

Off the Track: Problems Looming for the Right to Roam

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In creating a new a right of access to the countryside of England and Wales, the government could simply have announced that on a particular appointed day the law of trespass would be overturned, so that a general prohibition against being present in the countryside would be replaced by a general right to be present. Exemptions and exceptions could have been provided for obvious and easy-to-understand reasons, say, an exclusion for people's gardens to safeguard their desire for privacy, another for land under growing crops so they would not be damaged. Further temporary exemptions could have been added to deal with obvious and easy-to-understand events, like the shooting of game or the felling of trees. There would have been no need to define particular areas to be covered by the right, for anywhere that was not being excluded would have been included. There would have been no need to conjure up explanations for landowners affected as to why they were being hit while other landowners were being left alone. And there would have been no need to devise a means of communicating to walkers the news that certain stretches of countryside were becoming available to them while other not necessarily all that dissimilar stretches of countryside were remaining out of bounds. A right of access along these straightforward lines is not some ludicrously fanciful extremist ramblers' fantasy. Exactly such a right works perfectly well in Scandinavia and is about to be introduced no further away than Scotland.

Instead, the new Labour government in Westminster, if not for the Labour-led executive in Edinburgh, decided that such a straightforward approach was far too simple. Apparently in the belief that if landowners could be divided they would put up less resistance, Tony Blair, John Prescott and Michael Meacher took it for granted from the outset that whatever might be going to happen north of the

border, the right of access in England and Wales was going to be arbitrarily restricted. And the restrictions were not going to be simple. They were going to be such as would be bound to give rise to ever-burgeoning complexity. As a result, the prospects for the new right are now beset by an array of problems.

The government decided to restrict the new right to five particular landscape types – mountain, moor, heath, down and common land, which cover about four million acres or ten per cent of the land surface. Some of these access land types are ones which even an expert would find hard to define, let alone a Sunday afternoon walker. To make things even more puzzling one of the five types of countryside selected is not even a type of countryside at all. Common land is not necessarily heather and birches: it is whatever has been registered as a common: here in Derbyshire the 83 commons scattered through the county include disused quarries, stretches of limestone grassland, marshes, woods and bits of road verge. But at least we know what is common land and what is not. The same is far from true of mountain, moorland, heath and down. What's called a "moor" in the Somerset Levels is very different from either the so-called "moors" on the edge of York or the North Yorkshire Moors.

Even if you've decided you mean North-York-Moors-type moorland rather than other things called moors, it turns out to be far from easy to define just what you mean. If you try and brand moorland by vegetation type, you face the difficulty that such semi-natural vegetation is constantly changing naturally and can be even more dramatically altered by deliberate changes to, say, the grazing regime. Mountains can (perhaps) be defined by height, but heathland and downland are if anything even more problematic than moorland.

Once the enormity of all this sank in, the unfortunate officials faced with the task of making the government's scheme flesh seem to have given up. The Countryside and Rights of Way Bill is remarkable for the absence of definitions of the kinds of land to which the right of public access is actually supposed to apply. This is just as well. How could any definitions have coped with those countless hillsides in which you see heath, down or moor gradually merging into, indeed been taken over by scattered trees, here thin, there becoming dense woodland, the whole scene changing its shape from year to year? In shrinking from dilemmas such as this, the legislators have been entirely sensible. But they have not disposed of their problems in so doing. All they have done is replace one set of problems for another. For of course the land to be covered by the new right has got to be delineated in some way or other. And what the government has decided is that instead of it consisting of types of land which can be defined, it will actually consist of areas which officials draw upon maps - areas which bear some resemblance, but a varying one, to the five types of countryside originally mentioned. The land covered by the new right is now to be whatever the officials of the Countryside Agency and the Countryside Council for Wales say it is, within the constraint that it must consist at least "predominantly" of one or more of the five types of land originally specified, whatever these five types of land actually are now that no one seems even to be trying to define them any more. This desire is understandable, but a price has to be paid for getting rid of the problem of definition. Whatever logic there was to the selection of the original five types of landscape, and presumably there was some logic, although we never seem to be quite told what it was, now goes by the board. To create nice tidy chunks of access land on their maps, the agencies can and doubtless will include whole swathes of land which have nothing to do with the original five types. Bits of woodland, for example, which are surrounded by down or heath can now be cheerfully thrown open. But how are the owners of these woods supposed to understand why this is

legitimate when the owners of other woods remain untouched? How are walkers to understand why they can walk in woods that happen to have been embraced by the mappers but not woods which have not? What goes for woods will presumably go for streams, meadows, private roads and tracks and much else. Natural and artificial vegetative change during the ten-year life of a designation will mean that the areas selected will come to bear less and less connection with the five types of land which the new right was supposed to be all about.

