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PROTECTING THE COLLECTIVELY APPRECIATED: DIFFERENT APPROACHES TO AESTHETICS AND AESTHETIC REGULATION IN THE UNITED STATES

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INTRODUCTION

The demands of American society to preserve certain environments, because they provide aesthetic appreciation, has been increasingly referred as supportive evidence by the courts to sustain aesthetic regulations in the United States. However, in spite of the increasing collective demands of people for aesthetic preservation, and in spite of the increasing amount of such regulations, the courts still have problems to justify the validity of preservation oriented aesthetic regulations, *i.e.*, the courts are still troubled in providing a justification that these regulations are valid and legitimate forms of governmental control over private property for public purposes. Although the U. S. Supreme Court and the majority of the courts of States have recognized a broadened definition of public purpose which states that even the aesthetic purposes alone can be the basis of police power use, the courts are still struggling with finding a sound definition of aesthetics. In many court cases, even if the aesthetic purpose alone is accepted as the sufficient basis for the enforcement of a regulation, the general language used in justifications still include references to secondary non-aesthetic reasons, such as protecting the property values (in especially design review cases), maintaining the tourists' interests (in especially historical preservation cases), or protecting public safety (in especially billboard cases) (Linder 1990, Rowlett 1981, Williams 1977).

Many design scholars, regulators and judges deal with the question of defining aesthetic concerns. It is crucial for the courts to understand and scrutinize the motives behind the collective demands to preserve, for example, certain landmarks, or to protect the visual character of a neighborhood, or a scenic vista or to reserve an untouched natural area. Where do these collective interests or sentiments come from and what do they really want in terms of planning and design? Is it really because of the financial interests that people of New Orleans want to keep French Quarter's architectural character? Is it because of safety issues that many communities do not want to see billboards around the highways? A sound person's answer would be: 'These concerns are important but not so important to enforce historic preservation or billboard regulations. The real reasons are different and probably closely related with aesthetic concerns . . .'

Courts recognize and actually adapt this kind of reasoning but still are puzzled with the problem of defining these concerns. Why don't people like the billboards? Is it because they think they are not picturesque? If so, are there any other objects which are not picturesque, so that we can regulate them too? What is to be picturesque? To what degree people do not like them? In other words, are there some other people who like them? If yes, why do they like them? That is to say, on what aesthetic grounds do they appreciate them? Can there be a special kind of billboard design that most of the people like, or at least not be offended (so that we can require the use of that kind)? One can add tens of similar questions to these. These questions are questions with vital importance for the courts. Plausible answers can help the courts to test the constitutionality of regulations. Plausible answers are indeed necessary to be able to define government's interest in regulating the architectural style in a neighborhood and to address the freedom of speech issue. The answers are important to be able to balance the condemned private property and protected public interest. Unless some answers are provided, even though they recognize the validity of aesthetic purposes, the courts will continue to be puzzled and look for secondary non-aesthetic justifications to test the constitutionality of aesthetic regulations and to defend their validity.

Although the above listed questions seem hard to answer because of their seemingly subjective and vague character, they are by no means untouched and unstudied questions. Different aesthetic theories have different answers. Some of them are quite reasonable and have been used in courts. The problem is that, most of the time, their usage in courts is mixed with non-aesthetic justifications, and therefore, they fail to provide a comprehensive understanding of the collective aesthetic sentiments. Furthermore, the analytical studies comparing different aesthetic approaches and explanations, in terms of their ability to scrutinize the aesthetic collective attitudes, are few in number and this line of study has not yet attracted the attention it deserves.

This paper is an attempt to provide a framework to explore the interrelations between aesthetic judgments and aesthetic regulations and to review and compare different aesthetic approaches that courts generally refer to in the context of legal aesthetics in the United States.

The next section of the paper provides a quick general historical background of aesthetic regulations in the United States. This review will point out that during the history of aesthetic regulations the number of the regulations has increased, the collective will to preserve certain environments has grown, and the courts' definition of public welfare has been broadened. The following section will provide a framework to explore the interrelations between aesthetic judgments and legitimation of aesthetic regulations. The argument will be that it is not fair to consider the aesthetic regulations as restitutionary regulations where the

pecuniary compensation is aimed. The aesthetic regulations are motivated by some collective sentiments or emotions, and therefore, they can be validated only by a plausible explanation of the motives of mentioned collective emotions. In this sense, the aesthetic judgments used in normative aesthetic theories can be important sources for legal legitimation of aesthetic theories.

The next section of the paper will explore and compare four different aesthetic approaches and associated judgments. The historical backgrounds of these approaches will also be provided. These approaches are (a) subjective approach, (b) objective approach which sees nature as an object of beauty, (c) the objective approach which sees the experience in nature as uplifting, educating and aesthetically pleasing, and finally (d) the inter-subjective approach which defines the aesthetic experience referring to the symbolic meanings and values attached to the environment. The last section will conclude with the argument that the inter-subjective approach is the most promising one to provide a general framework to explore the aesthetic demands in many different cases. This approach is particularly suitable for courts in their efforts to test the constitutionality of aesthetic regulations and to justify their validity.

A BRIEF HISTORY OF AESTHETIC REGULATIONS IN THE UNITED STATES

The Village of Euclid *v.* Ambler Realty Co. (1926) is a well known landmark case whereby the U. S. Supreme Court legitimized the use of police power in the zoning of private land by local governments for public health, safety, welfare and morals. Other than legitimizing the use of police power for zoning, the Euclid case recognized the concept of 'welfare' as a valid public purpose (Rowlett, 1981). Before Euclid the public health and safety was the only valid basis to regulate private property. Public safety and health is a pretty straightforward purpose in terms of its accountability and its undeniable necessity. Public welfare, on the other hand, is a broader concept which has a potential to be interpreted to include many other purposes including the aesthetic ones. However, this broader interpretation of the term to include aesthetic purposes came into the scene only 28 years after Euclid. In his famous statement at the U. S. Supreme Court case Berman *v.* Parker (1954), Justice Douglas stated:

> The concept of public welfare is broad and inclusive. . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled (348 U. S. 26, 1954).

