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Edited By Kees Bastmeijer

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PART I

Introduction: wilderness in Europe

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Introduction

*An international history of wilderness protection
and the central aim of this book*

KEES BASTMEIJER

**1 Western legal philosophical roots: stimuli
for altering the earth's surface**

From a historical perspective, a book on the role of the law in protecting 'wilderness' might appear remarkable. Wilderness protection is about protecting large, relatively undisturbed natural areas that are free from buildings, roads and other human-made artefacts and 'where natural forces and processes predominate';¹ however, in the past the Western human–nature relationship and broadly acknowledged legal principles on State sovereignty and private property were strong stimuli for humans to use and alter the natural world.² For many centuries there has been a broadly shared conviction that nature originally constituted the common property of all humankind³ and was accordingly meant to benefit humans. Aristotle (384–322 BCE) has stated:

The author would like to thank each of the contributors to this book for their helpful comments on an earlier draft of this chapter. It is acknowledged that this chapter, as well as the book itself, adopts a Western perspective and should therefore not be considered an exhaustive account of all approaches to wilderness conservation worldwide.

¹ Nigel Dudley (ed.), *Guidelines for Applying Protected Area Management Categories* (Gland: World Conservation Union/IUCN, 2008), http://cmsdata.iucn.org/downloads/iucn_assignment_1.pdf, at 14. For the definition of wilderness for the purposes of this book, see Subsection 5.2.

² See Kees Bastmeijer, 'Addressing Weak Legal Protection of Wilderness: Deliberate Choices and Drawing Lines on the Map', in Steffen Fritz and Steve Carver (eds.), *Mapping Wilderness: Concepts, Techniques and Applications of GIS* (Dordrecht: Springer, 2016).

³ See, e.g., Hugo de Groot, *Mare Liberum* (Leiden: Elsevier, 1609), at 14, www.kb.nl/galerie/mareliberum/browse/index_1.html, English translation by Ralph Van Deman Magoffin: *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (Oxford/New York: Oxford University Press, 1916), http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=552&layout=html. Grotius refers in Chapter V to Cicero: 'As Cicero says: "But nothing is by nature private property"'.

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It is evident that we may conclude of those things that are, that plants are created for the sake of animals, and animals for the sake of men; the tame for our use and provision; the wild, at least the greater part, for our provision also, or for some other advantageous purpose, as furnishing us with clothes, and the like.⁴

Hallebeek researched the work of Thomas Aquinas (1225–1274) and explains that in Thomas Aquinas's vision 'God has the *dominium* over all of creation' and that, because humans are rational creatures since they were created in His image, 'man also has a certain dominion over other creatures.'⁵ According to John Locke (1632–1704), '[t]he earth and all that is therein is given to men for the support and comfort of their being'.⁶ The Swiss lawyer Emmerich de Vattel (1714–1767) expressed a similar view: 'The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants.'⁷

According to John Locke, the fact that nature was meant to benefit mankind implied that humans were justified in appropriating it as private property by physically using and adding value to it. With regard to the 'fruits and beasts of the earth' he stated: 'being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial, to any particular men.'⁸

⁴ Aristotle, *The Politics, A Treatise on Government*, translation from the original Greek by William Ellis (London & Toronto: J.M. Dent & Sons Ltd./New York: E.P. Dutton & Co., first issue in 1912, reprinted in 1919, 1923, 1928), www.gutenberg.org/files/6762/6763-h/6762-h.htm, Chapter VIII of the first book. See Paul Cliteur, 'De filosofie van de dierenrechten', in Johan Braeckman, Bert de Reuver and Thomas Vervisch (eds.), *Ethiek van DNA tot 9/11*, (Amsterdam: Amsterdam University Press, 2005), pp. 135–159, <http://libertyonline.hypermall.com/Locke/second/second-frame.html>, Chapter 5, para. 25.

⁵ Jan Hallebeek, *Quia Natura Nichil Privatum, Aspecten van de eigendomsvraag in het werk van Thomas van Aquino (1225–1274)* (Nijmegen: Gerard Noodt Instituut, 1986), at 37. Thomas Aquinas also refers to Psalm 8:8 and Aristotle's *Politica* to emphasize that the imperfect objects (for example animals) are there for the sake of the perfect objects (humans).

