



Protecting the natural and cultural heritage of local landscapes: Finding substance in law and legal decision making



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ABSTRACT

Local landscapes enrich the lives of the communities that live and work within them by reflecting their natural and cultural heritage. This heritage emerges from the physical formation of landscape and its relationship with the heritage assets and sites within it, for example, historic buildings, wildlife and protected habitats. This paper seeks to explore how these values are given substance in law and legal decision making. It outlines the conceptual framework for the protection of local landscape values in England and then reflects upon the way in which they are identified in land use planning decisions. It does so by focusing on the narratives that emerge around these values in the reports of Planning Inspectors. Two case studies are used to illustrate the possible challenges that might be encountered in attempting to adopt local and holistic perspectives, and a broad interpretation of the heritage that lies in the local landscape. The paper concludes by considering a possible future research agenda, especially the means of appreciating the role and significance of law in a multi-disciplinary approach.

1. Introduction

'Local landscapes' bind communities, their history and culture, to the natural surroundings. Thus, the concepts of natural and cultural heritage are increasingly used to explain the significance of 'local landscapes'.¹ It is a central contention of this paper that there are inextricable connections between all aspects of 'heritage' relevant to the local landscape. This includes heritage assets, such as buildings, ancient monuments and wildlife; defined areas or sites within the landscape; and the 'heritage' inherent in its physical formation.² The definition and value of cultural heritage has gained much academic attention, whilst natural heritage is a relatively unexplored concept.³ Nevertheless, both

have increasingly been recognised as essential to the value of landscape which is itself a subject of extended intellectual debate of a multi-disciplinary nature.⁴ There remains, however, a lack of attention to the connections between the different aspects of 'heritage' relevant to the local landscape.

Lawyers are rarely included in the academic debate surrounding the natural and cultural heritage of landscape.⁵ Yet, law plays an essential role in providing substantive meaning to these concepts⁶; not just in reflecting prevailing societal views, but in shaping those perceptions.⁷ Law from international sources also helps to frame normative understandings of these concepts. The European Landscape Convention (ELC) highlights the value of all landscape and identifies this with the

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¹ See for example the European Landscape Convention discussed at n. 40 below.

² See discussion from n. 15 onwards. On the distinction between this definition of 'heritage assets' and that in planning see further n. 105 below.

³ See discussion from n. 15 onwards.

⁴ Olwig notes that this traditionally relates to geography, history and aesthetics, but can be considered to add depth to study in anthropology, archaeology, philosophy and sociology Olwig K., 'Recovering the Substantive Nature of Landscape' (1996) 86(4) *Annals of the Association of American Geographers* 630–653. See further n. 24 onwards.

⁵ Lee has noted that landscape is underexplored in legal literature, but her work is a notable exception Lee M 'Knowledge and Landscape in Wind Energy Planning' (2017) 37 (1) *Legal Studies* 3–25. Also relevant is the work of Lee and others on participation and land use planning that touches on issues of landscape. Lee M. et al 'Public Participation and Climate Change Infrastructure' (2013) 25(1) *Journal of Environmental Law* 33 and Rydin Y Lee M and Stock S 'Public Engagement in Decision Making on Major Wind Energy Projects (2015) 27(1) *Journal of Environmental Law* 139. Also very relevant, is the work of Jane Holder on law and hedgerows: Holder J. 'Law and Landscape: The Legal Construction and Protection of Hedgerows' (1999) 62 *Modern Law Review* 100. An international perspective is provided by Fisher, Fisher D 'Can the Law Protect Landscape values?' (2005) 9 *New Zealand Journal of Environmental Law* 1–49.

⁶ See Olwig n. 4 above.

