

2024 Harmony with Nature – Theme: Earth Jurisprudence

By David Victor – Earth-centered Law

1. What would the practice of Earth-centered Law look like from an Earth Jurisprudence perspective? How is that different from how Earth-centered Law is generally practiced now? And, what are the benefits of practicing Earth-centered Law from an Earth Jurisprudence perspective?

From Indigenous Peoples across the world who live it every day and earlier authors (John Muir, Aldo Leopold to name only these two) who called it in other terms, to Thomas Berry and Cormac Mc Cullinan who elaborated on Earth Jurisprudence, the idea is relatively similar. Earth jurisprudence as I understand, deeply rooted in a holistic approach to life, aims to go beyond the Nature Culture divide that has permeated Western thought for centuries. This binary division, inherited from the ancient *Scala Naturae*, has led western contemporary legal systems and those inspired by them in post-colonial nation-States, to be founded on the false presumption that not only Humans are separate from Nature, but that Humans were created to dominate the rest of the living beings and non-living elements of Nature for their exclusive use and well-being.

Therefore, I would say that today, except in a very few and partial cases spread across the world, a truly Earth-centered Law is yet to be really created and implemented. Earth jurisprudence implies non-hierarchical and non-human centered relations between Humans and other elements of Nature. Humans are indeed a species apart from the rest of Nature by their ability to conceptualize, develop technical solutions and transform their environment to enhance their livelihoods but several scientific studies have shown that other living beings are not that much different in terms of emotions and sentience and deserve our respect.

Earth Jurisprudence is based on the idea that human beings are only one component of a greater whole of beings existing on this earth, each linked to the others by ties of interdependence necessary for the mutual well-being of all. An Earth-centered Law would develop and manage rules that are compliant with non-asymmetric relations between humans and other beings and diminish the place and role of other legal rules such as unilateral property rights and reduce the promotion of limitless economic growth and financial results oriented legal framework.

Michel Serres, the late 20th century French philosopher when he asserts that "Law can save Nature" or that only law can protect the environment, and invites "the jurist to take over from the philosopher's utopias" opens the way to think in terms of equality between Humans and Nature. The author of the "Natural Contract", a Jean-Jacques Rousseau of modern times, in fact invites us to go beyond the social contract between Humans alone, and to consider Nature as a subject of law, and to enter into a new *contractual* relationship with Nature, no more a legal underdog. This proposal is echoed by Thomas Berry's advocacy: "« We need a jurisprudence that would provide for the legal rights of geological and biological as well as human components of the Earth Community. A legal system exclusively for humans is not realistic. Habitat of all species, for instance, must be given legal status as sacred and inviolable."

There are many benefits to practicing Earth jurisprudence based on Earth Law that have been well described and explained by Harmony with Nature Experts such as the right to exist and live in a safe environment of all Natural elements including Humans, the right to have Nature's rights defended in Courts etc. There is no need to repeat those advantages here. There are two points on which maybe it's worth insisting. The real changes that occurs with applying Earth Jurisprudence principles are: 1/ Natural elements are no longer legal objects, the interests of which always come second to Humans' interests (we are not talking about fundamental Human Rights) such as individuals' and companies' rights to economic "development" and material possessions; 2/ Above all, making Earth Jurisprudence the foundation of Earth-centered Law leads to a truly Rights-based approach for all Natural elements.

2. What promising approaches would you recommend for achieving implementation of an Earth-centered worldview for Earth-centered Law? (Note: depending on the discipline, approaches could also be theoretical, although practical approaches should be prioritized).

First things first. Recognising the Rights of Nature in line with Earth Jurisprudence has gained increasing support around the world during the past 15 years. However, it is often not translated into concrete action, or remains most of the time at the level of soft law if not symbolic declarations. If we want to recognise Nature's rights today, then in most modern legal systems we must first change the status of Nature and its elements and lift them out of the status of "objects" into which the *summa divisio* has plunged them for centuries.

As a promising approach, rather than a theoretical exploration, I would like to share here a concrete example of implementation. It takes place in the Loyalty Islands, one of the three provinces of New Caledonia, a territory of the French Republic in the South Pacific, part of whose population is indigenous, the Kanak. Following the Nouméa Accord of 5 May 1998, a political agreement on the gradual decolonisation of New Caledonia, the amended Organic Law 99-209, which lays down the rules for the devolution of powers from the French State to New Caledonia, introduced a federalist-inspired mechanism between the French State and New Caledonia and its three provinces (Loyalty Islands, North and South). It has given New Caledonia and its three provinces deliberative and executive institutions, regulatory autonomy, and the local power to make laws.

