

## **In Defence of Natural Beauty: Aesthetic Obligation and the Law on the Designation of Protected Landscapes in England and Wales.**

**Keywords:** Landscape law; Protected landscape; Natural beauty; Aesthetic obligation; England and Wales.

### **Abstract**

Natural beauty has been the central legal criterion for the designation of 'protected landscapes' in England and Wales for over 70 years. This approach is subject to criticism that natural beauty is an outdated and subjective notion. Yet, there is surely merit in celebrating the beauty in nature that exists in these areas. Nevertheless, the legal approach necessitates some interrogation of the notion of natural beauty, its relationship to landscape, and the nature of the aesthetic exercise required to underpin a regulatory system for the designation of protected landscapes. This paper draws on literature in both aesthetic philosophy and landscape studies to provide such an analysis, arguing that an aesthetic observation of natural beauty can form the basis of a reasoned, robust and transparent process for the designation of protected landscapes that accounts for natural and cultural heritage concerns. Cross-disciplinary analysis is challenging but can be useful in considering the means of addressing complex issues such as the designation of protected landscapes in England and Wales. 166

### **Introduction**

Protected landscapes exist across the globe, framed by laws that seek to conserve the value of these spaces to the nation. The International Union on the Conservation

of Nature (IUCN) has led the global movement in support of protected areas.<sup>1</sup> It defines protected landscapes as follows:

A protected area where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural, and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.<sup>2</sup>

The burgeoning multi-disciplinary literature that has emerged on landscape also reflects this broad notion of its values, interrogating the idea of landscape as nature, culture and scenery.<sup>3</sup>

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<sup>1</sup> The IUCN held its first World Conference on National Parks, in 1962. At this time there were 9,214 such sites across the world; a figure that had risen to 209,000 by 2014. Marine Deguignet et al, 2014 United Nations List of Protected Areas (United Nations Environment Programme, 2014) available at <https://www.unep-wcmc.org/resources-and-data/2014-united-nations-list-of-protected-areas> (last accessed 8th July 2019).

<sup>2</sup> The IUCN categorises protected areas according to their key characteristics. These categories include, for example, strict nature reserves and wilderness areas. <https://www.iucn.org/theme/protected-areas/about/protected-areas-categories/category-v-protected-landscapesescape> (last accessed 8th July 2019).

<sup>3</sup> Landscape studies began as a 'core topic' of geography focusing on the topographies of landscape, but more recently more humanist perspectives have emerged with an emphasis on the 'cultural landscape'. See further Antrop Marc 'A Brief History of Landscape Research' in Peter Howard et al *Routledge Companion to Landscape Studies* (Routledge, 2012) and Brian Roberts et al. *People, Land and Time: An Historical Introduction to the Relations Between Landscape Culture and Environment* (Routledge, 1998). Today, landscape studies is a multi-disciplinary endeavor including not just geography, history and aesthetics, but anthropology, archaeology, philosophy and sociology Kenneth

Protected landscapes in England and Wales take the form of National Parks and Areas of Outstanding Natural Beauty (AONBs).<sup>4</sup> The legal framework for these protected landscapes dates back to the National Parks and Access to the Countryside Act 1949.<sup>5</sup> As the name suggests, the legal criterion for designation of an AONB is that the area provides an outstanding example of ‘natural beauty’.<sup>6</sup> The law in relation to the designation of National Parks refers to both the ‘natural beauty’ of the area and the opportunities it affords for access to recreation.<sup>7</sup> However, given

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Olwig ‘Recovering the Substantive Nature of Landscape’ (1996) 86(4) *Annals of the Association of American Geographers* 630.

<sup>4</sup> These have been classified by the IUCN as protected landscapes despite the fact that National Parks form a separate category. *Putting Nature on the Map: a Report and Recommendations on the Use of the IUCN System of Protected Area Management Categories in the UK* (IUCN, 2014). This distinction is made by the IUCN on the grounds that National Parks are essentially natural systems whilst protected landscapes are also cultural landscapes. <https://www.iucn.org/theme/protected-areas/about/protected-areas-categories/category-v-protected-landscapes/seascope> (last accessed 8th July 2019).

<sup>5</sup> National Parks and Access to the Countryside Act 1949.

<sup>6</sup> S82 Countryside and Rights of Way Act 2000. Both National Parks and AONBs were created under the 1949 Act, but today the legal framework for AONBs is found in Countryside and Rights of Way Act 2000.

<sup>7</sup> S5(2) National Parks and Access to the Countryside Act 1949. This paper focuses on England and Wales to which this Act applies. Northern Ireland and Scotland have taken a very different approach to the creation of ‘protected areas’. Northern Ireland has designated a number of AONBs under the Nature Conservation and Amenity Lands Order (NI) 1985. This also provides for the creation of National Parks, but none have so far emerged. Protected areas in Scotland were established by the National Parks (Scotland) Act 2000, but without reference to natural beauty. National Scenic Areas may also be designated on the grounds of their “outstanding scenic value in a national context” (s263A Planning etc Scotland Act 2006).

that the latter is more relevant to the 'place' of National Parks than their special qualities it is fair to say that the main criterion in law for the designation of National Parks is also natural beauty. Since 2006 the law on National Parks has also specifically referred to the possibility of taking into account the wildlife and cultural heritage of an area in assessing its natural beauty for the purposes of designation.<sup>8</sup>

If protected landscapes are to exist at all, they must reflect some 'special qualities' that allow them to be distinguished from other 'local landscapes'.<sup>9</sup> To view those 'special qualities' purely in terms of beauty is understandably controversial. Beauty may appear frivolous in comparison to other societal values; and, in the context of landscape, often appears in direct confrontation to concerns for our natural and cultural heritage. Yet to appreciate beauty is surely one of the greatest privileges of being human and the beauty in our everyday surroundings is an issue that still resonates with today's society.<sup>10</sup> It is certainly the desire to 'enjoy the landscape' that motivates many millions of tourists visiting protected landscapes in England and

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<sup>8</sup> S5(2)(A) National Parks and Access to the Countryside Act 1949.

<sup>9</sup> The controversy surrounding protected landscapes in England and Wales relates not only to the grounds for designation in terms of natural beauty but the very existence of landscapes that attract such special status. This arguably undermines the value of other 'local landscapes' to the communities that live and work within them. See further discussion at n.121.

<sup>10</sup> See for example a recent report highlighting the importance of 'beauty' in 'everyday' settings in our urban and rural communities. Adrian Harvey and Caroline Julian *A Community Right to Beauty: Giving Communities the Power to Shape, Enhance and Create Beautiful Places, Developments and Spaces* (Res Publica, 2015).

Wales.<sup>11</sup> Thus, beauty is wedded to the public understanding of the significance of these landscapes. Yet, beauty is also a difficult value to attach to the legal status of landscapes. Beauty is popularly conceived to be a subjective notion, epitomised by the idea that “beauty lies in the eye of the beholder”. If we ascribe to this notion of beauty, it appears absurd to suggest that: “standards of beauty are ontologically based and hence exist ‘out there’ ready to be plucked by aesthetic experts and transformed into legal ukases by policy makers”.<sup>12</sup> Aestheticians have already recognised this challenge and begun to contemplate the way forward; but it falls to lawyers to consider how an ‘aesthetic observation’ can underline a regulatory framework for the designation of protected landscapes

This paper provides a defence of natural beauty as the central legal criterion for designation of protected landscapes in England and Wales, but seeks to understand how, as a matter of aesthetic observation, this might reflect broader concerns to protect the natural and cultural heritage of those landscapes. It argues that natural beauty can form the basis of a reasoned, robust and transparent process of designation that can account for all the values of a protected landscape – as nature, culture and in terms of its beauty. It does so by drawing on the literature in aesthetic philosophy and landscape studies. This approach is essential because although it falls to lawyers to consider how aesthetic obligation might take shape in law we

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<sup>11</sup> For example, the Wales Visitor Survey 2016 found this to be the motivation for 67% of visitors to Wales. Fiona McAllister/Sarah McDonough *Wales Visitor Survey 2016: UK Staying Visitors* (Welsh Government, 2016) GSR report number 14/2017, 24.