Although Berman was an 'eminent domain' case, it influenced many zoning cases with its broad definition of public welfare (Rowlett, 1981). This definition removed from the shoulders of the court the necessity to find fictive legal justifications for aesthetic regulations, *i.e.*, using finance or safety related justifications to control billboards where the original intent behind the regulations is removing or preventing the visual disturbance, and provided the opportunity to use aesthetic purposes alone as the valid governmental interest to use the police power or the argument of 'eminent domain' (Karp, 1990; Pearlman, 1988).

In another important case, Penn Central Transportation Co. *v.* New York City, U. S. Supreme Court recognized New York City's Landmark Commission's concerns as valid public interest to use police power for 'taking' purposes. The court stated that:

> . . . state and cities may enact land use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city (438 U. S. 129, 1975).

This case is significant also, because it has legitimated the cultural stability oriented preservation purposes as opposed to aesthetic concerns in Berman which favored an 'Urban Renewal' development.

After Berman, the attitudes of State Courts towards aesthetic regulations have also changed. Many state courts have followed the Supreme Court's interpretation of public welfare and treated aesthetics as a valid basis for regulation. Karp (1990) suggests that the reasons are various. Some states, like Hawaii, Pennsylvania, and Montana, have constitutional provisions for using aesthetic basis alone. Others use aesthetic purposes depending on their state statutes, such as Minnesota's Highway Beautification Act and Washington's Shoreline Management Act (Smardon and Karp, 1993). Pearlman (1988) states that eighteen states have accepted regulations on the aesthetic basis alone, nine states prohibit regulations based on aesthetic purposes alone, and fourteen states have not decided the issue, as of 1988. In 1980, there were sixteen states with accepted regulations on aesthetic basis alone, and nine states which prohibited aesthetic basis (Bufford 1980).

One explanation of this change in the history of land use regulations is that as the society establishes its settlements and as the settlements reach to a mature phase, the concerns of its citizens for their surroundings shift from vital concerns like safety and health towards more subtle ones. In 1913, the first comprehensive bulk control regulations appeared in New York, where health was a serious problem in the very high density city barracks (Gerckens, 1988). Similarly, the first subdivision regulations appeared to control the design and construction standards with the primary concerns of public health and safety (Ducker, 1988). As the vital problems of these settlements were resolved, new concerns emerged. These new concerns were mostly about the character of communities or about the better configurations of different uses based on essential assumption of incompatibility of uses in zoning.

This explanation makes sense, but it is actually too general to grasp certain details. It is especially weak in explaining increasing concerns guiding the regulations oriented to nature preservation, *i.e.*, the scenic beauty and visual resource management regulations.

Another argument explaining the increase in aesthetic regulations is that processes, such as rapid suburbanization (the two big phases being the 1920's and postwar growth of 1950's through 1960's), increasing population in cities and urban sprawl, and appearances of unprecedented environmental problems, *e.g.* 'dust bowl' of Great Plains in 1930s, have created a movement from individualism toward more collectivism.

More and more collective concerns appeared, and hence, people started to accept the necessity of extended regulations over private property. Along with its emphasis on people's increasing sensitivity for environmental issues, the argument also suggests that both the increase in quantity and the expansion in purpose of regulations go parallel with the empowering cultural and collective values as opposed to increasing individuality.

Consequently, mechanisms such as billboard controls, scenic beauty regulations, and historic preservation have grown after the 1950s, and with the passage of National Environmental Policy Act (1969), the aesthetic impacts of any major federal project have been an issue of consideration.

As the number of regulations has increased, the language used in the courts has also changed and concepts referring to the motives of people's aesthetic preferences have been employed more and more . Many of these concepts have been used for justifying the validity of aesthetic concerns. To cite a few examples, the New Jersey Supreme Court in State *v.* Miller (1980) stated that well designed developments 'contribute to psychological and emotional stability and well being as well as stimulate a sense of well being' (Karp, 1990, 381). In Oregon City *v.* Hartke (1965), the Oregon Supreme Court claimed: 'It is not irrational for those who live in a community . . . to plan their physical surroundings in such a way that unsightliness is minimized' (Karp, 1990, 381). And for a final example, in Metromedia *v.* City of San Diego (1981), the U. S. Supreme Court argued: 'Each [billboard] destroys a unique perspective on the landscape and adds to the visual pollution of the city' (Pearlman, 1988, 479).

However, although the courts use these terms and concepts, the aesthetic concerns are generally used with the secondary non-aesthetic justifications to uphold the aesthetic regulations. The reason is that secondary justifications are mostly easier to refer. For instance Williams (1977) argues:

> Although the harm inflicted is exclusively the result of popular reaction to a form of expression, government's interest in protecting innocent parties against pecuniary loss seems more tolerable than an interest solely in protecting feelings (Williams, 1977, 26).

COLLECTIVE SENTIMENTS, AESTHETIC JUDGMENTS, AND THE PROBLEM OF HOW TO JUSTIFY THE VALIDITY OF AESTHETIC REGULATIONS

One may ask: 'What is wrong with supporting primary aesthetic purposes with secondary, for instance, economic justifications? After all, an increase in the environment's attractiveness affects the overall property values in the long run'. This assertion is indeed open to debate, but let's assume that it is true for the moment.

The first disadvantage of supporting aesthetic regulations with economic justification is that those aesthetic regulations which are totally independent from economic objectives will be ineffective. In other words, only those aesthetic regulations the rationale of which can be associated with economic concerns will be most likely to be upheld and others will be eliminated (Turnbull, 1971). The other disadvantage, in addition to the first one, is that upholding aesthetic regulations by means of secondary non-aesthetic concerns, Rowlett (1981) argues, obscures the primary purpose of the regulation, whereas 'ascertaining the primary purpose of a regulation is a necessary step in applying the well-recognized test of the constitutionality of police power regulations' (Rowlett, 1981, 51). Therefore, in many situations it is in essence unfair to justify aesthetic regulations based on non-aesthetic concerns.