⁶ See also John Locke, *Two Second Treatise of Government*, published in 1690, <http://libertyonline.hypermall.com/Locke/second/second-frame.html>, Chapter 5, para. 25.

⁷ Emmerich de Vattel, *Le Droit des gens*, 1758, English translation by Joseph Chitty: *The Law of Nations* (Philadelphia: Johnson & Co., 1844), www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/DeVattel_LawOfNations.pdf, Ch. XVIII, para. 203.

⁸ Locke, *The Second Treatise of Government*, *supra* note 6, Chapter 5, para. 25. See also David C. Snyder, 'Locke on Natural Law and Property Rights', in *Thom Brooks Locke and Law*, Philosophers and Law series (Hampshire: Ashgate 2007), pp. 3–30, at 15.

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The actual use or cultivation of nature was also a condition for appropriation of nature as private property to be justified: claiming something from nature without actually using it would prevent others from benefitting from it and this would be in violation of Natural Law. In the words of Locke:

But how far has [God] given [all things in nature] to us? To enjoy. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.⁹

Similar views can be recognized regarding the relationship between state governments and nature. According to De Vattel, governments of nations even had a positive obligation to cultivate the land:

The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing, if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share.¹⁰

Actual occupation and cultivation of land was also considered a condition for lawful sovereignty claims of States over land that was otherwise considered *terra nullius*:¹¹

But it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate. It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to

⁹ Locke, *The Second Treatise of Government*, *supra* note 6. See also Thom Brooks, *Locke and Law*, Philosophers and Law series (Hampshire: Ashgate, 2007), at xvi. Brooks summarizes the views of John Locke as follows: 'We can only have as much property as we can enjoy.' It should be noted that this is not the same as not using more than a person needs for his/her survival. If a person takes more from nature than he/she needs in order to trade this for silver or gold, this would according to Locke not be spoilage. See C.B. MacPherson, *The Political Theory of Possessive Individualism – Hobbes to Locke* (Oxford University Press, 1962), at 204.

¹⁰ De Vattel, *The Law of Nations*, *supra* note 7, Chapter VII, para. 81, at 35.

¹¹ On the legal historical background of the concept of *terra nullius*, see Randall Lesaffer, 'Argument from Roman Law in Current International Law', *European Journal of International Law* 16, 1 (2005), 25–58; Lesaffer points out that the term *terra nullius* was not part of classic Roman law, but was based on the term *res nullius* to create a legal basis for territorial land claims during the Age of Discovery.

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the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it. The law of nations, will, therefore, not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use.¹²

Thomas Willing Balch discussed these principles in more detail in 1910, using the above quotation from De Vattel as well as the views of several other lawyers of the eighteenth and nineteenth centuries.¹³ These theories were also used to justify the occupation of homelands of indigenous peoples (see Section 3.2).

These roots in Western legal thinking were stimuli for the active transformation of the ‘wilderness’ into cultivated lands, and rendered the protection of wilderness against human impacts illogical. Humankind in the Western world had positioned itself above nature and ‘wilderness’ was available to be exploited and ‘civilized’.¹⁴ Aldo Leopold stated in 1925: ‘From the earliest times one of the principal criteria of civilization has been the ability to conquer the wilderness and convert it to economic use.’¹⁵ As many of the above quotations make clear, this dominant human–nature attitude was strongly influenced by the Judeo-Christian tradition. Based on sources from the age of American pioneers, Roderick F. Nash states: ‘Transforming the wild into the rural had Scriptural precedents which the New England pioneers knew well. Genesis 1:28, the first commandment of God to man, stated that mankind should increase, conquer the earth, and have dominion over all living things. This made the fate of wilderness plain.’¹⁶

During the last few centuries in particular, these convictions have been paralleled by processes of labour division, industrialization, international trade, a strong belief in a liberal market economy, and – strongly

¹² De Vattel, *The Law of Nations*, *supra* note 7, at 99.

¹³ Thomas Willing Balch, ‘The Arctic and Antarctic Regions and the Law of Nations’, *American Journal of International Law* 4 (1910), 265–275.