⁷ See further Martin and Scherr who note that: "Legal rules shape landscapes, while landscapes shape the culture from which rules emerge. In describing this interplay, landscape can seem passive, as a canvas on which laws paint visions of society; or active, as a matrix for the creation of law and culture." Martin D and Scherr A 'Lawyering Landscapes: Lawyers as Constituents of Landscape' (2005) 30 *Landscape Research*, 379–393, 379.

concepts of natural and cultural heritage, whilst the World Heritage Convention (WHC) assists in considering how to define these terms and apply them to landscape.⁸ Nevertheless, these Conventions adopt a fragmented approach to heritage assets/sites, and that which is inherent in the physical formation of landscape. English law is also focused on the separate designation of landscapes, cultural heritage assets and wildlife⁹; and these separate interests are viewed in narrow terms, i.e., by reference to aesthetic, historical/cultural and scientific value respectively.

Designations in English law identify only aspects of heritage and landscape that are of 'national significance'. 'Nationally significant' natural and cultural heritage can be important from a local perspective. For example, a prominent ancient monument can contribute to the formation of local culture whilst endangered wildlife, such as wetland birds, can be viewed as part of both the natural and cultural heritage of that landscape.¹⁰ The natural beauty of landscape can also be significant to local people, notwithstanding its value to the nation as a whole. Nevertheless, there will undoubtedly be features and aspects of local significance. One way of recognising the 'local significance' of landscapes, heritage assets and specific sites and areas of local interest in the landscape, is to introduce formal systems of local designation. English law, however, provides little opportunity for this.

Land use planning law is relied upon to ensure the protection of the natural and cultural heritage relevant to the local landscape. Land use planning in England is focused on the local community interest and grants decision-makers broad discretion to consider a range of relevant issues which should facilitate a holistic perspective.¹¹ Some constraint is, however, provided by laws on the designation of interests of 'national significance' and national planning policies. The way in which decision-makers identify the natural and cultural heritage values of the local landscape, in practice, is essential in providing substance to those values. This is explored in this paper with reference to the narratives that emerge around these issues in the reports of Planning Inspectors in recovered planning appeals on wind farm development.

Wind farm development often raises issues relevant to 'landscape protection'.¹² A wealth of literature exists on wind farm planning.¹³ In general, this focuses on the parameters within which decision-makers operate in assessing the 'impact' of such development, its 'effects' and 'acceptability'.¹⁴ In contrast, this paper focuses on the narrative that emerges around the values of the local landscape as the decision-maker,

in these cases the Planning Inspector, establishes baseline evidence of the values of the local landscape to use in making these judgements. These narratives provide a lens through which to reflect upon the challenges that decision-makers may face in adopting local and holistic perspectives and a broad interpretation of these values. As the aim was not to draw any firm conclusions from these cases, two are chosen for illustrative purposes only.

The paper begins with an explanation of key aspects of the multi-disciplinary debate around the values of landscape and the way in which these are given substance in international convention and English law. It then outlines the framework for decision-making in land use planning in England, including the constraints provided by legal designations, land use planning policy and the necessity of rationality in decision-making. The main body of the paper focuses on the narratives that emerge in the two case studies and the way in which they highlight some issues that might require further research. The paper concludes by drawing together the issues raised in the paper to suggest a possible means of mapping out a future agenda for research. In doing so it pays particular attention to the contribution that lawyers may make to the multi-disciplinary debate in this regard.

2. Defining natural and cultural heritage in landscape: academic debate and international convention

'Cultural heritage' is a notion that has attracted considerable academic attention; whilst natural heritage is a concept that has emerged more recently.¹⁵ Cultural heritage can be defined along a continuum from a narrow definition that focuses on 'tangible assets' to one that encompasses broader concerns.¹⁶ It was originally focused on buildings and ancient monuments, but it is now acknowledged to include 'intangible' aspects of cultural heritage including skills, knowledge, craft and beliefs.¹⁷ There is an extensive literature around the values of cultural heritage and a number of attempts have been made to create relevant typologies.¹⁸ For example, the statutory organisation responsible for heritage protection in England, has referred to these values as evidential, historical, aesthetic and communal.¹⁹

Natural heritage is a concept that is still relatively unexplored, but is clearly related to traditional concerns to protect endangered flora and fauna. Natural heritage can be viewed from an entirely eco-centric perspective, but is equally of anthropocentric concern, most notably where it relates to an aesthetic perspective.²⁰ An anthropocentric

⁸ See discussion from n.29 onwards

⁹ See discussion from n. 45 onwards.