These problems bring the question of verification into the discussion. What kind of verification do courts need to refer in order to uphold aesthetic regulations? Do they need general standards for aesthetics which can be applied everywhere in every case? Do they have to verify the regulations, or can it possibly be verified on empirical bases that an aesthetic regulation is for public interest?

At this point it is helpful to remember Durkheim's well known classification of legislation. He proposes two types: restitutory and repressive (penal) law. Restitutory law is based on the compensation of pecuniary losses between parties,

whereas the repressive (penal) law aims to satisfy the will of collective conscious, *i.e.*, to satisfy the collective emotional reaction toward the guilt (Durkheim, 1984). In a case of homicide, for instance, the motive in the punishment is not to compensate the loss, but simply to react against an infringement of the collective ethical values. The justification of a restitutory regulation is therefore different than the one of a repressive law. The economical or utilitarian justification works for the former, but not for the latter. A plausible definition of the collective values, *i.e.*, the will of collective conscious, is necessary and also sufficient for the latter. Following this line of reasoning, it is fair to argue that the concept of public welfare and morality necessitates the latter type of justification, because the definition of the concept depends on the definition of the collective values of the time.

There cannot be an empirical verification showing that an aesthetic regulation is for the public interest, but this does not make the aesthetic regulations non-testable in terms of their constitutionality. Reasonable, consistent, and fair description of the will of collective conscious, with a description employing value statements instead of verifiable empirical ones, can be sufficient. Williams (1977) reminds us that the aesthetic regulations are not the only ones having these characteristics, but there are many others for which the assertion that they are for the public interest cannot be empirically verified. Furthermore, interpretations of certain values or certain concepts like 'public welfare' by the courts can change in time. The courts can change their attitudes towards certain issues as the cultural and intellectual environment changes, as in the case of the changing attitudes towards death penalty, or towards the abortion rights. If the attitudes of the courts change in time, following the will of collective conscious, then empirical verification, even though it may facilitate argumentation, will lose its grounds.

Aesthetic regulations are closely linked with collective sentiments and values. Consequently, it is fair to state that neither the utilitarian and economic justifications, nor empirical verification can provide an answer for the question of testing the constitutionality of aesthetic regulations.

So, what can be done? I propose to turn our attention to another realm, namely the realm of aesthetic normative theories the where the aim is to define what aesthetics is, and to provide a framework for criticism by means of aesthetic judgment. Almost every normative theory of beauty provides different answers to the following questions: What makes something, an object, or an artifact, a musical or literary piece, a scenic view, or a wilderness area, beautiful? Or, what makes an experience an aesthetic experience, an act of admiring, being impressed emotionally, *etc.*? What is an aesthetic statement? What are the criteria for aesthetic evaluation? (Coleman, 1968). Aesthetic theories try to answer these questions in order to produce certain aesthetic judgments. These judgments provide a framework for aesthetic evaluation.

For instance, a socialist, following the social realist movement in 1940s' Russia, would typically say that an artifact is beautiful and therefore provide appreciation, if it mirrors (or reflects) the material reality or class struggle of the society. The argument would further state that the real experience should depend on the real consciousness which is the consciousness of material reality. An expressionist from the romantic period, on the other hand, would claim that artist's emotions are important, and those artists, who can express their unique emotions through art, produce great pieces to be appreciated. In other words, what is beautiful according to this view depends on the exceptional characteristics of the person who created it. A formist, however, would oppose this idea, by asserting that

what is beautiful is the inner structure of the work or the artifact. Therefore, the argument would proceed with the statement that exploring those characteristics of the object, which give it its inherent potential of being aesthetically appreciable, is a meaningful effort.

By answering the questions in these ways, each approach also produces some value judgments, such as, 'art should reflect the material reality, and hence, should primarily be educational', or 'the artist should express her or his inner world in a poetic way that no other forms of expression can', or 'the artist should explore the universal structures which can be appreciated everywhere and should transfer those to the artifact he or she creates'. These judgments provide certain frameworks to evaluate aesthetic creation. Yet, how can we decide on a single framework? How can we know which framework is the best?

These aesthetic judgments provide criteria for evaluation, but at the same time they also suggest arguments that explain the motives of our sentiments emerging from our aesthetic experiences. We find some explanations plausible and reject others. If we feel that these arguments refer to our experiences and they help us to understand some of our sentiments in a structured and verbalized way, then, we find them to have greater acceptance.

Furthermore, these explanations can be partial, *i.e.* some arguments may scrutinize certain experiences of ours, whereas others help us to understand some other experiences. There is nothing wrong, for instance, with the following line of reasoning: 'The socialist argument is weak in explaining why I enjoy listening to Bach. On one hand, the formist argument provides a much sounder explanation for my listening to Bach. But on the other hand, the socialist argument makes sense when Bertolucci's movie '1990' is concerned'. We can discuss the collective sentiments in the same way. For instance, we may argue that the socialist argument is weak in explaining why certain musical pieces are being appreciated by people of different cultures and from different social strata throughout the ages. On the other hand, the same approach can give a plausible explanation why a lot of people enjoyed watching the movie '1900'. Yet, neither of them can give a sound explanation why John Muir walked from Wisconsin to Louisiana, alone in wild nature, and still enjoyed this journey. So, we look for explanations and aesthetic judgments associated with different theories.

Consequently, one criterion to assess aesthetic theories is whether or not associated aesthetic judgments are helpful in providing sound explanations to understand and verbalize collective sentiments of the day. Another important criterion, in our case, is whether or not these aesthetic judgments are compatible with the previously established higher level procedural rules and values of the courts.

DIFFERENT AESTHETIC APPROACHES AND THEIR SIGNIFICANCE IN LEGAL AESTHETICS

Having our basic expectations and the two criteria in mind, *i.e.*, usefulness in explanation and the courts' compatibility, we may now discuss the aesthetic theories of environmental conservation and design. As mentioned in the introduction, four distinct approaches are to be reviewed and compared here . These are (a) the subjective approach, (b) the objective approach which sees nature as a beautiful object, (c) the objective approach which sees the experience in nature as uplifting, educating and aesthetic, and finally (d) the inter-subjective approach which defines the beauty referring to the symbolic meanings and values attached to the object or to the environment.