<sup>12</sup> John Costonis ‘Law and Aesthetics: A Critique and a Reformulation of the Dilemmas’ (1981-1982) 80 *Michigan Law Review* 355.

cannot do so in isolation of the scholarship in related fields. The necessity of cross-disciplinary endeavour is gaining increasing recognition given the complexity of problems facing society. Continuing to recognise the natural beauty of landscape, particularly in the face of pressing environmental concerns, is clearly such an issue.

The argument presented in this paper will be challenging for those who might instinctively deny the significance of beauty in this context and those who view legal scholarship to include only detailed accounts of law in theory or practice. The reality is that academics, especially law academics, need to be bolder in their scholarship and recognise the value of a broad range of contributions.<sup>13</sup> Nevertheless, engaging with other disciplines to the satisfaction of experts in the area is not easy. Thus, the significance of this paper lies in its ability to create a starting point for discussion of the designation of protected landscapes between lawyers and other relevant disciplines.

This paper begins by considering how natural beauty emerged as the central legal criterion for the designation of protected landscapes in England and Wales and provides some contemplation as to why this may have had lasting appeal in this context. The first section also explains the background to the changes to law on the designation of National Parks that were introduced to reflect concerns to protect broader landscape values. The intention is not, however, to posit a detailed review of current approaches to designation. Nor, indeed, is there room for in-depth discussion of how the law on the designation of protected landscapes relates to the legal

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<sup>13</sup> See further comments of Duxbury. Neil Duxbury in 'A Century of Legal Studies' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* OUP, 2005).

framework for identifying the purposes of these areas (which may be broader than the reasons for designation). Furthermore, it does not discuss how landscape values are taken into account in wider land use decision-making (either specifically in designated areas or with reference to the relationship with more local landscapes).<sup>14</sup>

The main body of this paper is devoted to the development of an argument based in aesthetic philosophy that it is possible to provide an aesthetic observation of the natural beauty of landscape that can take account of wildlife and cultural heritage concerns. The argument is based on three essential propositions which are explored in the central sections of this paper. First, natural beauty should be viewed as a term of art distinct from the idea of scenic value, i.e., it is focused on understanding the beauty in nature not just assessing its value as a 'picture'. As part of this analysis, other values of the landscape, such as its natural and cultural heritage, form an important context in which the aesthetic observation of natural beauty takes place.

The second proposition is that the regulatory context is essential to the form of aesthetic observation. It is argued that in this context the aesthetic observation should take the form of aesthetic interpretation that is focused on eliciting the public meaning of the natural beauty of the landscape. An act of aesthetic interpretation can be distinguished from most aesthetic observations which take the form of an act of aesthetic appreciation with

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<sup>14</sup> These issues have been addressed in depth in work by Lee and Jenkins. Maria Lee 'Knowledge and Landscape in Wind Energy Planning' (2017) 37 (1) *Legal Studies* 3-25 and Victoria Jenkins "Protecting the natural and cultural heritage of local landscapes: Finding substance in law and legal decision making" (2018) *Land Use Policy* 7.

the objective of providing a qualitative judgement about an object.<sup>15</sup> Finally, it is posited that an act of aesthetic interpretation should be viewed as a matter of practice/expertise separate from the value-laden process of judging ‘significance’. Furthermore, the significance of the natural beauty of the landscape for the purposes of designating protected landscapes in England and Wales will rest upon the extent of its public meaning at a national level.

This paper concludes with an outline of the design of a designation process that will reflect the essential propositions made. It is important to note, however, that there is insufficient room to explore the relationship between the model proposed and the detailed process in the existing regimes for the designation of AONBs and National Parks.

## **Natural Beauty and Current Approaches to the Designation of Protected Landscapes in England and Wales**

Protected landscapes take many different forms; from the vast state-owned areas of ‘wilderness’ to the ‘living landscapes’, or more populated rural areas, of Western

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<sup>15</sup> This is the author’s view based on the ordinary meaning of the word and an analysis of the works in aesthetic philosophy. Aestheticians themselves pay little attention to the meaning of the term. See further Allen Carlson ‘Appreciating Art and Appreciating Nature’ in Salim Kermal and Ivan Gaskell *Landscape, Natural Beauty and the Arts* (Cambridge University Press 1995) 199. Carlson notes that the ‘appreciation’ is a notion that ties aesthetics to the Kantian concept of ‘disinterestedness’ and can be distinguished from notions such as contemplation and awareness.



Europe.<sup>16</sup> In more populated areas processes of human interaction are particularly important in shaping and reshaping landscapes, alongside natural forces. Thus, the designation of protected landscapes in Western Europe differs according to a country's geography, history, social structures, political organisation and planning culture.<sup>17</sup> A focus on beauty was common to many of these countries in the past but has not always endured.<sup>18</sup> Yet, the 'natural beauty' of landscape has remained the central legal criterion for designation in England and Wales for 70 years.

Although the origins of the phrase 'natural beauty' in the National Parks and Access to the Countryside Act 1949 are uncertain, there is evidence that the Romantic view of nature and the 'picturesque' in landscape were significant.<sup>19</sup> The 'picturesque' – meaning simply 'like a picture' – is perhaps one of the most widely known aesthetic concepts that has inspired the work of English Romantic poets and landscape artists since the 18<sup>th</sup> century.<sup>20</sup> The focus on the idea of landscape as a 'pleasant view', or

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<sup>16</sup> Joks Janssen 'Sustainable development and protected landscapes: the case of The Netherlands' International (2009) 16(1) Journal of Sustainable Development & World Ecology 37, 37.

<sup>17</sup> Ibid.,37.

<sup>18</sup> Examples from European countries include Belgian Law of 12 August 1911 on the Conservation of Beauty of Landscape.

<sup>19</sup> Carys Swanwick, Paul Selman and Melanie Knight *Report to the Countryside Council of Wales: A Background Research Report on Natural Beauty* (Countryside Council for Wales 2006) para 3.2.

<sup>20</sup> See further for example, Tim Fulford, *Landscape, Liberty and Authority: Poetry Criticism and Politics from Thompson to Wordsworth* (Cambridge University Press, 1996). Perhaps less well known is the importance of Welsh landscapes to the Romantics and the relationship between landscape and literature in the Welsh language. Turner, for example, painted the landscapes of Wales on his Welsh tour 1799-1800, *Nant Peris Looking Towards Snowdonia* 1799. See further <http://www.tate.org.uk/>.

of scenic value, has fuelled a strong tradition of landscape tourism since Gilpin first undertook his tours of Britain during this period.<sup>21</sup> Once closely associated with the bourgeoisie, the beauty of landscape has become a matter of interest to the broader population; epitomised by Wordsworth's description of the Lake District as 'a sort of national property in which every man has a right and interest, who has an eye to perceive and a heart to enjoy.'<sup>22</sup> Beauty has thus become rooted in the public understanding of protected landscapes in England and Wales. Nevertheless, it must be acknowledged that the values of these areas clearly extend beyond their artistic properties.

Landscape is a relatively new area of academic scholarship but one that has revealed the richness of this notion.<sup>23</sup> 'Protected landscapes' in England and Wales are predominantly rural landscapes, highlighting their value as a natural environment. Landscape also exists not just as a physical entity but in perspective. This has assisted geographers in distinguishing the features of landscape not just in terms of topography but in cultural perspective.<sup>24</sup> Such humanist perspectives also

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The work of the Romantic poets in Wales is also documented by Hughes in Glyn Tegai Hughes (ed) *The Romantics in Wales: An Anthology* (Gwasg Greygynog, 2009).