The Loyalty Islands Province decided in 2013 to adopt a comprehensive environmental law, brought together in an Environmental Code (CEPIL). The Loyalty Islands Province sought the support of the Institut de Recherche pour le Développement (IRD) where I worked as a research fellow in environmental law, and I was able to assist the province with legal expertise to draft the regulations. Together with the Province we chose to use a participatory method for the concerted adoption of its environmental regulations with the customary authorities, in order to consider as much as possible the Kanak cultural dimension, which is based on a special bond to the land and Nature in general.

At the request of the Customary Senate of New Caledonia, a preamble was included in the CEPIL in which the province vows to co-manage the environment with the customary authorities, stating its desire to "promote partnership with the customary authorities as the preferred mode of governance for the preservation of their environment". It is in this political, institutional, and cultural context that the Loyalty Islands Province adopted a new regulation on the protection of Living Beings on 29 June 2023. The announcement of the

adoption of these regulations aroused the curiosity of many legal experts and those involved in the legal protection of the environment: as a matter of fact, the main innovation is that it introduces a new category of legal subjects, the Natural Legal Entities, NLEs hereafter (Entités Naturelles Juridiques (ENJ) in French). Sharks and marine turtles were the first to benefit from this status.

The primary concern of the Loyalty Islands Province was to provide the highest possible level of protection for Nature, above the classification of "protected species".

In a very "Earth Jurisprudence approach", the Kanak world vision is holistic: Humans and the rest of living things are one and the same. In the minds of the Loyalty Islanders, existing environmental law did not fully express this understanding of the world, even though this approach has always been known among indigenous populations across the planet. Even if it is now enjoying a resurgence just about everywhere, as witnessed in France and Europe by numerous recent citizens' initiatives in favor of the rights of Nature for rivers.

Therefore, the Loyalty Islands Province, with the support of IRD, started working - at a time when the rights of nature were only just beginning to be recognised in a handful of countries – decided to give expression to the 'unitary principle of life'. A central principle in oral Kanak culture since time immemorial, it was set down in writing in the early 2000s by Grand Chief Nidoish Naisseline of Maré Island and Pastor Béniala Houmbouy in a "Charter of the Environment of the Loyalty Islands Province". From the outset of the CEPIL project, it was seen as the basis for endowing rights to Nature and the creation of the NLEs, and was logically included in the Code when it was launched in April 2016 in article 110-3: *"The unitary principle of life, which means that man belongs to the natural environment that surrounds him and sees his identity in the elements of this natural environment, is the founding principle of Kanak society. In order to take account of this conception of life, certain elements of Nature may be recognised as having a legal personality with rights of their own."*

We immediately see that the idea of Nature being appropriated by humans is rejected, as is that of Nature being a "common good" or a "heritage". Following numerous meetings, the decision was made in 2016 to recognise certain elements of Nature as subjects of law, rather than Nature in its entirety, as was the case in Ecuador with Pacha Mama in its Constitution in 2008. However, it was less a question of reintroducing a *Scala Naturae* than showing pragmatism, bearing in mind the effectiveness of future measures and the necessary differentiations to be made between future NLEs.

The provincial regulation was unanimously adopted in June 2023. Section 242-16 of the CEPIL reads as follows: "In the territory of the Loyalty Islands Province, in application of the unitary principle of life laid down in Section 110-3 and in order to take account of the customary value in Kanak culture, the elements of Nature, living species and natural sites listed in Article 242-17 are recognised as natural entities subject of rights".

As Judge Salmond said as early as 1902 "[a] legal person is any subject matter to which the law attributes a merely legal or fictitious personality. This extension, for good and sufficient reasons, of the conception of personality beyond the limits of fact, this recognition of persons who are not men, is one of the most noteworthy feats of the legal imagination. (...)

Legal persons, being the arbitrary creations of the law, may be of as many Kinds as the law

pleases. Closer to us, Jans Klabbers, a Dutch jurist, said in 2005 that "legal personality is a step that must be taken". The step has been taken.

Alongside the traditional categories of legal "persons" (natural persons and legal entities), the Province of the Loyalty Islands, with the aim of protecting the environment, introduced a category of subjects of rights intended to encompass elements of Nature. The terms "Natural Legal Entities" to refer to subjects of law other than humans or groups of humans, including animals, were preferred so as not to create confusion with human beings or their groups and leave open the risk of any assimilation.