The subjectivist approach claims that the environmental aesthetics is a matter of taste and it is the individual's choice and background which determines how one approaches to the environment. This approach was adopted by the courts especially in the pre-Berman period, and courts, referring to this approach, claimed that aesthetic purposes alone cannot provide a valid basis for government's use of police power.

The objectivist approach, which sees nature as an object of beauty, argues that every human being can appreciate nature's scenic beauties and panoramas. There is an inherent characteristic in those scenic vistas and panoramas, and because of that these places can be appreciated by everyone. This approach has been adopted especially in governmental policies for the management of public lands, *i.e.* National Parks, National Forests, Shores, and so on.

The objectivist natural aesthetics approach emphasizes the experience. It argues that if one can grasp the ecological relations hidden behind its surface beauty, the experience in nature can be uplifting, educating and aesthetically pleasing. This approach has been advocated by growing number of environmentalists who propose a biocentric ethical basis for land use planning.

Finally, the inter-subjective approach claims that there are some shared bases for people's aesthetic experiences. The collective meanings associated with the environment condition people's attachment to their surroundings and facilitate their ability to identify themselves with their environments. Therefore, their aesthetic experiences in those environments cannot be independent from those meanings and attachments. This approach has been recognized by the courts and, one way or other, has been referred in many design reviews, and zoning and historical landmark cases.

Before getting into detailed discussion of each approach, it is helpful to spend a little time about the objectivist and subjectivist views of aesthetics. The objectivist view claims that there exists an aesthetic value embodied by the object, which is independent from people's attitudes. That is to say, the aesthetic value of a musical piece, or a painting, or an architectural work, exists independent of people listening to that musical piece, or viewing the painting, or living in that architecture.

Coleman (1968), being an advocate of this view, gives the example of a complex musical piece, let's say, a symphony by Brahms. He claims that a child cannot understand this music, because he or she is to be educated both emotionally and technically in order to follow the music. But the fact that this child cannot follow the music is irrelevant in evaluating the aesthetic value of that musical piece; the value is still there waiting to be appreciated. Similarly, if a lot of people appreciate viewing a natural scenery, we can say that there is an aesthetic value inherent in that scenery. The fact that some other people do not find that scenery exceptional or beautiful does not detract from its aesthetic value.

The subjectivist view, on the other hand, does not accept the existence of an aesthetic value which is independent from peoples' emotions and sentiments. This view claims that if there is no psychological impulse such as an emotion, a pleasure, or something similar, then there is no aesthetic value. In other words, one cannot talk about an aesthetic value without referring to people's interests, and expectations. After all, people may have different interests and they may approach the same object with different expectations. Let us think about a building, say, a house. An engineer, with the structural problems in mind, would see it as a structural problem. On the other hand, it is natural for, let's say, its

future users who have some utilitarian questions in mind, to see the house like a tool they are going to use. Finally, an architectural critic who has just finished a paper on styles, most probably would approach the house as if it were a sculpture in which one could walk around. Furthermore, it is true for every one of us that we sometimes play the role of engineer, sometimes of the user, and still at other times that of the critic.

The subjectivist view argues that there are no distinct categories to differentiate objects of beauty and other objects. If we are playing the role of critics at the moment, even the very profane tools in the house, a faucet, or a hammer can activate our emotions. The trees, the cities, the streets can become works of art to the degree we are able to experience them aesthetically. On the other hand, for an appraiser who is trying to predict the original date of a painting, even a painting in the museum can be seen as an accumulation of paints with different chemicals. Consequently, for the subjectivist view, there are different types of experiences instead of different types of objects, and the aesthetic experience is one form of experience among many others.

THE SUBJECTIVIST VIEW

The subjectivist view of aesthetics was the common view recognized by the courts in the pre-Berman period. The following quote from Colorado Supreme Court's statement in Curran Bill Posting and Distribution Co. *v.* City of Denver (1910) demonstrates a typical earlier attitude of the courts toward the aesthetic issues:

> The cut of the dress, the color of the garment worn, the style of the hat, the architecture of the building or its color, may be distasteful to the refined senses of some, yet government can neither control nor regulate in such affairs (47 Colo. 1910; Costonis, 1988, 21).

The subjectivist view, in essence, implies an extreme relativism of tastes and suggests no support for aesthetic regulations. If there is no aesthetic value inherently embodied by the objects, and if the aesthetic experience is seen as a specific form of pleasure giving emotional experience, then, one object may be pleasing for one and not pleasing for others. Aesthetic preference becomes a matter of individual's taste. In other words, if there is no value embodied in the object, nobody has the right to argue that any specific object is worth preserving, because it will give an aesthetic pleasure to others, in the future. Hence, there can be no aesthetic reason to preserve an object or the environment.

According to the editor of the *Michigan Law Review* (1973, 1442), there are primarily two assumptions that the courts have employed following the subjective view: 'First, that there can be no consensus in matters of aesthetics. Second, that no aesthetic judgment is more or less reasonable than any other. . '. The second assumption especially stands against justifying any aesthetic regulation for legitimate use of police power to secure public interest.

The subjectivist claims lost their strength continuously, as the intellectual environment shifted from individualism of the 1920's, towards the New Deal Federalism's collective spirit (Costonis, 1988). During the 1930's and the 1940's, the courts began to recognize the aesthetic claims as significant concerns, but used them as secondary justifications along with non-aesthetic concerns (Karp, 1990). Especially, after the Berman case, the majority of courts left the subjectivist view and, as already mentioned, recognized the aesthetic concerns alone to uphold aesthetic regulations. However, there are still some courts following the

subjectivist claims and some scholars critiquing the increasing number of aesthetic regulations (*e.g.*, Lightner, 1992; Pouler, 1992). Pouler (1992), for instance, attacks aesthetic regulations claiming that they are killing the variety, encouraging a socially and physically homogenous surrounding, and oppressing the plurality. Lightner (1992), following the subjectivist view, argues that even when there is a consensus on aesthetic taste in a community, the majority has no right to suppress the minority's taste. If we follow the subjectivist view, the argument makes sense. After all, the courts do not suppress the minority party's freedom of speech, because the majority has voted for the other party. So, why for instance, a review board prohibits certain types of architecture in certain districts?