<sup>21</sup> See further Malcom Andrews *The Search for the Picturesque': Landscape Aesthetics and Tourism in Britain 1760-1800* (Scolar Press, 1990) viii.

<sup>22</sup> William Wordsworth *Guide to the Lakes* quoted in Jeremy Rowan-Robinson *A Sort of National Property: Managing the Lake District National Park: The First 60 years* (Lake District National Park) 2. Today there are over 65 million visitors to the National Parks of England and Wales every year. See further <http://www.nationalparks.gov.uk/learningabout/whatisanationalpark/factsandfigures> (last accessed 8th July 2019).

<sup>23</sup> See for example, John Wylie *Landscape* (Routledge, 2007).

<sup>24</sup> Wiley *Ibid*.

make links between the pictorial representation of landscape with ‘ways of seeing’ from historical and cultural perspectives.<sup>25</sup> Landscapes are also dynamic and subject to constant transformation as a result not just of natural forces but also human social and economic development pressures. In short, a landscape exists not just as a ‘pleasant view’, but as a reflection of our natural and cultural heritage.<sup>26</sup>

In recognition of these concerns, the National Parks and Access to the Countryside Act 1949 was amended, in 1995, to include the conservation and enhancement of wildlife and cultural heritage, alongside that of ‘natural beauty’, as purposes of National Parks.<sup>27</sup> At this stage, the law relating to the designation process remained unchanged. It was, however, challenged in the case of *Meyrick Estates Management*, in 2005.<sup>28</sup> This case involved a challenge to the designation of a new area of land, that formed part of a managed estate within the New Forest National Park.<sup>29</sup> Sullivan J took the opportunity in this case to discuss the notion of ‘natural

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<sup>25</sup> Cosgrove, D *Social formation and symbolic landscape*. (University of Wisconsin Press, 1998). See also, D Cosgrove and S Daniels (eds) *The Iconography of Landscape* (Cambridge University Press, 1987).

<sup>26</sup> See discussion at n. 81 onwards below. It is notable that the cultural context will differ significantly between countries. See for example Ken Taylor ‘Cultural Landscapes and Asia: Reconciling International and Southeast Asian Regional Values (2009) *Landscape Research*, 7.

<sup>27</sup> S5(1) (a) National Parks and Access to the Countryside Act 1949 as amended by the Environment Act 1995 s61(1).

<sup>28</sup> *Meyrick Estate Management Ltd and Others v Secretary of State for Environment, Food & Rural Affairs* [2005] EWHC 2618.

<sup>29</sup> This formed part of the Hinton estate managed by the claimants on behalf of the Meyrick family. *Ibid.*, para 3.

beauty'.<sup>30</sup> He concluded that nature conservation concerns were not relevant to the legal interpretation of this term; and that the authorities had been wrong to refer to concerns such as "human influences on the landscape, including archaeological, historical, cultural, architectural and vernacular features".<sup>31</sup> This approach, he espoused, would not be in line with the original intentions of the authors of the legislation, who, in Sullivan's analysis, intended the concept to refer to scenic quality and not to encompass broader factors.

For Sullivan J, the natural and cultural heritage of the landscape was important in understanding the evolution of the landscape but not relevant to the decision as to whether the tract of land possessed the necessary quality of 'natural beauty' for the purposes of designation.<sup>32</sup> He also noted that the legal interpretation of the 'natural beauty' of landscape, as it stood in 2005, was not in line with countryside and leisure planning in the 21<sup>st</sup> century; but, he opined, Parliament must intervene to address this.<sup>33</sup> Indeed, following the decision in *Meyrick*, the National Parks and Access to the Countryside Act 1949 was amended to allow those responsible for the designation of National Parks to take account of wildlife and cultural heritage in deciding whether to designate an area on the grounds of its 'natural beauty'.<sup>34</sup> This

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<sup>30</sup> The narrow basis for the legal challenge was the contention that s114(2) of the 1949 Act should be applied only to the purposes of the National Park and not the grounds for designation. *Ibid.*, para 13.

<sup>31</sup> *Ibid.*, para 23. See also the comments of Justice Sullivan at para 53.

<sup>32</sup> *Ibid.*, para 60.

<sup>33</sup> *Ibid.*, para 62.

<sup>34</sup> S5(2)(A) National Parks and Access to the Countryside Act 1949 added by Natural Environment and Rural Communities Act 2006 s59(1). This paper, therefore, refers to the High Court decision in *Meyrick* because it was central to the changes to the legislative framework. A Court of Appeal decision followed and made some further comments regarding naturalness. These are not, however,

was not extended to Areas of Outstanding Natural Beauty (AONBs) where natural beauty remains the only legal criterion relevant to designation. This has created a ‘split’ between issues of designation relating to the two forms of protected landscape that is difficult to justify.

The idea and purpose of ‘protected landscapes’ in England and Wales continues to attract controversy. The Welsh Government has recently undertaken a review of ‘protected landscapes’ in Wales with the express intention of bringing the law in line with its new legislation on the Well-Being of Future Generations and the Sustainable Management of Natural Resources.<sup>35</sup> It identified the following vision for these areas:

deliver both within and beyond their boundaries to enhance their social, economic, environmental and cultural resources; delivering the maximum well-being benefits for present and future generations whilst enhancing the very qualities that make them both distinctive and cherished.”<sup>36</sup>

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considered relevant to the central argument in this paper. See further *Meyrick Estate Management Ltd v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 53.

<sup>35</sup> *Future Landscapes Delivering for Wales: The Review of Areas of Outstanding Natural Beauty and National Parks in Wales* (Welsh Government, 2017) WG30197. Wellbeing objectives are now central to the work of Welsh Government and all public authorities in Wales. In addition Natural Resources Wales has adopted a new operational framework based on the notion of the sustainable management of natural resources. See further Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016, Part 1.

<sup>36</sup> *Ibid.*, 7.

In the event, the Welsh Government decided not to change the existing law;<sup>37</sup> but a review of protected landscapes in England also followed. This concluded that 'protected landscapes' in England should be a positive force for the nation's well-being and that their purposes should be renewed to provide for the recovery, conservation and enhancement of natural beauty, biodiversity, natural capital and cultural heritage.<sup>38</sup>

Despite this continued controversy, natural beauty remains the central legal criterion for the designation of protected landscapes.. Given that the law has bestowed instrumental value on the 'natural beauty' of landscape for more than 70 years it may seem surprising that there has been little attention to this issue from legal academics<sup>39</sup> This may be explained by the fact that there is little by way of aesthetic obligation in the law of England and Wales. Those references that do exist relate to the aesthetic properties in historical monuments and the 'beauty' of the countryside and

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<sup>37</sup> Environment Minister confirms no changes to Designated Landscapes 13 March 2018

<https://gov.wales/newsroom/environmentandcountryside/2018/130313-environment-minister-confirms-no-changes-to-designated-landscapes/?lang=en>

<sup>38</sup> Julian Glover Landscapes Review (Department for Environment, Food and Rural Affairs, 2019) 38.

It is notable that both reports referred only to the statutory purposes of protected landscapes rather than the grounds for designation; the latter having always been narrower in legal terms than the former.