¹⁴ See also Chapters 2 and 12.

¹⁵ Aldo Leopold, ‘Wilderness as a Form of Land Use’, *The Journal of Land & Public Utility Economics* 1, 4 (1925), 398–404, at 398.

¹⁶ R.F. Nash, *Wilderness & the American Mind*, (4th edn.) (New Haven: Yale University Press, 2001), at 31. See also Lynn White Jr., ‘The Historical Roots of Our Ecological Crisis’, 155 *Science* (1967), 1203–1207. White expressed the view that the Judeo-Christian tradition predominantly underpins the dominant attitude of humans over nature.

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interconnected with these developments – a substantial increase in the human population¹⁷ and of the exploitation of the world's natural resources. This combination of factors has resulted in a continuing process of human cultivation of nature.¹⁸ As explained by Crispin Tickell 'unlike other animals, we made a jump from being successful to being a runaway success [...] because of our ability to adapt environments for our own uses in ways that no other animal can match'.¹⁹

As a consequence of these 'adaptation processes', the number of wilderness areas has decreased substantially in almost every region of the world.²⁰ The Polar Regions are still characterized by large wilderness areas; however, these regions are also under pressure. Current discussions about the use of Arctic resources indicate that the legal philosophical roots noted above still exercise a strong influence at both levels of the human 'appropriation' of nature, namely private property and state sovereignty. In Greenland, for example, one of the very few places on Earth in which, based on Inuit traditions, formal private land-ownership is still anathema, private investment in the land (adding value to it) is being increasingly acknowledged as a justification for issuing more exclusive concessions for mining and tourism projects.²¹ And, when announcing the construction of offshore patrol ships and a deep water port for the High Arctic on 9 July 2007, Canada's Prime Minister Stephen

¹⁷ See, e.g., Jacobus A. Du Pisani, 'Sustainable Development – Historic Roots of the concept', *Environmental Sciences* 3, 2 (2006), 83–96, at 87: 'In the period between 1800 and 1970, when the world's population tripled from around 978 million to 3632 million, seemingly unslackened economic growth occurred and the quantity of manufacturing production in the world increased about 1730 times.' Du Pisani refers to W.W. Rostow, *The World Economy. History and Prospect* (London: Macmillan, 1978), at 47–48.

¹⁸ See N. Roberts, 'The Human Transformation of the Earth's Surface' *International Social Science Journal* 150 (1996), 493–510.

¹⁹ Crispin Tickell, 'The Human Species: A Suicidal Success?' *The Geographical Journal* 159, 2 (1993), 219–226, www.jstor.org/stable/3451413, at 219. See also Roberts, 'The Human Transformation of the Earth's Surface', *supra* note 18.

²⁰ See Cyril F. Kormos and Harvey Locke, 'Introduction', in Cyril F. Kormos (ed.), *A Handbook on International Wilderness Law and Policy* (Golden: Fulcrum Publishing 2008), at 16: '[V]ery roughly one-third of the planet remains undisturbed in large areas of wilderness.'

²¹ Personal communication between the author and representatives of the Greenlandic Ministry of Infrastructure (Nuuk), the Ministry of Industry (Nuuk), Greenlandic advisors on tourism (Nuuk), agricultural advisers (Qaqortoq) and the mayor of the South Greenlandic municipality of Kujalleq (Qaqortoq), 8–20 September 2014 (research sponsored by the INTERACT program). In the conversations it was stressed that these rights may become more exclusive in favour of other commercial operators, but should not in principle exclude local people from conducting traditional activities, such as fishing, hunting and gathering.