Indeed, as we know, other legal systems (New Zealand, India, etc.) have decided to apply the regime of legal persons to elements of Nature. Because natural entities, particularly living ones, are neither persons nor objects, we suggested that the Province of the Loyalty Islands create a new category, in order to neither copy nor assimilate the legal regime of NLEs, which has yet to be fully developed, with those of legal persons. The regulation of the Loyalty Islands Province of 29 June initiates this development in Section 242-16:

"[ENJs] are recognised as having fundamental rights. They have no duties. Neither the natural entities subject to law, nor their spokespersons, nor the Province of the Loyalty Islands may be held liable for any damage they may cause. Each natural entity which is a subject of law has standing (...)."

Following our inputs on comparative law on the recognition of rights to Nature and its elements, the Loyalty Islands elected representatives chose not to hold NLEs liable (in practice this made no sense, unless we were to fall into nostalgia for medieval lawsuits against animals), nor their spokespersons. The question of standing, on which many environmental lawsuits fail, is also addressed in a broad way, without going as far as *actio popularis*. The standing is that of the NLEs, with a large number of legal persons able individually or collectively to exercise it on behalf of the latter.

Section 242-17 lists the natural entities that the Province of the Loyalty Islands has selected for this new high level of protection, with the status of subject of law. Unsurprisingly, sharks and sea turtles, two totemic species that were mentioned back in 2013, are leading the way. Other species and natural sites of particular cultural value should be added to article 242-17 in the coming months.

The rights enjoyed by NLEs in the Loyalty Islands Province (Section 242-18) are largely inspired by those found in other legal systems where rights have been recognised for elements of Nature (right to exist, right to habitat restoration, etc.). A distinction is made between living species and natural sites and ecosystems.

Through this example I wanted to showcase the pragmatic approach that was mobilized to introduce concrete legal rights to natural elements and how we contributed to the general movement of Rights of Nature.

3. What key problems or obstacles do you see as impeding the implementation of an Earth-centered worldview in Earth-centered Law?

If we take the example of the Loyalty Islands Province above, the limitations to the creation of the legal category are well known. It is a regulatory act and therefore liable to be annulled by texts higher up the hierarchy of norms directly or through a judge. It is a regulation of a

French local authority which may lose its current normative autonomy, whose geographical scope is a small archipelago in the South Pacific, admittedly rich in biodiversity and Melanesian culture, but sparsely populated. The main problem is the lack of political will to consider Rights of Nature. More awareness raising in direction of lawmakers is necessary.

Other arguments put forward by “anti” Earth-centered Law are quite familiar: Earth-centered law is against Human Rights and the superiority of Humans on non-human natural elements cannot be questioned, in any case; In Western societies, one cannot step away from the Roman-Law inherited *Summa Divisio* and only Humans and their groups can be subjects of law; Rights of Nature are good only for exotic indigenous contexts. Another argument put forward is that we already have a comprehensive environmental law, you just have to implement it, there is no need for an Earth-Centered law. Also, critics say that the very determination of which natural entity should benefit from the NLE status is an anthropocentric choice therefore incompatible with Earth-Jurisprudence.

And many more arguments like these can be heard or read on a regular basis. The consequence of these rhetoric arguments is that while environmental law has existed in most countries since the early 1970s, scientific data show that Earth has lost 70% of its biodiversity in the same period. Time has come for a transformative change.

Earth-Centered Law may not be the only miraculous solution to the current environmental crisis, nor to the oft-acknowledged ineffectiveness of current legal protection of the environment. But its promises of a better harmony with Nature is worth the try.

4. What are the top recommendations for priority, near-term action to move Earth-centered Law toward an Earth Jurisprudence approach? What are the specific, longer-term priorities for action? (Note: give 3 to 10 priorities for action).

1. We recommend that constitutional or legal provisions in all countries introduce the status of natural legal entities in their respective legal orders, opening the way to the endorsement of Rights of Nature. This can be done at a national level or by giving local authorities the jurisdiction to confer the ENJ status to locally significant entities. Governments who wish to engage in this direction can do it step by step regarding the construction of a new legal regime for natural entities. There is no need for a copy-paste of rights, duties, and liabilities of legal persons for natural entities nor for a unified regime of ENJs. On the contrary, rivers will have rights more than forests, sharks and wolves will have different regimes than wild horses or elephants etc. The determination of the human face will be different from one NLE to another.
2. Once it is made possible, natural entities that are already symbolically recognised in various parts of the world, including in Western, non-indigenous contexts should be officially recognised.
3. We recommend that the construction of the legal regime of natural legal entities includes rules on insurance, on assets management and continues with reflections on transnational ecosystems such as rivers, forests, and seas.