Access rights, freedoms and the Dartmoor judgement

Description

The Cairngorms and Loch Lomond and Trossachs National Parks are part of the UK family of national parks. The experience gained in any one of these national parks may therefore be of relevance to other parks within the family and more generally as regards the enjoyment, management and protection of land and water in the UK. This is why the recent court judgement on camping within the Dartmoor National Park has wide ramifications, for all countries of the UK, and provides an opportunity for different jurisdictions to learn from each other on matters relating to public access to land and water.

The greatest significance of the High Court judgement on camping in the Dartmoor National Park, which has received much media coverage, is the way in which it has stimulated political commitment to new legislation on public access rights in England. While it may be several years before such legislation passes through the UK Parliament it is important to discuss the potential scope and scale of such legislation and, in the meantime, how public access to land and water in England is exercised today and how this might be improved by policy or legislative change. These discussions need to encompass both the existing â??rightsâ?• and â??freedomsâ?• on which this access is based and the relevance of existing access legislation within the UK.

In England and Wales the most relevant legislation is the Countryside and Rights of Way Act 2000 (known as the CROW Act) and in Scotland this is the Land Reform (Scotland) Act 2003. As Scotland covers 33% of the land mass of the UK and is a near neighbour of England it provides an obvious starting point to compare the two legislative frameworks and how they have performed over at least 20 years. In both countries popular opinion usually refers to this as â??right to roamâ?• legislation, an expression which is also used in court judgements handed down in both the English and Scottish courts in recent years.

The Land Reform (Scotland) Act 2003 established public access rights to most of Scotlandâ??s land and water, from the edge of every city to every coastline, field, wood, moor and mountain. In England many members of the public, as well as politicians from across the political spectrum, have noted the more comprehensive nature of the Scottish legislation and expressed a desire to see its basic elements replicated in England. This will only happen if politicians in the UK parliament understand how this legislation was secured in Scotland and are prepared to apply its key principles to the situation in England.

Unfortunately, during the last 20 years, it appears that no politician from England, with one exception, has visited Scotland for the purpose of learning about Scotlandâ??s right to roam, what it has delivered and to examine to what extent, if any, it has relevance to England. The one exception was the then Deputy Prime Minister, Nick Clegg MP, who combined a visit to the closing ceremony of the Commonwealth Games in Glasgow, in August 2014, with an examination of the operation of the 2003 Act in the Kinross area, between Edinburgh and Perth. This included the fields and woods surrounding Loch Leven, one of the most important aquatic conservation areas in the UK.

Up until 2003 the loch and surrounding ground was protected by a byelaws and nature reserve agreements with the landowners. Public access was prohibited on the loch and on most of the immediate surrounding land. The 2003 Act required all such byelaws to be reviewed across the whole of Scotland. In the case of Loch Leven this requirement led to the termination of the byelaws with public access then managed through the Scottish Outdoor Access Code (SOAC). This 127 page document was produced as part of the 2003 Act process and provides detailed advice to both the public and land managers on the exercise of access rights and the corresponding responsibilities on the general public, land managers and public bodies to ensure this legislation works well. One consequence of the termination of the Loch Leven byelaws was the stimulus it gave to the construction of a 21 km all abilities path around the whole of Loch Leven which connected local communities to each other and to various facilities, including an RSPB visitor centre. Well over 200,000 people use this trail each year and its creation has then led to enhanced refreshment facilities at or near the trail, including several new cafes.

The DPMâ??s visit in 2014 led directly to a UK Coalition Government decision to speed up the completion of the round England coastal path in recognition of the economic, environmental and social value inherent in improved access to the outdoors. This decision remains the only example of the beneficial experience of Scotlandâ??s right to roam legislation being used to improve the situation in England.

Today, any politician concerned about public access rights in England needs to learn how Scotlandâ??s right to roam was based on a clear understanding of the fundamental principles that underlie the way in which citizens use the outdoors, for enjoyment, education and study and for commercial purposes, and how these activities interface with private property rights. These principles, which are the cornerstone of Scotlandâ??s access legislation, are equally applicable to England.