Consequently, if we define the motive behind the consensus as a matter of personal taste, the consensus loses its grounds to be presented as for the public interest. Let us think about the following example. Say, there is a highway to be built between two major cities. Although there may be some minorities who will never use this highway, and although there are some private properties who are going to be condemned, it is very easy for the courts to recognize that the highway is for the public interest. They do not ask the majority's opinion for each case; it is obvious for almost everybody that the highway will provide rapid and easier means of transportation, will improve business, and so on.

In other words, there is a sound argument to accept that the implementation of the highway is for the public interest. Let's say, there is a strong opposition in the community against the highway. Following the same line of reasoning, we may say that what is important here is not the question of whether or not the opposition represents the majority's opinion, but it is how reasonable the argument behind the opposition is to represent it as a public interest. Let's say, the argument is a strong economic one. We may say that most probably the courts will uphold any regulation prohibiting the construction of that highway on the basis of the opposition. By the same token, if the opposition emerges as an aesthetic reaction, in other words, if it is activated by the collective sentiments, then, these sentiments should be represented in the courts with an argument stronger than the 'individuals' personal tastes', according to the claims of the subjectivist view.

To conclude, it can be asserted that the subjective view is far from providing sound explanations for the motives of collective sentiments. It is essentially against the governmental involvement in aesthetic regulations.

OBJECTIVIST VIEW

The objectivist view, on the other hand, provides a stable rationale for preservation, by means of its assumption that the aesthetic value is an inherent property of the object of beauty. However, I am going to claim that, in the legal realm, this view creates certain problems in terms of its compatibility with the courts' higher level procedural rules and values, especially those related with fairness and equity.

Although sometimes one can find some objectivist claims in the design review guidelines or historical landmark cases, it is especially in the field of nature preservation that objectivist aesthetic view has been extensively referred by the courts. Therefore, I am going to review two primary nature preservation approaches which are based on objectivist view of aesthetics.

NATURE AS THE OBJECT OF BEAUTY

The idea of natural scenes and panoramas which are able to 'take the breath of every human being away' has been a very common theme guiding many nature preservation activities, since the earliest conservation movements. Since the establishment of earlier State Parks and later the National Parks, the aesthetic concerns were one of the foreground purposes, especially for the group called nature preservationists (Koppes, 1987). The mentioned aesthetic concerns were essentially objectivist concerns. It was believed that nature inhabits a sublime value within itself. This value is out there waiting to be appreciated. This value is like a resource. Indeed, it is nonrenewable. Once it is gone, the next generations will lose the chance to enjoy and appreciate it.

It is important to note that in those earlier years of nature preservation, the opposition which exists today between visual resource management and the advocates of deepest nature experience did not exist. The concept of the sublime value of nature implied both a picturesque aesthetic value and also an uplifting, educating and emotionally activating, I would say, aesthetic plus moral value. Leaving the latter side of this opposition to the next section, I want to concentrate here on visual resource management.

The picturesque aesthetic value of nature is seen as a resource to be preserved by agencies like National Park Service and Natural Forest Service and attracted many researchers to establish certain aesthetic standards which are to be used in designating scenery and areas worth preserving. The nature of those standards is a significant issue for us.

In the previous section it was discussed that for subjectivists consensus is meaningless. For objectivists it is the contrary. If there is an aesthetic value embodied by an object, say a scenery, the existence of a significant amount of people enjoying that scenery can be a good clue in fixing the existence and defining the ingredients of that value. The researcher facilitates this by asking which characteristics of the sceneries are being appreciated, and therefore, are those to be appreciated.

Linton's (1968) study of landscape assessment where he established the characteristics of relative relief, wildness, desolateness, untouchedness as the major criteria, Fines' (1968) study where he categorized and mapped 773 square-mile area of East Sussex in unsightly, spectacular, superb, *etc.* zones, and Steinitz' (1990) visual preference studies are few examples among many other similar aesthetic assessment studies which follow the objectivist view (1). Each of these studies provides certain landscape characteristics as aesthetic standards which facilitate management guidelines for governmental agencies to follow.

1. Both Linton's and Fine's works have been published again in Brooks and Lavigne (1985)

When an aesthetic value is said to belong to an object, following the objectivist view, this value becomes everlasting as long as the object exists. Therefore, once certain aesthetic standards are established with the presumption that these standards represent the universal characteristics of the mentioned everlasting aesthetic value, one no longer needs to change these standards. For instance, if Fines' East Essex map is able to designate the natural areas having aesthetic values, and if his criteria are to depict those characteristics of the landscape which give it the mentioned aesthetic value, then the governmental agencies have the right to preserve those characteristics till eternity. In the objectivist approach, there remains no need for change; the aesthetic value is over there and preserved. The established standards can be legalized and coerced by police power. Even if there appear new majorities with new preferences, there is no chance in the

mentioned process to employ the new inputs. Once the standards are established, they are valid everywhere and anytime.

When it is employed by governmental agencies, or by the courts upholding regulations, this resistance against change and the dependence on experts establishing the standards make the objectivist aesthetic view overly conservative, elitist, and remote from changing collective sentiments. These aspects of standards remind us of Lightner's (1992) and Pouler's (1992) cry for dynamism, plurality, and variety. Pouler, for instance, argues:

> Aesthetic decision making is ultimately not founded upon objective or mutual standards of judgment, nor in consensus, but simply reverts back to those in control, the same forces that determine much of the public realm; the political, capitalist, cultural elite (Pouler, 1992, 223).