<sup>39</sup> Following the Meyrick case there was, however, some discussion of the legal position by academics in other disciplines. See further Paul Selman and Carys Swanwick. 'On the Meaning of Natural Beauty in Landscape Legislation' (2010) 35(1) *Landscape Research* 3. They conclude that the duty relating to natural beauty should be interpreted with reference to guidance that reflects modern views in landscape studies. .

there is no tradition of aesthetic nuisance.<sup>40</sup> In contrast, the notion of aesthetic obligation has attracted significant attention in the US, where all US state courts have accepted aesthetic regulation.<sup>41</sup> More radical approaches include basing aesthetic regulation on a theory of cultural stability, whilst others believe that different theories of aesthetics can be reflected in regulatory decision-making.<sup>42</sup>

Beauty also receives some attention in environmental law where it is recognised that beauty can contribute to our “empathy and ethical commitment to environmental stewardship” but also the danger that “references to natural beauty risk importing an

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<sup>40</sup> The legal protection of aesthetic properties in historical monuments dates back to the late 19<sup>th</sup> century (Ancient Monuments Protection Act 1882). There are also specific references in 20<sup>th</sup> century legislation to the need to protect the natural beauty of the countryside and forestry as well as ‘protected landscapes’ (s11 Countryside Act 1968 and S3A Forestry Act 1967). In addition, although there are also legal duties with respect to design in the built environment, there is no tradition of aesthetic nuisance or duty to demolish disused buildings. See further Pontin B Nuisance *Law and Environmental Protection: A Study of Nuisance Injunctions in Practice* (Lawtext Publishing Ltd, 2013), 177. See also Ben Pontin ‘A Room with a View in English Nuisance Law: Exploring Modernisation Hidden within the “Textbook Tradition”’ (2018) 38 *Legal Studies* 627.

<sup>41</sup> Kenneth Pearlman et al ‘Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation’ (2006) 38 *Urban.Law* 1119. The notion of aesthetic nuisance has attracted particular attention. See for example Raymond Coletta ‘The Case for Aesthetic Nuisance: Traditional Judicial Attitudes’ (1987) *Ohio State Law Journal* 141.

<sup>42</sup> See further Costonis n. 15 above and Richard Brooks and Peter Lavigne “Aesthetic Theory and Landscape Protection: The Many Meanings of Beauty and Their Implications for the Design, Control and Protection of Vermont’s Landscape” (1984) 4 *UCLA Journal Environmental. Law & Policy* 129.

anthropocentric ‘special’ versus ordinary dichotomy in environmental protection”.<sup>43</sup> Beauty may not be capable of providing a “lingua franca” for environmental law;<sup>44</sup> but this does not mean it should not be possible for natural beauty to underline a system of protected status for certain landscape areas within a country. The significance of the particular circumstances in which aesthetic obligation exists in law has also been noted in US literature on landscape regulation.<sup>45</sup> Certainly, aesthetic obligation in law is complicated by the complex notion of the idea of landscape which exists not just as a natural environment but in cultural perspective.

This paper argues that it is possible to defend an approach to the assignation of ‘special status’ to a protected landscape on the grounds of natural beauty through a process that relies on aesthetic observation in a way that also accounts for the existence of landscape as both nature and culture. To achieve this, we must consider ‘natural beauty’ to be a term of art, distinct from scenic value so that understanding the beauty of landscape is not confined to the pictorial. Thus, the starting point lies in an interrogation of natural beauty as an aesthetic concept. This concerns both the relationship between beauty and nature; and between natural beauty and landscape. Before carrying out this investigation it is important to note that the approach advocated is in sharp contrast to modern methods of assessing landscape value that centre on Landscape Character Assessment (LCA).

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<sup>43</sup> Benjamin Richardson et al. ‘Beauty: A Lingua Franca for Environmental Law?’ (2019) 8(1) *Transnational Environmental Law* 59 at 59 and 86 respectively.

<sup>44</sup> *Ibid.*

<sup>45</sup> Brooks and Lavigne n. 46 above.



LCA classifies landscapes according to differences in their physiographical formation; but also includes other historical, spiritual, cultural, and geological features.<sup>46</sup> It can provide a means of adopting a holistic perspective on the distinctive features of a landscape as they relate to nature, culture and scenery. Landscape Character Assessment is widely used in processes of designation and, indeed, in land use planning both within and outside designated areas. There is no room here for a detailed comparative critique of these approaches. Suffice to say that this paper focuses on the means of fulfilling the legal duty to designate protected landscapes on the grounds of natural beauty, as a matter of aesthetic observation.

### **Natural Beauty and Landscape**

Understanding the natural beauty of landscape as an aesthetic observation requires some reference to aesthetic philosophy. Aesthetics is based on understanding the significance of 'aesthesis', or knowledge that arises from sensation.<sup>47</sup> According to Levinson, there are three essential foci of aesthetics: a certain kind of practice, activity or object; a certain kind of property, feature or aspect; and a certain kind of attitude, perception or experience.<sup>48</sup> Experience is rooted in a personal observation

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<sup>46</sup> Lars Brabyn 'Classifying Landscape Character' (2009) 34 *Landscape Research* 299.

<sup>47</sup> Baumgarten is attributed with creating a science of 'aesthetics' in the 18<sup>th</sup> century. He used the term to refer to the "science of how something is sensitively cognized." Paul Guyer 'History of Modern Aesthetics' in Jerrold Levinson *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 25, 25.

<sup>48</sup> Jerrold Levinson 'Philosophical Aesthetics: An Overview' in Jerrold Levinson *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 3, 3.

of an object and much of aesthetic philosophy is focused on understanding the nature of “the various mental states that figure in response to art or nature, e.g., perceptions, imaginings, reasonings, feelings, memories, moods”.<sup>49</sup>

The approach to the aesthetic observation of the natural beauty of landscape is entirely dependent on the context. Thus, it is important to understand how to approach an observation of the beauty in nature; and, subsequently, the way in which natural beauty is related to landscape.

### The Beauty in Nature

Beauty in nature was a prominent concern in aesthetic philosophy until the 19<sup>th</sup> century when, following Hegel’s assertion of the superiority of human artistic endeavour, the discipline began to focus on the aesthetics of art.<sup>50</sup> The study of beauty in nature resurfaced as a subject of contemplation in the late 20<sup>th</sup> century, but remains a small branch of the discipline.<sup>51</sup> Nature is not art, and a central debate in nature aesthetics is whether the same techniques should be adopted in the aesthetic observation of art and nature. Although some authors argue that nature is not the

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<sup>49</sup> Ibid., 9.

<sup>50</sup> *Selections from Hegel's Lectures on Aesthetics*, by Bernard Bosanquet & W.M. Bryant, *The Journal of Speculative Philosophy*, 1886.

<sup>51</sup> Malcolm Budd ‘Aesthetics of Nature’ in Jerrold Levinson (ed) *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 117, 117.

foundational concept of natural beauty;<sup>52</sup> others believe strongly that the aesthetic appreciation of nature relies on the view of nature *as nature* and not art.<sup>53</sup>

Furthermore, It may be argued that our aesthetic experience of nature is informed by our relationship to the natural environment; this being defined by our role not just as spectators but operating within and, indeed, forming a part of nature.<sup>54</sup> Finally, in contrast to art, nature appears frameless, in the sense that “natural things are not set apart from their environment as objects of aesthetic interest.”<sup>55</sup>

Aestheticians in nature aesthetics are particularly concerned to find answers to the problems of indeterminacy in aesthetics, because assessments of natural beauty are important to legal and political decision making. Hepburn, for example, notes that:

“When we seem to defend AONBs against degradations it matters greatly what account we can give of the appreciation of that beauty: how its value can

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<sup>52</sup> See for example, Kermal and Gaskell: “Nature is not the foundational concept of natural beauty or landscape, and the attempt to resolve issues about the experience of natural beauty by deriving its vocabulary from such concepts is likely to fail” Salim Kermal and Ivan Gaskell ‘Nature, Fine Arts and Aesthetics’ in Kermal and Gaskell n. 18 above 1, 3.

<sup>53</sup> See Budd n. 55 above, 123.

<sup>54</sup> Arnold Berleant ‘The Aesthetics of Art and Nature’ in Kermal and Gaskell n. 18 above 228. On the view of humans as part of nature see further Raymond Williams ‘When we say nature, do we mean to include ourselves?’ *Ideas of Nature Problems in Materialism and Culture* (verso Books, 1980) 67 quoted in Amy Strecker *Landscape Protection in International Law* 20.