It appears that the Dartmoor judgement is likely to be appealed by the Dartmoor National Park Authority. Recent media comment on this judgement has displayed a woeful lack of understanding of the basis on which the general public access land and water in England, either through legislative provision, custom or tradition. These misunderstandings must be cleared up before any new legislative proposals for England are prepared.

The outcome of the current Dartmoor case should not affect the basis by which most people access land and water in England, providing everyone understands what that basis is. Public access is based on the exercise of a â??rightâ?• or a â??freedomâ?•. Where a right of access applies, as on a right of way or on land designated as â??access landâ?• in England and Wales, under the Countryside and Rights of Way Act 2000, there are legislative measures in place which require a public body, namely a Local Authority or a National Park Authority, to take whatever action is required to safeguard that right and prevent any obstruction to public use. In some locations public body agreements have been made with landowners so that existing access freedoms are safeguarded. Elsewhere all public access is exercised on the basis of custom or tradition, as a â??freedomâ?•. This means that across most land and water in England there are no safeguards in place which allow for public body intervention to ensure this freedom of access continues, in recognition of longstanding custom or tradition.

In theory the absence of such safeguards was not usually a problem in the past, so long as landowners were tolerant of people exercising this freedom. Landowner attitudes, however, have changed in recent decades, across the UK and this, alongside the intensification of farming and forestry practice, now

requires statutory intervention to convert existing freedoms into formal rights and/or new regulatory mechanisms and financial incentives to secure public access to most land and water, subject to both responsible public use and responsible land management. The necessary statutory framework was established in Scotland in 2003 and is now needed in the rest of the UK. The Scottish legislation applies to most non motorised recreational, education and commercial activities, including informal camping, so long as special facilities are not required. For example walking, climbing, running, horse riding, cycling, canoeing and sailing are included; fishing and shooting for game are excluded.

The Dartmoor judgement, which sought to identify whether the public had a â??rightâ?• to camp on common land in the national park, under the Dartmoor Commons Act 1985, concluded that such a right to camp on the commons did not exist. Nevertheless the judgement did acknowledge that persons wanting to camp â??if in a remote place, [they could] take their chances on pitching a tent without the landowner knowing, whilst being prepared to move on if asked to do soâ?•. The judgement therefore recognised the â??freedomâ?• to camp, at least on part of Dartmoor, while not accepting that a â??rightâ?• to camp existed.

It needs to be understood that anyone can camp today on Dartmoor, as in the past, or anywhere else in England on the basis of an existing liberty or freedom. This freedom, legally expressed as an â??implied consentâ?•, was explained in 1954 by the UK Governmentâ??s Law Reform Committee. This recognised lawful access by implied consent in England and Wales, while an equivalent Scottish Committee reached the same conclusion two years later. Such access applies wherever permission is taken for granted according to the ordinary usages of society, unless expressly withheld, or where the landownerâ??s conduct has raised an inference of the existence of such permission (Third Report of the Law Reform Committee (Occupierâ??s liability to Invitees, Licensees and Trespassersâ??, Cmd 9305, HMSO, Nov 1954, para 40).

Persons taking access by implied consent are â??licenseesâ?•. Access freedoms can only be removed in the Dartmoor National Park, or anywhere else in England and Wales, if a public body establishes a byelaw to specifically prohibit camping or any other access freedom in that location. Meanwhile the landowner who does not tolerate camping or any other activity based on this freedom can do no more than to request the camper etc to leave the land. They cannot use any force to remove the camper etc and the only measure available to them is to seek an injunction from a civil court (an interdict in Scotland) to prevent that person from returning. Such an injunction is unlikely to be granted if no damage or unreasonable disturbance has been or is likely to be caused. This â??freedomâ?• applies to most people exercising any form of non motorised public access to land and water in England or Wales when not on a public right of way or on â??access landâ?• as defined by the CROW Act.