¹⁰ See further discussion in case studies at n and respectively.

¹¹ For further discussion of these key aspects of the system see further Stallworthy M. *Sustainability, Land Use and the Environment* (Cavendish, 2002), 105 and 112.

¹² A point made by Lee in her work on knowledge and landscape n 5 above, 4.

¹³ This is an inter-disciplinary literature much of which, nevertheless focuses on issues around participation in wind farm decision-making: See for example in law, the work of Lee and other authors at n. 5 above and Scott K 'Tilting at offshore windmills: Regulating wind farm Development within the Renewable Energy Zone' (2006) 18 (1) *Journal of Environmental Law* 89–118. From other disciplinary perspectives see also Devine-Wright, P. 'Beyond NIMBYism: towards an integrated framework for understanding public perceptions of wind energy.' (2005) 8(2) *Wind energy* 125–139 and Breukers S. and Maarten W. 'Wind power implementation in changing institutional landscapes: An international comparison.' *Energy policy* (2007) 35(5) 2737–2750. There is also some interesting work around the political issues associated with wind farm development: Pasqualetti M, Gipe P and Righter R, eds. *Wind Power in View: Energy Landscapes in a Crowded World* (Academic Press, 2002) and D Toke. 'Exploring the landscape of wind farm developments; Local area characteristics and planning process outcomes in rural England' (2010) 27(2) *Land Use Policy* 214–221.

¹⁴ The difference between the 'impact' and 'effects' of development is explained in the guidance on landscape impact assessment. Landscape Institute *Guidelines for Landscape and Visual Impact Assessment (Third Edition)* (Routledge, 2013). 'Impact' is defined as action being taken and 'effect' as the change resulting from that action (para 1.15). Making a judgement about the 'effects' of development is a two-stage process; first, establishing the sensitivity of the landscape to the proposed development and then assessing the magnitude of change. Once the 'significance' of each of those 'effects' has been established they must all be considered as part of the 'planning balance' before a final judgement can be made about the 'acceptability' of the proposed development.

¹⁵ These two concepts are bound by the notion of 'heritage'. This generally leads us to consider the importance of the 'conservation' of those aspects of nature and culture that we wish to hold on to. We can however, make temporal connections between the past and the future in considering the importance of this 'heritage' to future generations. On the legal questions in this regard see further Ross A and Zasiaina A 'The Use of Presumptions and Duties in Sustainable Development Equations: Promoting Micro-Renewables and Preserving Historic Buildings' (2017) *Environmental Law Review* 93–112. This perspective is particularly important in landscape given the dynamic nature and the significance of human intervention in their development.

¹⁶ On defining cultural heritage see further Smith G, Messentger P and Soderland H (eds) *Heritage Values in Contemporary Society* (Routledge, 2015). On the relationship between natural and cultural heritage see for example Baird M. 'Natural Heritage, Heritage Ecologies and the Rhetoric of Nature in Rhetoric and Redescription' in Samuels K and Rico T *Cultural Heritage* (University Press of Colorado, 2015).

¹⁷ See for example Borelli S and Lenzerini F (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff, 2012); Smith L and Akagawa N (eds) *Intangible Heritage* (Routledge, 2009); and Ahmad Y 'The Scope and Definitions of Heritage: From Tangible to Intangible' (2006) 12 (3) *International Journal of Heritage Studies* 292–300.

¹⁸ See further Fredheim LH and Khalaf M 'The significance of values: heritage value typologies re-examined' (2016) 22(6) *International Journal of Heritage Studies* 466–481. This paper also discusses the significance of these 'value-based' approaches.

¹⁹ *Conservation Principles: Policies and Guidance for the Sustainable Management of the Historic Environment* (English Heritage, 2008). Note that English Heritage is now referred to as Historic England see n. 74.

²⁰ On the relationship between animal beauty and environmental protection see further Hettinger N 'Animal Beauty, Ethics and Environmental Preservation' (2010) 32(2) *Environmental Ethics* 115–134. On the importance of aesthetics to the value of landscape

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