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Harper stated: ‘Canada has a choice when it comes to defending our sovereignty over the Arctic. We either use it or lose it. And make no mistake, this Government intends to use it.’²²

2 Acknowledgement of the downside of civilization and the increase of wilderness appreciation

During the nineteenth century in particular, people in Western societies became increasingly aware of the downside of the intensive human use of nature. As Jepson and Whittaker explain, by the end of the nineteenth century, the Passenger Pigeon had established ‘the concept of human-induced extinction [...] in the public mind’ and ‘concepts of nature as a robust preordained system of checks and balances had been replaced by the notion of delicate and intricate systems sensitive to human interference’.²³ A shift in the human–nature relationship may also have been influenced by an increased appreciation for wildlife: ‘Doubts and hesitations had arisen about man’s place in nature and his relationship to other species. [...] A closer sense of affinity with the animal creation had weakened old assumptions about human uniqueness.’²⁴ In this context, the works of Charles Darwin (1809–1882)²⁵ and his contemporaries such as Thomas Henry Huxley (1825–1895)²⁶ are of great importance.²⁷ A more positive attitude towards nature was also stimulated by the downside of ‘modern life’ in large cities: increasing air pollution, crime and disease. Keith Thomas offers considerable evidence to show that the

²² News Release of Canada’s Prime Minister of 9 July 2007, www.pm.gc.ca/eng/news/2007/07/09/prime-minister-stephen-harper-announces-new-arctic-offshore-patrol-ships.

²³ Paul Jepson and Robert J. Whittaker, ‘Histories of Protected Areas: Internationalisation of Conservationist Values and their Adoption in the Netherlands Indies (Indonesia)’, *Environment and History* 8 (2002), 129–172, at 133.

²⁴ Keith Thomas, *Man and the Natural World, Changing Attitudes in England (1500–1800)*, (Harmondsworth, Middlesex: Allen Lane/Penguin Books Ltd., 1983), at 243. See also Jepson and Whittaker, ‘Histories of Protected Areas’, *supra* note 23, 132: ‘The image of humans as divinely created beings was replaced with the realisation (or possibility) of kinship with animals.’

²⁵ Darwin’s classic treatise *On the Origin of Species* [...], in which he does not really discuss the descent of humans is not his only text of relevance in this respect, but also especially his later works such as *The Descent of man, and Selection in Relation to Sex* (London: John Murray, 1871). See Paul Cliteur, *Darwin, Dier en Recht* (Den Haag: Boom, 2001), <http://media.leidenuniv.nl/legacy/Darwin%20%20dier%20en%20recht.pdf>, at 6.

²⁶ Thomas H. Huxley, *Evidence as to Man’s Place in Nature*, 1863, www.gutenberg.org/files/2931/2931-h/2931-h.htm.

²⁷ See Cliteur, *Darwin, Dier en Recht*, *supra* note 25, at 6.

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idealization of cities of earlier times in Europe had to give way to an increasing appreciation for country life and nature.²⁸

The changing appreciation of nature also applied more specifically to relatively untouched natural areas: ‘Mountains and wilderness which once were landscapes of fear now became panoramas of awe and admiration.’²⁹ The strong advocacy in North America by Thoreau, Muir, Marsh and others to set aside untouched nature is well-known, although, as Steve Carver explains in the next chapter, this advocacy also had European roots.³⁰ In Europe, wild nature had become scarce and received increasing appreciation from the second half of the eighteenth century. This is reflected for instance in the public perception of mountains in England: prior to the romantic period ‘the dominant tendency in England and many other parts of Europe was to regard mountains as inconvenient, aesthetically repellent, and dangerous not just to one’s body but to one’s soul’, while in the late eighteenth century ‘English attitudes toward mountain landscape underwent nearly a 180-degree reversal.’³¹ Mark Fisher explains that in Germany in the 1850s, the German journalist, writer and historian Wilhelm Heinrich Riehl (1823–1897) was arguing against the process of turning every piece of forest into field, and cites Riehl from the English translation of his book *Die Pfälzer. Ein rheinisches Volksbild* (1857):

For centuries it was fitting that progress should advocate exclusively the rights of the field; now, however, it is fitting that progress should advocate the rights of the wilderness together with the rights of the cultivated land.³²

²⁸ Thomas, *Man and the Natural World*, *supra* note 24, pp. 242–254.

²⁹ C. Michael Hall, ‘The Changing Cultural Geography of the Frontier: National Parks and Wilderness As Frontier Remnant’, in S. Krakover and Y. Gradus (eds.), *Tourism in Frontier Areas* (Lanham: Lexington Books, 2002), pp. 283–298, at 286. For a comprehensive discussion of this shift in attitude, see Nash, *Wilderness & the American Mind*, *supra* note 16, Chapters 2 and 3.