The Dartmoor controversy demonstrates the confusion that exists in England and Wales over â??freedomsâ?• and â??rightsâ?•. Too often it is stated that anyone on land where they have no â??rightâ?• to be is a trespasser. This is incorrect â?? most people enjoying access to land and water are doing this by implied consent, ie by exercising a â??freedomâ?•. How else, in my younger days, did I roam, without hinderance, through the fields and woods and across the moors and mountains of England and Wales? Even if a landowner had taken active steps to prevent my access, their power to remove me from their land was and still is very limited, unless a byelaw or injunction is in place. The law remains is still as it was in 1954 when exercising harmless access over land where access rights do not apply .

The CROW Act is no basis for going forward in England. This legislation was excessively constrained by the massive hurdle of an unreformed House of Lords, packed full of landowners. The Labour government of the day knew that these peers would be very antagonistic to comprehensive right to roam legislation and so the CROW Act secured access rights over very limited areas of land, mainly in the uplands, and based on an expensive and bureaucratic mapping process. No such constraint now applies to the UK Parliament, with the removal of hereditary and other peers, and may disappear altogether if the House of Lords is abolished. Such a parliamentary constraint, applied by unelected landowners, did not apply to the Scottish Parliament when it passed the Land Reform (Scotland) Act 2003. This established a right of access for most non motorised activities to most land and water, to be guided by the SOAC. This Code, with minor modifications, should now form the basis for access throughout the UK, whether that access is taken on the basis of a right or a freedom.

SOAC explains how to take access from seashore to field margin to mountain summit. Anyone who is capable of taking access in a responsible way around a Scottish field margin is equally capable of doing the same thing south of the border. I have a right of access to the first field margin I encounter when walking out of Glasgow or any other conurbation. The same should apply when leaving Birmingham, Cardiff and every other city. That is the simplest way for citizens to enjoy nature wherever they live.

Scotlandâ??s right to roam legislation has been in place for 20 years and works well, with no proposals to make significant changes to either the Act or the Code. Equivalent legislation is now needed in England and Wales but must be based on the existing freedoms of access to most land and water in those countries and not on a piecemeal approach by trying to extend CROW. The freedom needs to be converted into a statutory right, similar to the approach taken in Scotland. This requires a much better public and political understanding of the existing basis on which freedom of access is exercised in England and Wales and how this can be converted into a statutory right before any more nonsense is said about people not being â??allowedâ?• to exercise their existing freedom to step off a path or go anywhere else where the CROW provisions do not apply. And with a statutory right of access would come the necessary powers that are needed to deal with those landowners who no longer recognise the customs and traditions which have underpinned access freedoms over the centuries in these countries.

While we await this legislation for England and Wales there is, however, an urgent matter that needs to be addressed. The whole basis of public subsidy for agriculture and forestry is currently being determined in the post Brexit era. All governments, throughout the UK, need to ensure that future public subsidy for agricultural and forestry activities is conditional on landowners tolerating public access to their land and water whether that access is exercised by right or freedom. Landowners who do not tolerate such public access, exercised responsibly, should lose their entitlement to public subsidy. Tolerating public access is the least that landowners can do in response to the generosity of taxpayers who support landowners through annual subsidies and special tax arrangements such as the provision of low cost relief landowners enjoy when purchasing diesel for their various management activities. Tolerating public access must be an integral part of the conditions attached to new agricultural and forestry grants, as well as taxation measures, throughout the UK. This means, for example, that any landowner who obstructs a person exercising their freedom to walk along any field margin in England would lose their entitlement to agricultural grant, or at least have it suspended, until they agreed to tolerate such access.

Politicians need to commit to making public funding conditional on public access, as a top priority, as the new grant arrangements are discussed within the devolved administrations. This should then be

followed by new access legislation for England, Wales and Northern Ireland, if these countries aspire to be modern European states. A right of access to most land and water should be regarded as a basic human right, in parallel with a right of access to nature, for every 21st century nation.

Category

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Date Created
February 2, 2023
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