The mapping process will invest in unelected bureaucrats a degree of arbitrary power which is perhaps unfortunate. The three-stage process through which their handiwork is unveiled, consulted upon and appealed promises to enshroud the countryside in one of the most monumental, dreary but completely inescapable wrangles which we have ever seen. Complaints that the whole thing breaches landowners' human rights will gain added weight from the new element of arbitrariness which has been introduced.

As if the problems springing directly from the choice of a partial as opposed to a universal approach to access were not enough, the government has chosen to bury its necessarily complicated proposal in further unnecessary complications.

In other European countries where rights of access exist, the responsibility for administering the right rests more or less straightforwardly in the hands of local authorities. The thinking behind this is that they are democratically accountable, are responsive to local needs, and, very important this, they are in a position to dovetail the implementation of access rights with their other areas of activity - the drawing up of countryside management plans, the purchase of land, communication with the public, the provision of rangers and traffic management like providing car parks and banning particular types of traffic where this is considered necessary. There are provisions for appeal against decisions taken at local level to national arms of government; and there are

national agencies to be sure which provide extremely useful advice and back-up to local authorities, and which oversee the publication of information about access rights to the general population including immigrants and foreign visitors.

Under our proposed new system, it is the new, little-known national agencies which assume primary responsibility, with councils being allocated a walk-on role, except in national parks. Local authorities outside the parks will have five main tasks. They will put up signs indicating access land. Second, they will set up and organise local access forums. Third, they will be expected to manage sites which become popular, for instance through the introduction of bylaws and wardens. Fourth, local councils will be expected to secure access to islands of stranded access land. Fifth, they will be expected to enforce access rights where these have been contravened.

This division of function will mean that the public will have no idea who is really responsible for implementing the new right. They will not know who to complain to when it goes wrong. The division will create the usual confusion accompanying the split of closely related functions. But it is worse than that.

Local councils could be forgiven for seeing themselves as being asked to do the national agencies' dirty work. Whichever way you look at things, they won't be getting any of the glory if the system works because they won't be taking any of the interesting decisions. The determination of which land will be covered by the new right, the mapping of access land, the publicising of the location of such land, the determination of closures and restrictions, the adjudication of what to do when the rules are broken - all these things will fall to the national agencies.

This situation seems to have come about partly because the new agencies have been created, need to have something to do and fancy taking on a high-

profile new responsibility. But there is a real danger that local authorities will feel unenthusiastic about their role in making the new right of access work. They may wonder why they are being marginalised. The five tasks councils have been handed may be the most menial ones, but that doesn't mean they are easy ones. If local authorities do not throw themselves into their new tasks things won't go well. Take the issue of stranded land. Stretches of land suitable for access status but surrounded by land which is not can be surprisingly numerous. Access to such land will have to be achieved on an individual basis. Up till now, the creation of the odd public footpath to inaccessible land in this way has proved so difficult and expensive that it has rarely happened. It will only happen in the case of stranded access land if local authorities put a colossal effort into making it happen. If they fail in this regard, a lot of the stranded land which won't be opened up will probably be in the south of England. Since the new right anyway offers so little to lowland walkers (down and lowland heath make up only four per cent of the 4 million acres involved) the news that even the little they are supposed to get will not actually materialise may exacerbate a customer satisfaction deficit already burgeoning for other reasons I have already alluded to.

If local councils are unlikely to crack the problem of stranded land, signage is likely to present them with a problem which may seem simple but is actually likely to prove an even bigger weakness in the new system. Signing access land will be down to local authorities, but it will be discretionary, not mandatory. Councils will know that the more energetically they draw access land to the public's attention the more visitors will come and therefore the more pressure there will be on them to find the resources for managing this use with car-parks, rubbish-bin provision, wardening, by-laws and so on, all of which will be expensive and, for sure, under-financed. For local councils, access areas may take on some of the characteristics of country parks as the public fasten on particular areas which become opened up. But whereas country parks are

as the public fasten on particular areas which become opened up. But whereas country parks are provided where and when the local authority wants them, and the local authority reaps the rewards in terms of public gratitude, they will be expected to provide similar facilities to areas selected by another body in places they may think unsuitable. If, however, local councils do not provide the maintenance expected of them problems like erosion, wildlife disturbance, litter and so on can be expected to materialise.