Similarly, Costonis (1982) attacks the elitism of the objectivist view. He claims that establishing and coercing objective standards of beauty implies a despotism. This despotism is incompatible with courts' concerns about equal protection and their way of securing the public interests. I want to close this section with a quote by Costonis, which summarizes this argument of incompatibility:

> The visual beauty rationale's search for standards, defined as objective canons of aesthetic formalism, is both unnecessary and futile. . . Standards of aesthetic formalism cannot be authoritatively rendered as objective, ontologically based 'laws' (Costonis, 1982, 424-425).

NATURE AS THE REALM OF UPLIFTING, EDUCATING, AND AESTHETIC EXPERIENCE

Aldo Leopold, in *A Sand County Almanac*, states:

> A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise (Leopold, 1949).

This quote says many things: First, in the same line with the subjectivist view, it suggests that there is an aesthetic value in nature waiting to be appreciated. Second, this aesthetic value is not independent from the integrity and stability of the biotic community. Finally, and most important, the appreciation of this aesthetic value cannot be independent from ethical attitudes, in other words, one should first be respectful towards the integrity and stability of the biotic community; only after, he or she can appreciate the aesthetic value inherent in nature. This approach defines the aesthetic experience within a specific ethical paradigm. In other words, instead of using standards to define the characteristics of the aesthetic value existing inherently in nature, this approach suggests some ethical principles guaranteeing the appreciation of its value.

Honestly, I hesitate discussing this approach in this section. There can be two different interpretations of this approach. The first one says that (*e.g.*, Karp, 1989), if the mentioned ethical principles represent the collective will of the communities, then it is the Congress' job to amend acts such as Wilderness Act of 1964, or Endangered Species Act of 1973, and it is the courts' job to uphold related regulations and enlarge the definition of public interest, claiming that respect for biodiversity is for the public interest. Indeed, the mentioned ethical principles have underlined the history of conservation in United States since the very early times of the movement. As I will discuss in the next section, this

interpretation is essentially inter-subjective, because it recognizes that the mentioned ethical principles had originated culturally, and are sustained by means of the support of the people of this country.

The other interpretation, which is closer to the objectivist view, claims that the mentioned ethical principles are indeed necessary procedures to appreciate the nature's beauty. In other words, if there is an aesthetic value out there, and if we know that the appreciation of it depends on some principles and procedures, then, the preservation of that value means the protection of the procedures and coercion of the principles.

Callicott (1992), for instance, argues that the real aesthetic experience in nature is possible only with the real understanding of how nature works. Along this line, the ecological knowledge can significantly support a person in developing an ability to appreciate nature. But, this knowledge, as Collicott (1992) claims, should be supported with the real experiences and real observations in nature. The ecological knowledge can be a tool for someone to see what cannot be seen at first look. The aesthetic value existing in nature is the representation of the perfect creation. According to Callicott (1992), by even watching an ant, one can grasp the insights of ant's life and appreciate this value of nature's beauty and perfection. Furthermore, if one is able to appreciate watching an ant, then by even watching an ant, that person can educate him-or-herself ethically and emotionally.

This approach can be seen as a recent version of the Platonic philosophy. Plato suggests that the things around us are images that we perceive, and are the representations of some 'idea' which are perfection of God. One can reach and grasp that 'idea' by going behind the realm of visions and understanding the essential interrelations among the things in nature. According to Plato, art mirrors the surface appearances we perceive, in other words, it is the copy of a copy. Hence, art puts distance between us and the world of 'idea'. A picture of an ant can show only the surface image that we can perceive at first look anyway.

Similarly, Sax (1980) argues that the aesthetic appreciation of nature is totally different from driving through a scenic road and looking for spots to take pictures. Wood (1988) goes one step further and critiques the scenic management and argues that scenic management policies lie to us about nature and obscure its deep relations. In a similar line of Plato's anti-art philosophy, this approach encourages an anti-culture stance and sees the famous 'scenic beauty' images, *i.e.*, vistas and panoramas that popular culture favors, as artificial and superficial. Collicott (1992) emphasizes the differences between artifactual and natural aesthetics and argues that nature can provide us an educating and emotionally uplifting experience that no artifact or art piece can provide.

This approach is a forceful approach in preparing some experience oriented management programs in parks and wilderness areas (2). But it underemphasizes the significance of the collective sentiments of popular culture. Furthermore, it does not recognize the symbolic meanings of certain experiences in scenic areas and unique vista points. Taking a picture of a Grand Canyon view from exactly where thousands of other Americans have taken the same picture is a worthless activity, according to this view. What this view fails to see though, is that the view in Grand Canyon has been preserved for decades, just because every year thousands of people take pictures from that very viewpoint and put those pictures proudly in albums or on their walls. In other words, taking pictures of that vista becomes a kind of cultural ritual, and therefore, it represents a significant concern, preservation of which can be justified as for the public interest in the courts.

2. See the proposed policy improvements for National Parks by Sax (1980).

INTER-SUBJECTIVIST VIEW

This view starts with the basic subjectivist assumption that there can be no aesthetic value inherent in objects, which is independent from people's emotions and sentiments. Yet it differs from the subjectivist view by asserting that people indeed can attach certain aesthetic values, along with some non-aesthetic ones, to certain objects through a symbolism that they construct and through identifying themselves with those objects. Therefore, there is reason to preserve those objects as long as the mentioned attachments are made. Furthermore, these attachments can be collectively constructed.

Any kind of object, like buildings, plazas, scenic views, valleys, and mountains, can symbolize certain values and can reveal certain attachments for people. In that case the infringement of such visual, spatial or experiential structures means the destruction of values, and identities as perceived by the latter. Costonis (1988), one of the major supporters of this view, calls these objects as icons. He claims that the destruction of icons by means of new developments (he calls them aliens) means the destruction of what those icons symbolize. The Statue of Liberty in New York, the White House in Washington D. C., the Grand Canyon in Arizona are examples embodying strong national attachments. They represent high degree of sensitivity at national scale, in other words, the destruction of those may create strong nationwide emotional reactions.

Appleyard (1979) argues that beyond their specific symbolic meanings, icons may embody some other and deeper attachments; people may identify themselves with those icons. In other words, the destruction of those icons can threaten the psychological security of those who see the surrounding icons as part of themselves.

