to the *other* weed, which also known by less opulent names such as Dirty Dick and Dungweed, Pig Weed and Muckheap. The "goosefoot" leaf can mislead - Arum (Cuckoo Pint) is the same shape, but poisonous.