<sup>55</sup> See Budd n. 55 above, 117.

be set alongside competing and vociferously promoted values involved in industry, commerce and urban expansion”.<sup>56</sup>

Seeking some form of objectivity, detachment or impartiality in aesthetic observation is a pressing concern in this context. Aesthetic encounters appear entirely subjective given the personal nature of such experiences. Yet, there is often agreement that an individual object, such as a particular flower, is beautiful. Thus, writing specifically in the context of natural beauty, Moore explains:

It is a common perception that among the encounters we have with natural objects that we are inclined to speak of as aesthetic experiences there is a certain quality of *sameness*. Or, at least that there seems to be enough alike in them to call these experiences by the same name.<sup>57</sup>

It appears that the search for objectivity, detachment or impartiality in aesthetic observation falls primarily into three lines of inquiry. First, formalist approaches focus on the properties of an object in defining its aesthetic value. Thus, for example, the

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<sup>56</sup> Ronald Hepburn ‘Trivial and Serious in Aesthetic Appreciation of Nature’ in Kernal and Gaskell n. 18 above, 65.

<sup>57</sup> Ronald Moore *Natural Beauty: A Theory of Aesthetics Beyond the Arts* (Broadview Press, 2007), 91. It is notable that Moore’s theory extends beyond natural beauty in the natural environment to nature everywhere, e.g., even in the “cloud outside the office window” (13).

beauty of nature can be considered in terms of lines, shapes, and colours.<sup>58</sup>

Secondly, the Kantian notion of 'disinterested' also suggests that it is possible to perceive something "without regard for its real existence or connection to one's interest."<sup>59</sup> Although referred to as the advent of the 'subjective turn' in aesthetics because of its focus on the response of the aesthetic observer, this is clearly a means of creating detachment. Thirdly, some studies have considered the place of cognitive science to an analysis of experience.<sup>60</sup> This leads to discussion of the role of practice or expertise in this respect. Even Hume, for example, who subscribed to the idea that it is possible to clear the mind of all prejudice, referred to the importance of the practice of an observer in establishing a 'standard of taste'.<sup>61</sup>

Carlson is a leading author in environmental aesthetics and proponent of cognitive approaches. He forms part of a movement within nature aesthetics that is particularly

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<sup>58</sup> Allen Carlson *Nature and Landscape: An Introduction to Environmental Aesthetics* (Columbia University Press, 2008) 43 noting the significance of the work of Bell in this respect Clive Bell *Art* (Putnam, 1958). See also in the context of nature, Budd n. 55 above, 119.

<sup>59</sup> See n. 52 above, 9.

<sup>60</sup> *Ibid.*, 9.

<sup>61</sup> Hume's thesis that a 'standard of taste' is discernible was based on the notion that such a judgement might be provided by a person with five key characteristics: ". . . a strong sense, united to delicate sentiment, improved by practice, perfected by comparison and cleared of all prejudice, can alone entitle critics to this valuable character; and the joint verdict of such, wherever they are found, is the true standard of taste and beauty". David Hume "Of the Standard of Taste," quoted in Jens Kulenkampff 'The Objectivity of Taste: Hume and Kant (1990) 24(1) *Nous: On the Bicentenary of Immanuel Kant's Critique of Judgement*, 97.

motivated by current ecological imperatives. He proposes an 'environment model' of nature aesthetics which:

[I]nvolves recognizing that nature is an environment and thus a setting within which we exist and which we normally experience with our complete range of senses as our unobtrusive background. But our experience being aesthetic requires unobtrusive background to be experienced as obtrusive foreground.<sup>62</sup>

In this scenario, knowledge of nature is essential to aesthetic experience of the natural environment and “yields the appropriate boundaries of appreciation, the particular foci of aesthetic significance, and the relevant act or acts of aspection for that type of environment.”<sup>63</sup> Carlson thus contends that, just as the art critic and art historian are well equipped to make an aesthetic observation of art, the skills of the naturalist and the ecologist are important in understanding the beauty of nature.<sup>64</sup>

One might assume that cognitive approaches to aesthetic observation such as this are irreconcilable with non-cognitive theories. However, avoiding the two extreme positions of “science and unfettered imagination”, Moore, provides a syncretic theory of natural beauty that tries to make sense of the juxtapositions between these

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<sup>62</sup> Allen Carlson. 'Appreciation and the Natural Environment' (1979) 37(3) *Journal of Aesthetics and Art Criticism* 267, 274.

<sup>63</sup> *Ibid.*, 274.

<sup>64</sup> *Ibid.*, 273.

positions.<sup>65</sup> His theory centres on the ‘experience’ of natural beauty but also draws upon other theories by “taking stock of the many disparate factors observers report as playing into this experience”.<sup>66</sup> He also highlights the importance of the knowledge of the observer to the aesthetic exercise:

Just as participants – insiders – in the artworld are those who have a stake in art and are appropriately equipped with background knowledge, to make aesthetic judgements regarding artworks, so insiders in the natureworld are those who have an aesthetic stake in the non-artifactual world, and who with a different appropriate range of background knowledge make aesthetic judgements regarding natural objects<sup>67</sup>

This discussion of aesthetic observation of nature has focused on the views of two authors, Moore and Carlson, which are clearly not representative of even this small branch of aesthetics. Indeed, there is little consensus among scholars in this field.<sup>68</sup> Nevertheless, the discussion highlights two essential propositions that can prove

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<sup>65</sup> See Moore n.61 above, especially 19, Chapter 2 and 134 onwards.

<sup>66</sup> Ibid., 221.

<sup>67</sup> Ibid., 137.

<sup>68</sup> See for example criticisms of Carlson’s environment model from Berleant, the leading proponent of experience in natural aesthetics, and Budd who rejects any theory based on a taxonomy of models of nature appreciation. Arnold Berleant *The Aesthetics of Environment* (Temple University Press, 1992). Malcom Budd *Aesthetic Appreciation of Nature* (Oxford University Press, 2002), 147. See also Diffey who notes that we cannot be sure how ecological and other knowledge relates to aesthetic appreciation. T Diffey T ‘Arguing about the Environment’ (2000) 40(1) *British Journal of Aesthetics* 133, 140.

useful in considering aesthetic obligation in law as it applies to natural phenomena. First, that nature is not art; and it is possible to adopt different techniques in observing natural beauty than would apply to art. Secondly, some sense of objectivity, impartiality or detachment in that process of aesthetic observation can be provided by acknowledging the importance of expertise and practice in this regard. It is also important to consider how natural beauty relates to landscape.

### Natural Beauty and Landscape

Nature, environment, the natural environment and landscape are often conflated in nature aesthetics or at least not clearly defined.<sup>69</sup> Nevertheless, recourse to the work of Carlson on nature and landscape, alongside the literature in landscape studies, can illuminate some of the key issues that arise in understanding aesthetic observation of natural beauty, specifically as it relates to landscape.<sup>70</sup> These issues will be discussed with reference to the idea of landscape as scenery, nature and culture.

Scenic value is the dominant view of landscape according to the Romantic idea of the picturesque that “frames nature as it were, and deposits it in galleries – the

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<sup>69</sup> Although note that Moore identifies the fact that natural beauty can exist in urban environments Ibid., 13. Carlson’s work also suggests that ‘landscape as scenery’ is a ‘model’ for viewing the natural environment from an aesthetic point of view. Allen Carlson. ‘Appreciation and the Natural Environment’(1979) 37(3) Journal of Aesthetics and Art Criticism 267, 270.

<sup>70</sup> See Carlson n. 62 above.



national parks.”<sup>71</sup> This approach is closely associated with the idea that nature can be viewed as art rather than its existence as nature.<sup>72</sup> Seeking beauty in nature can appear to be a hedonistic pursuit of pleasure that is incompatible with the conservation of the natural environment.<sup>73</sup> On the other hand, to deny the importance of the beauty of natural landscapes is also to deny the real benefits such recognition can provide.