The intersubjective view, with its 'attached values' argument provides a flexible reasoning in scrutinizing responses of collective sentiments in different issues, such as historical preservation, design review, and environmental protection. As it is mentioned in the previous section, the ethical environmental principles, for instance having respect for biodiversity, can be seen as culturally developed attitudes. They can be interpreted as the reflections of collective values and sentiments. In this sense, the justification of many nature preservation regulations, which are based on the argument that they reflect the will of the collective conscious, is compatible with the inter-subjective approach.

Following a similar line of reasoning, Stiles (1975) argues that the argument of 'attached values' has underlined the primary assumptions of historical preservation since its earlier days. Pyke (1971) claims that courts generally employ the cultural emphasis in the definition of 'special historical or aesthetic value'. Because of attachments such as truthfulness, morality, memory, and stability, Merryman (1989) argues that the preservation of cultural icons is for the public interest.

Other than historical landmark cases, the inter-subjective approach has been increasingly employed by the courts in design review cases. Costonis (1988) points out that the argument of 'emotional and cultural stability' is a suitable issue that the courts have increasingly employed in problematic design review cases. In Reid *v.* Architectural Board of Review (1963) where Ohio Appeals Court upheld Cleveland Heights' (a suburb of Cleveland) Architectural Board of Review's decision denying Mrs. Reid's application for building a modernist one story house in a neighborhood of two storey residential buildings, the court claimed that the house 'does not conform to the character of the houses in the

area' (119 Ohio App., Williams, 1977, 3). Although this decision has been found discriminatory (Turnbull, 1971) and problematic by some (Turnbull, 1971; Williams, 1977), 'the attached values' argument helps us to understand that this and similar decisions may have valid justifications.

The decision seems unfair from an individualist point of view. Yet if we can see the whole environment as a single artifact with attached collective values, then the construction of that house in that neighborhood can be seen like putting a 'nonconforming' handrail to a house. Here, the icon is the whole neighborhood. If we think about building a glass walled high-rise office building in the middle of French Quarter of New Orleans, 'the historical associations and values of single buildings' would not be enough to explain the emotional collective reaction which would probably appear. 'Symbolic and identity related attachments of whole district' would be a more reasonable argument to represent the collective reaction in the courts, as a valid public interest to prevent the construction of the building.

This whole argument may seem to promote conservatism. Yet, it does not have to. As long as the speed of change is kept at a reasonable rate, and the changes do not distract the icons, the surroundings can be developed without a serious negative aesthetic impact. The issue is to what degree the new elements have the potential to become the bases of new attachments, to what degree people are ready to accept differences and changes, and how willing people are to attach new meanings to the new elements.

In this sense, what inter-subjectivist view is actually advocating is a dynamic process, literally a 'design review' process, instead of a 'preservation' based on standards. If there is a tolerable degree of change and if the collective sentiments defining that level are also subject to change, then, protection cannot be a process dependent upon stable standards. Preservation of icons necessitates a process of continuous reinterpretation of attachments and of continuous effort for representing the changing collective sentiments in the courts.

After all, a development or a project, which is seen as an alien today, can be tolerated tomorrow, and vice versa. I think it is fair to close this section with the following argument. It is this dynamism and flexibility to scrutinize collective sentiments in different cases which makes the inter-subjective approach and 'the attachment of values' argument particularly suitable for the courts in justifying the validity of aesthetic regulations as significant public purposes.

CONCLUSION

I started the discussion with an historical review suggesting that during the history of aesthetic regulations the number of the regulations has increased, the collective will to preserve certain environments has grown, and the courts' definition of public welfare has been broadened.

However, we have seen that many courts justify constitutionality of aesthetic regulations by employing non-aesthetic concerns such as property values and public safety. Furthermore, sometimes courts try to justify aesthetic regulations by means of empirical verifications. It is argued that these forms of justification are problematic and unfair. The aesthetic regulations are motivated by some collective sentiments or emotions, and therefore, they should be validated only by a plausible explanation of the motives of mentioned collective sentiments. Thus, the aesthetic judgments used in normative aesthetic theories can be important sources for legitimation of aesthetic theories.

Following this line of reasoning, I tried to make a comparative review of different approaches. These approaches are the subjective approach, the objective approach which sees nature as an object of beauty, the objective approach which sees the experience in nature as uplifting, educating, and aesthetically pleasing, and finally the inter-subjective approach which defines the aesthetic experience referring to the symbolic meanings and values attached to the environment and peoples' ability to identify themselves with their surroundings.

I classified these approaches within the framework of the well known opposition of objectivist and subjectivist aesthetic views. I assessed these approaches based on two criteria: how well the aesthetic judgments of these approaches scrutinize the motives of collective sentiments and whether or not the approaches are compatible with the higher procedural values of the courts.

The subjectivist view rejects the existence of an aesthetic value inherently existing within the object, and therefore, it is essentially against the governmental involvement in aesthetic regulations. Furthermore, it defines the motive behind the aesthetic consensus as a matter of personal taste, thus even if it exists, the consensus loses its grounds to be presented as public interest. Therefore, the subjectivist view is far from providing sound explanation for the motives of collective sentiments.

The objectivist view, on the other hand, claims the existence of an aesthetic value inherent in the object, waiting over there, to be appreciated. The consensus is significant in determining the characteristics or the ingredients of that aesthetic value. But, this line of reasoning suggests that once this aesthetic value, *e.g.*, the beauty in nature, is determined and defined, then the established standards are sufficient to preserve them; there is no need for change. The aesthetic value, which is no different than any other resource, exists over there, and it is preserved as long as the area is preserved. Although this view provides a strong base for preservation, the elitism employed in the establishment of standards and the despotism employed in coercing them are incompatible with the courts' higher level procedural rules and values.