³⁰ See Chapter 2. See also C. Michael Hall, ‘The Changing Cultural Geography of the Frontier: National Parks and Wilderness As Frontier Remnant’, *supra* note 29, at 286: ‘To the Romantics, the New World was perceived as a new Eden in which man could draw close to wild nature.’ For a rich debate on the history of international nature conservation, see also Martin Holdgate, *The Green Web. A Union for World Conservation* (Abingdon: Earthscan, 2009).

³¹ William Cronon, ‘Foreword’, in Marjorie Hope Nicolson, *Mountain Gloom and Mountain Glory: The Development of the Aesthetics of the Infinite* (Washington: University of Washington Press, 1957 (reprint of original, published by Cornell University in 1959), pp. vii–xii, at viii.

³² Wilhelm Heinrich Riehl, *Die Pfälzer. Ein rheinisches Volksbild* (Stuttgart: Cotta’scher Verlag, 1857), <https://archive.org/stream/diepfalzereinrhe00riehgoog#page/n7/mode/2u>; English translation: Kuno Francke and William Guild Howard (eds.), *The German Classics of the Nineteenth and Twentieth Centuries: Masterpieces of German Literature*,

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With reference to Frederik Willem van Eeden Sr. (1829–1901), the Dutch nature conservationist H.P. Gorter describes a similar awareness in the Netherlands during the second half of the nineteenth century:

It was at that time, that they, who looked further into the future, saw the signs that the wilderness, which at one time covered our land as far as the eye could see, would become a scarcity, and that it would become necessary to defend the ‘right of the wilderness’.³³

Such statements should not however be ‘over-romanticised’: the general attitude towards nature remained strongly anthropocentric. ‘Though Muir like other romantics denied that the earth was made for man, it was for men’s spiritual salvation that they sought to save wild nature [. . .].’³⁴ This is illustrated by the Act that designated Yellowstone as the first National Park of the US: According to the Act, the natural area was ‘set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people’.³⁵

The above discussions also illustrate that the concept of wilderness may to a large extent be considered an ‘invention’ of Western society: Increasing scarcity is often paralleled by increasing appreciation and the conviction that protection is needed.³⁶

Some go one step further by taking the view that the appreciation of wilderness is a luxury: ‘A general appreciation of the positive virtues of nature and of the wilderness could only be developed after the conversion of some of the wild lands into a cultivated or semi-cultivated landscape

Volume VIII (New York: The German Publication Society, 1914), pp. 404–477, at 427, <https://archive.org/details/germanclassicsof08franuoft>. See Mark Fisher, ‘The Natural Vegetation of England’, electronic publication, 28 August 2014, www.self-willed-land.org.uk/articles/natural_veg_england.htm.

³³ H.P. Gorter, ‘Vijftig jaar natuurmonumenten’ (fifty years nature monuments), in *Vijftig jaar natuurbescherming in Nederland* (Amsterdam: Drukkerij De Volharding, 1956), pp. 11–66, at 11. In the eighteenth and early nineteenth century, in other parts of Europe too the special value of wilderness was emphasized in literature, works of art, as well as in legal and policy debates. See Chapter 3 and Part III.

³⁴ David Lowenthal, ‘Nature and Morality from George Perkins Marsh to the Millennium’, *Journal of Historical Geography* 26, 1 (2000), 3–27, http://geography.fullerton.edu/taylor/ENST595T/Lowenthal_JHG.pdf.

³⁵ ‘An Act to set apart a certain tract of land lying near the headwaters of the Yellowstone river as a public park’, approved 1 March 1872, 17 Stat. 32/ U.S.C., title 16, sec. 21 and 22), www.cr.nps.gov/history/online_books/anps/anps_1c.htm.

³⁶ For North America, see, e.g., Michael McCloskey, ‘The Wilderness Act of 1964: Its Background and Meaning’, *Oregon Law Review* 45, 288 (1965–1966), 288–321, at 288: ‘A pronounced scarcity of wilderness was needed to change the attitudes of a nation long preoccupied with taming wilderness.’