Recognising the beauty in nature is often where the relationship between humans and concern for their environment begins. Natural beauty can have the effect of drawing people into the natural environment. This can assist in nurturing public interest in environmental issues and provide routes for public education in this regard.<sup>74</sup> Recreation in the natural environment can also benefit people’s physical health and mental well-being; and that this may be associated with the enjoyment of the beauty in nature.<sup>75</sup> Meanwhile, a fascination with ‘beauty’ and the ways in which beauty takes shape in society is essential to our culture and includes the ‘natural

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<sup>71</sup> Callicot J.B *In Defense of the Land Ethic: Essays in Environmental Philosophy* (Albany, NY: University of New York Press, 1989) 242.

<sup>72</sup> The relationship between landscape and art is explored in Kernal and Gaskell n. 18 above.

<sup>73</sup> Mark Sagoff ‘On Preserving the Natural Environment’ (1974) 84 Yale L.J 205, 209.

<sup>74</sup> This is evidenced by the education teams that operate in the National Parks of England and Wales. See further <https://nationalparks.uk/students> (last accessed 8th July 2019).

<sup>75</sup> As a result, National Park authorities work closely with public health organisations to maximise these benefits. See further <https://www.nationalparksengland.org.uk/home/about-national-parks-england/policy/our-work-pages2/health> (last accessed 8th July 2019). It must be acknowledged, however, that these benefits are not exclusively associated with the ‘visual’ but may relate to other senses.

world' as much as the 'art world'.<sup>76</sup> Nevertheless, focusing on scenic value clearly provides a narrow means of identifying the cultural value of landscape.

Some scholars in nature aesthetics would agree that to see nature as it exists in landscape as a set of "ready-made standard views" is to trivialize it.<sup>77</sup> The focus on 'framing' is, in particular, at odds with the idea that nature is frameless, i.e., that natural things cannot be set apart from their environment.<sup>78</sup> Carlson's thesis of nature and landscape rejects the disinterested observation of picturesque landscapes or formal approaches that "characterize the beautiful as small, smooth, subtly varied, delicate, and 'clean and fair' ... of colour".<sup>79</sup> Indeed, Carlson has been keen to relate the aesthetics of landscape to their existence as both a product of nature and in cultural perspective.

Landscapes exist as a product of nature and a repository of the natural resources on which future human development depends. Landscape ecology is also important to the protection of biodiversity.<sup>80</sup> A landscape can be viewed as an area within which networks of 'ecosystems' operate and interact with one another and the broader

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<sup>76</sup> Evidence of the importance of the "distinctive, beautiful, characterful and cared for landscapes" of England was reported in a publication by a consortium of charities *Landscapes for Everyone: Creating a Better Future* (2015).

<sup>77</sup>Hepburn n.60, 69.

<sup>78</sup> Budd n. 55 above, 117.

<sup>79</sup> Carlson n.62 above 90 quoting Conron. John Conron 'American Picturesque (Pennsylvania University Press, 2000) 17.

<sup>80</sup> See for example David W. Burnett 'New Science but Old Laws: The Need to Include Landscape Ecology in the Legal Framework of Biodiversity Protection' (1999) 23(1) *Environ* 49.

natural environment. Landscape ecologists are, therefore, interested in landscape as a perspective from which to seek to understand the 'flow' of organisms or nutrients and spatial distributions of species or populations.<sup>81</sup> Modern ecological studies also highlight the need for connectivity which is more appropriate to the landscape scale.<sup>82</sup>

Recognising that nature is not art provides a means of aligning natural beauty with modern concerns for the ecological condition of landscapes. Carlson's 'environment model' can be informative in considering the way in which the boundaries of the landscape, arising from the natural environment, can provide the frame for aesthetic observation.<sup>83</sup> Relating this act of aesthetic observation to the process of nature, of which the observer is a part, is also important in considering the beauty of landscape as a product of nature.<sup>84</sup> For example, an aesthetic observation of upland moorland would be take into account the fact that this is, ecologically, a relatively destitute landscape.

Landscapes are not only a product of nature but of human transformation. Neither is landscape simply a physical entity but exists as a social construct.<sup>85</sup> Thus,

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<sup>81</sup>Francoise Burel Jacques Baudry (eds) *Landscape Ecology: Concepts, Methods and Applications* (Science Publishers New Hampshire USA 2004) 45.

<sup>82</sup> See for example the conclusions of the Lawton Report. Lawton J., *Making Space for Nature: A Review of England's Wildlife Sites and Ecological Network* (DEFRA, 2010).

<sup>83</sup> See n. 66 above.

<sup>84</sup> See n. 58 above.

<sup>85</sup> See n. 27 above.

landscapes can be viewed as something that forms an essential element of our culture. The relationship between culture and landscape is often conceptualised with reference to cultural heritage. This relates not just to the physical formation of the landscape or other tangible assets within it, such as ancient monuments, but 'intangible' heritage, such as the myths and legends that arise in this context.<sup>86</sup> In more recent years, the notion of the cultural landscape has become a powerful concept that has increasing relevance in modern society.<sup>87</sup> The cultural landscape can be interrogated from many different perspectives ranging from its historical relevance to the way landscape provides an expression of cultural political and economic power.<sup>88</sup> The 'cultural landscape' can also be identified with more metaphysical notions of 'cultural identity';<sup>89</sup> and highlights the importance of the broad spectrum of temporality to landscape, focusing not just on the heritage of the past but the response of present and future generations.<sup>90</sup>

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<sup>86</sup> For further explanation of the differences between tangible and intangible cultural heritage see for example Yahaya Ahmad 'The Scope and Definitions of Heritage: From Tangible to Intangible' (2006) 12 (3) *International Journal of Heritage Studies* 292.

<sup>87</sup> For example, the World Heritage Convention includes the designation of 'cultural landscape' as part of its mission to protect representations of "the combined works of nature and man". World Heritage Convention (United Nations Economic and Social Organisation, 1972) Article 1.

<sup>88</sup> See further Wylie n. 26 above.

<sup>89</sup> See for example, Shelley Egoz, S. 'Landscape and identity: Beyond a geography of one place', in Peter Howard Ian Thompson and Emma Waterton (eds) *Routledge Companion to Landscape Studies* (Routledge 2013) 272–285.

<sup>90</sup> See for example Cornelius Holtorf, Anders Hogberg *Cultural Heritage and the Future* (Routledge, 2018).

It is arguable that the cultural context is important to aesthetic observation of natural beauty and the way this relates to landscape. First, Moore's theory suggests that the 'layers of response' to natural beauty include measuring our pleased reaction to a natural object and reflective awareness of it to "prevailing ideas or standards of beauty in a given cultural community."<sup>91</sup> Thus, a 'mature' response to natural beauty can "link individuals and their communities in a creative way, advancing the normative interests of both."<sup>92</sup>

Furthermore, Moore asserts that this can reflect "past traditions of sensory awareness, currently evolving cultural views and aspirations for the trajectory of values toward future generations."<sup>93</sup> Thus, he suggests that the aesthetic observer of natural beauty should have achieved 'cultural maturity':

Cultural maturity ... is marked by the conscious adoption of cognitive principles and responsive styles as one's own, after the growing up process of examining and sampling the principles and styles of others and after having positioned oneself in relation to a given normative heritage.<sup>94</sup>

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<sup>91</sup> Moore n. 61 above, 240. Moore uses the example of the professionally qualified referee at a flower show as evidence that they are established culture specific standards of aesthetic merit in some fields (152).

<sup>92</sup> *Ibid.*, 240.

<sup>93</sup> *Ibid.*, 92.

<sup>94</sup> *Ibid.*, 241.