Well, if as I suggest, the new access regime for England and Wales is going to pose problems, what will be the outcome? One thing I think they mean is that the new system is not going to bed down easily and win universal acceptance, of the kind enjoyed by, say, the public footpath system. I suspect it will retain a provisional feel. This will make it more vulnerable than it would otherwise be to continuous revision and meddling of one kind or another by future governments. The fact that the system is being controlled by national agencies will of course make it easier for such changes to be made. Sooner or later of course a government hostile to the whole idea of access to the countryside will come along. The many complications of the new system will present it with a ready means of castration. The 28 days of unexplained exclusion could be added to. The bar on Bank Holiday and weekend exclusion could be abolished. Entry could be confined to a few access points and all the other forms of dilution being mooted during the Bill's committee stage in the House of Commons could be effected. Slashing the resources available to the Countryside Agency for access would make the whole process of emasculation easier.

All this might sound ominously familiar to some of you. It's not unlike the fate which befell the access to open country provisions of the 1949 National Parks and Access to the Countryside Act. Local authorities were not enthusiastic; but central government retained quite a lot of power to get councils to take action if necessary. A change of government in 1951

and the advent of thirteen years of Conservative rule meant that central government chose not to take the action needed to get the system to take off and, outside a handful of areas, notably the Peak District National Park, it withered away.

So will the new system peter out and eventually be forgotten? Well, downbeat though you may feel I've been up to till now, I don't actually think it will. There may be disadvantages in placing the system in the hands of the national agencies, but their energy and commitment will, I believe, ensure that access maps really will have been drawn up and pushed through the consultation and appeal processes before a Conservative government is likely to be elected. Once access land is on the maps, a future government will find it hard to abolish it, however much it waters down the meaning of the idea. This stage was of course never have reached with the provisions of the 1949 Act, which were almost immediately at the tender mercy of a hostile government. This time demarcation of access land is likely to prove irreversible.

This is partly because the world has become so different from the way it was in the 1950s. The idea of public access to the countryside, whatever the form in which it is implemented, has touched a chord in an increasingly democratic and undeferential age. The idea of access will undoubtedly survive the current proposals.

Although these will at most open up only 10 per cent of the land, and that subject to considerable exemptions, the existence of something called a "right to roam" will change people's attitude to their presence in the landscape. They will start feeling they have a right to be in the countryside instead of thinking of themselves as trespassers. So there will be a change in the psychology of the people: they will think they have got more entitlement and that that entitlement involves being able to be off the public footpaths. As a result, both people who are more adventurous and people who can't be bothered to study maps will roam around more and more. There

is probably going to be a lot more generalised trespassing over land not covered by the new scheme. And the absence of a logic for the limitations in the new proposals will encourage people to demand the right to go wherever they want.

While this is going on, a very different access regime will be taking shape across the border in Scotland. English and Welsh people holidaying north of the border will find that the strange limitations on access to the countryside which apply at home are unknown there. As in Scandinavia, they'll be able to go wherever their presence will do no harm. As in Scandinavia, this system is likely to work with no apparent difficulties. When they get back home, the English and Welsh will wonder why they can't have the same system here. In the Borders the contrast between the two approaches will become particularly striking, and doubtless will be highlighted by the media, for whom it will become a peculiar anomaly. Politicians wrestling with the fiddly

and problematic aspects of the system devised for England and Wales will be increasingly drawn to an obvious solution: standardise the system throughout the UK - but on the Scottish model. In other countries which have taken a partialist rather than a universalist approach to access to the countryside, like Germany and Denmark, the tendency has been for the scope of the law to be ever further widened. This is, I think, where we are heading. It is looking as if it will be a rough ride, but at least we are going in the right direction.

Marion Shoard is the author of This Land is our Land (Gaia Books, 1997) and A Right to Roam (Oxford University Press, 1999). This article is a summary of a speech given at the Countryside Recreation Network's conference "Managing the Challenge of Access" at Buxton, Derbyshire on 17 April, 2000. The full text of the speech will be available in the conference proceedings which will be published by Countryside Recreation Network, price £15. To order a copy, please contact the CRN office.