Finally, the inter-subjectivist view rejects the existence of an aesthetic value which is independent from people's emotions and sentiments. It further proposes that people can attach certain aesthetic values, with non-aesthetic ones, to certain objects through symbolism or through identifying themselves with those objects. These attachments can change in time. Therefore, they should be redefined continuously. In this sense this view encourages a dynamic 'design review' process instead of 'preserving' objects according to aesthetic standards. This dynamism and flexibility of the 'attached values' argument makes the inter-subjectivist approach particularly suitable for the courts in representing collective sentiments in different aesthetic matters and in justifying the constitutionality of different aesthetic regulations.

TOPLUMCA BEĞENİLENİ KORUMAK: ESTETİK YAKLAŞIMLAR VE BU YAKLAŞIMLARIN YASAL ÇERÇEVEDEKİ ÖNEMLERİ

ÖZET

Alındı : 4. 11. 1996
Anahtar Sözcükler: Estetik, Çevre Estetiği, Toplumsal Yargı, Çevre Hukuku, Toplumsal Yargı, Nesnellik-Öznellik, Uzlaşımsal Öznellik.

Amerika Birleşik Devletleri'nde çevrenin estetiğine ilişkin yasal çerçevenin yakın tarihini gözden geçirdiğimizde, farklı gelişmeler göze çarpmaktadır. Estetik nedenlerin öne sürüldüğü koruma yasaları hem sayısal olarak artmış, hem de içerikleri karmaşıklaşmıştır. Çevrenin korunmasını isteyen toplumsal irade güç kazanmakta ve kendini daha geniş tabanlarda dile getirmektedir. Ayrıca mahkemelerin kullandığı 'kamu yararı' kavramı genişletilmektedir. Özellikle 1956 yılında yer alan Berman-Parker duruşmasından sonra 'estetik kaygı'nın, yönetimlerin özel mülk üstündeki yapılaşmaların kısıtlanmasında, tek başına yeterli bir dayanak olduğu görüşü çok sayıda yargıç tarafından benimsenmiştir.

Öte yandan, estetikle ilgili söz konusu yasa ve yönetmeliklerin anayasallığı sorgulandığında, 1956 yılından sonra bile, yargıçların bu yönetmelikleri kamu güvenliği ya da mali gereklilik gibi ikincil nedenlere başvurarak savunabildiklerini izliyoruz. Bazı duruşmalarda, yönetmeliklerde yer alan estetikle ilgili kuralların görgül doğruluklarının bile ispatlanmaya çalışıldığını, bunun için de bazen bilirkişilere danışıldığını izlemekteyiz.

Gerek estetik kuralların ikincil bazı başka kaygılara dayanılarak savunulmasında, gerekse de bu kuralların doğruluklarının ispatlanmaya çalışılmasında sorunlar ve adaletsizlikler bulunduğu öne sürülebilmektedir. Estetikle ilgili koruma yasaları, toplu olarak hissedilen bazı duyguların sonucunda doğmuştur. Bu kurallar ancak söz konusu duyguların sağ duyuya aykırı olmayacak bir biçimde dile getirilmesiyle ve tartışılabilmesiyle savunulabilir ve bu kurallar ancak bu yolla yasal dayanaklar elde edebilir. Bu çerçevede, çevrenin estetiğine ilişkin bazı kuramların gözden geçirilmesi mahkeme salonlarında estetikle ilgili yasaların makul bir biçimde nasıl savunulabileceği konusundaki tartışmaya ışık tutacaktır.

Burada çeşitli estetik yaklaşımları tartışılmakta, karşılaştırılmakta ve mahkemelerde estetik değer yargılarının kullanımını artırmayı amaçlayan bir çerçeve açısından bu yaklaşımlar değerlendirilmektedir. Değerlendirmede başlıca iki ölçüt kullanılmıştır: (a) Söz konusu yaklaşımın öne sürdüğü estetik değer yargıları, çevrelerin korunması konusunda topluca hissedilen kaygıların ve duyguların dile getirilmesinde ne kadar yardımcı olabiliyor? (b) Bu yaklaşımların öne sürdüğü koruma çerçeveleri anayasallık açısından (eşit muamele, tahmin edilebilir ya da beklenilir muamele ve ifade özgürlükleri açılarından) ne kadar tutarlıdır?

Günümüzde çevresel estetik konusunda akademik çevrelerde yaygın olan ve aynı zamanda yönetimlerin çeşitli birimleri tarafından kullanılan koruma kurallarında dört farklı estetik yaklaşımı gözlenmektedir. Bunlar: (1) estetiği öznel bir deneyim olarak gören 'öznel yaklaşım', (2) doğayı mutlak bir güzellik unsuru olarak gören nesnel yaklaşım, (2) doğadaki deneyimi öğretici, yükseltici ve geliştirici bir deneyim olarak gören nesnel yaklaşım, (3) estetik deneyimi çevreyle özdeşleşme ve çevreye topluluklarca atfedilen sembolik ve mecazi değerler açısından tanımlayan 'uzlaşımcı öznel yaklaşım'dır. Bu dört yaklaşımın tarih içindeki gelişimleri de farklılıklar göstermektedir.

Estetik deneyimin kişisel birikimlerle ilişkili olduğunu ve kamu yararı kavramının böylesi göreli bir ortamda tanımlanamayacağını öne süren öznel yaklaşım, koruma yasaları için her hangi bir savunu sunamamaktadır. Nesnel yaklaşımlar ise estetik değeri, nesneye (ya da çevreye) ait bir doğal kaynak olarak görmekte ve sunduğu yasal çerçeve devinim içinde olan planlama ve tasarım etkinlikleriyle uzlaşamamaktadır. Ayrıca bu yaklaşıma dayanan koruma kuralları teknokratik bir biçimde tepeden inme uygulandığından ve topluca hissedilen duyguları dışladığından dolayı çoğunlukla anayasallıkları açısından sorunlu bulunmaktadır. Bu açıdan 'uzlaşmacı öznel yaklaşım'ın, sembolik ve mecazi değerleri ve toplulukların kendini çeşitli çevrelerle özdeşleştirme süreçlerini en iyi dile getirdiği için, yasal çerçeve açısından en verimli ve yararlı yaklaşım olduğu sonucuna varılmaktadır.

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