Carlson's theory of nature and landscape also highlights the importance of a cultural perspective in understanding the histories of landscape. He focuses on the expressive beauty of landscapes defined as the manner in which a landscape expresses 'life values':

Life values involve a wide range of characteristics associated with objects such that they are felt or perceived to be qualities of the object themselves. They are connected with objects by deep-seated and commonly held beliefs and thus depend on what is in general taken to be the 'true' nature of the objects said to express them.<sup>95</sup>

Thus, for example, the expressive beauty of agricultural landscapes lies in their function, productivity and sustainability.<sup>96</sup>

This account of aesthetic observation of the natural beauty of landscape relates the broad scholarship in landscape studies to the work of Moore and Carlson in nature and landscape aesthetics. Again, the discussion of both is necessarily limited but is useful in considering how the relationship between landscape and nature might take shape as a matter of aesthetic observation. Once more it is possible to elicit some essential propositions. First, natural beauty is not akin to scenic value. Secondly, the natural beauty of landscape should be viewed as a product of nature. Thirdly, the cultural context of aesthetic observation of the natural beauty of landscape is essential, in recognising the natural beauty of the landscape. Fourthly, that the

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<sup>95</sup> Carlson n. 62 above, 98.

<sup>96</sup> *Ibid.*, 97 onward.

practice and skill of the aesthetic observer is important and must relate to its value as both nature and culture.

Moore makes some comment on the issue of practice and skill in aesthetic observation, but Carlson is explicit that cognitive approaches are essential. For Carlson, the 'correct' way to aesthetically appreciate landscape is to be educated in relevant ways.<sup>97</sup> According to Carlson, the key areas of the 'curriculum' would be scientific knowledge related to the natural environment but also matters of form, common knowledge and information about the histories of production of landscape.<sup>98</sup> This would need to be supplemented where appropriate with knowledge of mythical, symbolic and artistic uses.<sup>99</sup> Carlson's reference to common knowledge and myths associated with the landscape reminds us that, in order to gain a full picture of the cultural heritage of a landscape, it is important not just to rely on scholarly endeavour or expert opinion, but to connect with local people who will have relevant experience. Indeed, public participation is widely recognised to be essential in establishing systems of landscape protection, as evidenced by the focus in this respect in the European Landscape Convention..<sup>100</sup>

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<sup>97</sup> Carlson n. 62 above, Chapter 7.

<sup>98</sup> *Ibid.*, 127.

<sup>99</sup> *Ibid.*, 127.

<sup>100</sup> Article 5 European Landscape Convention Council of Europe Florence, 20.X.2000. Similarly, it is increasingly acknowledged that local communities are well-placed to understand their natural environment and can contribute relevant information to our understanding of this alongside scientific investigation. See for example the attention to the role of public participation in the implementation of the United Nations Convention on Biological

Having established some essential propositions to help illuminate the notion of the natural beauty of landscape as a matter of aesthetic observation, it is necessary to consider the relevance of the regulatory context in which that observation takes place. Aesthetic observation takes many different forms with a variety of objectives. There is a significant difference between the individual observer who considers the beauty of a particular flower to the person charged with observing the natural beauty of a landscape as part of a legal process for designation. In a regulatory context, it is arguable that the aesthetic observation should be viewed as a matter of aesthetic interpretation that seeks to elicit the 'public meaning' of the natural beauty of the landscape. .

### **Aesthetic Interpretation of the Natural Beauty of Landscape**

It is proposed that aesthetic objects which form the subject of a regulatory regime exists for the benefit of society and, as a result, should have meaning, aesthetically, to the public. Thus, it is posited that the aesthetic exercise at the first stage of decision-making should take the form of an aesthetic interpretation of the landscape that aims to elicit its 'public meaning'. This approach is based on Raz's view of interpretation. Indeed, the idea of aesthetic interpretation is best explained by reference to Raz's examination of interpretation as an autonomous notion, especially

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Diversity Lalanath de Silva 'Public Participation in Biodiversity Conservation' in Elisa Morgera and Jona Razzaque (eds) *Biodiversity and Nature Protection Law* (Edward Elgar, 2017).



as it relates to the comparison between acts of interpretation in law and the arts.<sup>101</sup>

The purpose of legal interpretation is to reveal the original intention of its author because this is the root of its authority.<sup>102</sup> In the context of the natural beauty of landscape, the idea of the importance of the intention of a creator is absurd.

Landscape is a product of nature, but, absent of a belief in a Divine creator, it is impossible to identify an author in this respect. Where interpretation is not carried out in pursuit of the retrieval of the author's intention, Raz suggests that the meaning of an object can arise from its existence as a cultural object.<sup>103</sup>

Raz asserts that an artwork can be viewed as a cultural object because "it is part of its nature to be a mirror to our lives and the world...".<sup>104</sup> This is also true of landscapes. Following Raz's analysis, if a landscape is viewed as a cultural object its meaning can be ascertained from the (i) state of the landscape itself and (ii) "other reflections on or representations of the meaning of human life, man's place in the world and aspects of human experience."<sup>105</sup> This supports the view that aesthetic interpretation of the natural beauty of a landscape should relate to its physical properties as a product of nature, but also the importance of the cultural context. The cultural context must also be related to the dynamic nature of landscape from a

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<sup>101</sup> Joseph Raz 'Why Interpret' and 'Interpretation without Retrieval' in Joseph Raz *Between Authority and Interpretation* (Oxford University Press 2009) 223 and 241 respectively.

<sup>102</sup> Ibid, 223.

<sup>103</sup> Joseph Raz 'Interpretation without Retrieval' in Joseph Raz *Between Authority and Interpretation* (Oxford University Press 2009) 241, 246 onward.

<sup>104</sup> Ibid., 264. This can be contrasted with history and law which „are not mirrors; they are there, made by those who forged them, and are merely to be understood by those who interpret them (264).

<sup>105</sup> Ibid., 241, 249.

temporal perspective; or the need to understand the meaning of its natural beauty according to cultural values that exist across time and space. Just like artworks, landscapes can, as Raz opines, invite interest “as a treasure house of icons, of image and associations, with complex connections with people, movement and ideas across generations, whose interest and reinterest enables us to define ourselves within our history.”<sup>106</sup> This resonates with Moore’s view that the cultural context relevant to natural beauty crosses the generations.<sup>107</sup>

Interpretation is a matter of expertise; hence legal interpretation is the preserve of lawyers and judges skilled in the practice. Similarly, the interpretation of artworks, arguably, requires not just practice in this exercise, as Hume proclaimed, but relevant skills in art history. This resonates with cognitive approaches in aesthetic philosophy which suggest that an aesthetic observation focused on the experience of an object may require some element of cognitive skill.<sup>108</sup> Thus, an act of aesthetic interpretation may also be viewed as a matter of expertise. However, the aesthetic observer must also look beyond their own viewpoint to consider the ‘public meaning’ of a cultural object and this will necessitate a mechanism for public participation. In the context of the natural beauty of landscape, the ‘public, falls broadly into two categories; those that are geographically defined to fall within and outside the landscape and those that form communities of interest related to the landscape. It is important, therefore, to provide routes to public participation in the decision making

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<sup>106</sup> Raz n. 105 above, 316.

<sup>107</sup> See n. 97 above.

<sup>108</sup> See n. 101 above.

process to ensure the representation of those interests; and that these are taken into account by the observer.

An important consideration is whether the aesthetic interpretation of the natural beauty of landscape should be carried out by a single individual or range of skilled practitioners. A broad range of skills have been identified as essential to an act of the aesthetic interpretation of the natural beauty of landscape. Thus, one might question whether it is possible for anyone to reach the desired level of qualification to carry out the exercise described. Landscape architecture is a field that already combines expertise in the design aspects of landscape with knowledge of ecological and cultural concerns.<sup>109</sup> Nevertheless, it might be argued that it is more desirable to involve a range of skilled practitioners in the process.<sup>110</sup> Whilst compelling, this in sharp contrast to the kind of syncretic approaches in aesthetics that have been discussed here. For example, Carlson believes that a single aesthetic observer is best placed to adopt the kind of holistic or syncretic approach necessary to recognise the synergies between the values of landscape as nature, culture and beauty.

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<sup>109</sup>See further Landscape Institute <https://www.landscapeinstitute.org/education/landscape-architect-careers/> (last accessed 8<sup>th</sup> July 2019).

<sup>110</sup> Other scholars have argued, for example, that it is possible to reflect an awareness of different aesthetic theories in landscape regulation by involving different groups. For example, subjectivism suggests everyone having an 'equal voice' in the definition of beauty by referendum or mediation to establish a common position; whilst a cognitive approach emphasises scientific methodologies in measuring beauty. Brooks and Lavigne n. 46 above, 169-171.

The idea that there should be greater attention to expertise in aesthetic observation in the designation of protected landscapes appears to be quite apposite to the established position in environmental law scholarship that expert evidence is often given too much weight in land-use decision-making.<sup>111</sup> However, the focus here is on the designation process for protected landscapes not decision-making following designation. Furthermore, the argument that aesthetic interpretation is a matter of expertise does not deny the importance of public participation in the process. Indeed, the process advocated is committed to ensuring that the views of the public are taken into account.

So far, the focus has been on how we might elicit evidence of the natural beauty of landscape through a process of aesthetic interpretation. The next stage in a process of the designation of a protected landscape is to establish whether on the basis of this evidence the landscape in question should attract 'special status' in law. Where the natural beauty of landscape is based on an aesthetic interpretation that establishes its public meaning, it follows that the 'special status' of the landscape should rest upon its significance in providing such meaning to the public - rather than a judgement regarding the level or extent of the natural beauty of the landscape.

### **Assessing the Significance of an Aesthetic Interpretation of the Natural Beauty of a Landscape**

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<sup>111</sup> See further specifically in the context of landscape decision-making the work of Lee and Jenkins at n. 17 above.

If protected landscapes are to exist at all we must be able to clearly identify their 'special qualities'. If those special qualities are referred to in terms of natural beauty, it might be assumed that the purpose of aesthetic observation is to decide upon the extent of its natural beauty i.e., by devising a means of stating that one landscape is more naturally beautiful than another. This necessitates a process of some form of philosophical ordering of the natural beauty of landscape. Whilst some aestheticians believe this is possible;<sup>112</sup> the idea is instinctively controversial. Most importantly, it does not fit with the notion that the purpose of aesthetic observation in a regulatory context is to provide an aesthetic interpretation of the landscape. Aesthetic interpretation differs from most other acts of aesthetic observation because it aims to elicit the 'public meaning' of the landscape rather than make a qualitative judgement in this respect. It follows that the significance of the natural beauty of the landscape will depend on the extent to which it conveys that public meaning.

Public meaning exists at different spatial scales and according to different communities of interest. Protected landscapes are identified on a national scale and, hence, the focus must be the extent to which the natural beauty of the landscape has relevance to the public at a national level.<sup>113</sup> This approach accords with other legal systems of designation that are created at different spatial scales, such as wildlife and cultural heritage regimes. Wildlife laws exist, for example, to protect endangered species and habitats; but their significance is judged according to the 'level' of the relevant legal regime, i.e., with respect to the European Union or in

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<sup>112</sup> Moore certainly believes that this possible in relation to natural beauty. Moore n. 61 above, 128.

<sup>113</sup> This fits clearly with the existing approach in which the IUCN supports nation states in designating 'protected landscapes'. See n. 2 above.

England and Wales.<sup>114</sup> Cultural heritage laws in England and Wales also list buildings or ancient monuments of architectural or historic interest of national significance.<sup>115</sup> Meanwhile, World Heritage Sites are designated for their global significance.<sup>116</sup>

If a system of designation of protected landscapes is based on an aesthetic interpretation of the natural beauty of the landscape and assigning 'special status' relies on the extent of the public meaning of the landscape in this regard, it follows that the process will involve two stages. The first step will involve eliciting information about the natural beauty of the landscape, whilst at the second stage this information will be used in evidence to inform the decision as to whether the natural beauty of the landscape is 'significant'. Viewed in this way, the purpose of the aesthetic observation of the natural beauty of the landscape is not to make a qualitative judgement but to provide evidence to be used in judging the significance of the natural beauty of the landscape.

The approach advocated will not address the problem that by creating a system of protected landscapes, we necessarily devalue those that exist outside these areas.<sup>117</sup> Nor will it stop the socio-economic interests of those living within protected

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<sup>114</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Wildlife and Countryside Act 1981.

<sup>115</sup> Ancient Monuments and Archaeological Areas Act 1979 and listed buildings in the Planning (Listed Buildings and Conservation Areas) Act 1990 respectively.

<sup>116</sup> World Heritage Convention (United Nations Economic and Social Organisation, 1972).

<sup>117</sup> See n. 11 above.

landscapes becoming contingent on the designation of a protected landscape. Any system of protected landscapes based on the identification of special qualities of the relevant area will require us to place some precedence on those qualities over more local considerations. Clearly, we need to find more sophisticated means of balancing these interests. Nevertheless, providing a reasoned, robust and transparent system for identifying the special qualities of the landscape for the purpose of designation in terms of natural beauty will assist in engaging local people, as well as visitors, with the values of the protected landscape. The evidence resulting from the aesthetic interpretation of the landscape will be important in considering how our actions should be directed in helping to shape the landscape in the future. Although it is important to recognise that the purposes of protected landscapes, once designated, may extend beyond the legal criterion for designation.

## **Conclusions**

Landscapes exist in a contested space; reflecting the conflicts between our ecological imperatives, our concerns for our cultural heritage and our desire to delight in the beauty of nature. If we wish to continue to provide some areas with 'special status' in law we must find a means of identifying the special qualities of those landscapes for the purposes of designation.. Defending natural beauty in this respect will not be easy. Natural beauty appears to stand in stark contrast to the values of landscape as both natural and cultural heritage. As an aesthetic concept, natural beauty also presents a significant challenge to law. To include natural beauty in the designation of protected landscapes requires us to confront some of the most

pressing problems of indeterminacy in aesthetics. Nevertheless, this paper has sought to establish a means of ensuring that such an aesthetic observation may form the basis of a reasoned, robust and transparent system that can also account for natural and cultural heritage concerns.

The way forward will require us to dispense with popular conceptions: of landscape as scenery; that the recognition of natural beauty is directly opposed to efforts to address ecological imperatives; and aesthetics as the sole preserve of theoretical scholarship. Natural beauty should be viewed as a term of art, capable of accounting for the natural and cultural heritage of landscape. Furthermore, it should be acknowledged that a 'correctly' educated individual is capable of carrying out an aesthetic interpretation of the natural beauty of the landscape that can underline a decision-making process regarding the 'national significance' of that area.

If the conclusions of this paper are accepted, it follows that the existing duties for the designation of AONBs and National Parks in England and Wales must be replaced with a procedural framework that includes four essential features. First, ensuring that an individual is appointed with the appropriate cognitive skills, evidenced by their qualifications and experience of practice. Secondly, requiring the observer to create a report setting out the method by which that person has adopted an aesthetic interpretation of the natural beauty of landscape. This must account for the nature and culture of the landscape in ascribing public meaning to it and include a means of directly accounting for the views of the public in this respect. Thirdly, providing a process through which this report can be used to establish whether the aesthetic



interpretation of the landscape is 'significant' by considering the extent to which it conveys 'public meaning' at a national level.

The conclusions of this paper may be controversial with scholars from different disciplines who highlight the limits of engagement with their particular specialism. Practitioners may also dispute the way that these conclusions relate to existing practice or the barriers that exist to the implementation of these ideas. These claims are not disputed, thus, this paper should be viewed as a starting point for wider discussion across the relevant disciplines, and between academia and practice, in exploring aesthetic obligation in law, particularly as it relates to landscape.

7821 (including abstract).