

# An Introduction to Earth Jurisprudence in the African Context

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## Earth Jurisprudence in brief

*Definition:* It is a legal theory premised on rethinking law and *governance* to achieve the well-being of the earth and its inhabitants. It is closely related to robust environmental regulation; environmental ethics; and the connection between earth justice and social justice. Earth jurisprudence is premised on the *inevitable* shift from an anthropocentric to an earth-centered system of law and governance (Koons, 2009). It poses a challenge to humans to ‘think like a mountain’ (Leopold, 1987).

Earth jurisprudence has also developed, originally by Thomas Berry, in response to the impacts of human-centered law and governance: The disastrous global warming leading to temperature rise by 2 degrees Celsius is blamed on human action on the environment. Irreversible melting of the Greenland ice sheet; Melting glaciers will increase flooding; reduction of water supplies; multiplication (X10) in hurricane wind speed; water stress in 2/3 of the world regions; pollution; impacts of declining in crop yield, especially in Africa (Koons, 2008). As a legal system that operates in a governance system that seeks social and environmental justice, Earth jurisprudence is a special kind of natural

law and it is different from customary law. It may also require a different kind of lawyer in an African country.

## **Mistaken for Earth jurisprudence**

### *Natural law*

*To St. Thomas Aquinas:* ‘...since human beings are by nature *rational* beings, it is morally appropriate that they should behave in a way that conforms to their *rational* nature. Thus, Aquinas derives the moral law from the nature of human beings (thus, “natural law”)’ (IEP). **BUT** it is the rationality of human beings that is in question under Earth Jurisprudence.

*To Moore and others:* ‘Strictly speaking, then, natural law moral theory is committed only to the *objectivity* of moral norms’ (IEP).

*To William Blackstone:* “This law of nature, being co-eval with mankind and dictated by God himself [*sic*], is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original” (IEP).

*Conceptual jurisprudence (as a category of natural law) :* ‘Thus, conceptual theories of law have traditionally been divided into two main categories: those like natural law legal theory that affirm there is a conceptual relation between law and morality and those like legal positivism that deny such a relation’ (IEP).

### *Customary law*

Customary law is accepted / tolerated as a result of Africa's colonial history. As such it is part the 'legal pluralism' in any former colony on the African continent. To the extent that it is not coded, it is at best tolerated to operate in limited linguistic areas where particular customs apply and at worst it is considered inferior. A learned anthropologist, Lloyd Fallers, describes customary law in Uganda with such condescension, pointing out that so long as customary law is in existence, it will remain an obstacle to resolving the conflicts created by such a plurality of the law (material attached). However, while customary law remains an obstacle for a modern academic, states, that have since become military enclaves within a post-colonial polity, resolve this obstacle with violence whenever elite interests are involved. For example, the current land grabbing is one powerful indicator that untitled customary land rights have little legal force, if any, than the land that has been recognized by state land authorities even after such land has been acquired forcefully or fraudulently.

### *Ethical questions for a lawyer*

Two challenges exist for the legal profession. With Earth jurisprudence, like any scientist, the lawyer will have to eradicate the subject-object dichotomy. The whole question of arriving at the truth through objectivity will have to be thought through. It is not only about privileging the morality but also looking at different sides of the truth, again thinking like a mountain. Secondly there is a whole question of a lawyer belonging to the middle class, the same as the army commander, the commander in chief of the armed forces, and the chief newspaper editor. This question goes with the income and the related social status. Questions of social and environmental justice get subordinated to class interests. It is doubtful whether Earth

jurisprudence can best be served by such lawyers. The concept of *barefoot lawyers* takes shape as we become more serious about Earth jurisprudence.

### **The 'African Genius' and Earth Jurisprudence**

Human civilization does not start with the recording technologies of the Greeks. Davidson (1970) considers that civilization is the 'humanization of man in his environment,' therefore, according to him, the ideas, social systems, religions, moral values, arts, and metaphysics of African peoples constitute a civilization that produced simple technologies that transformed the African continent.

Orality or oral tradition is the mother of these simple technologies. It is not a form of ignorance or illiteracy that must be fought. It is part of Africa's source of history and knowledge in general (Ki-zerbo). It is partly on this basis that UNESCO's eight-volume General History of Africa was written. Volume 1 (1981) in particular has several chapters on orality as a methodological source of history. Orality is a linguistic medium that encapsulates /captures local knowledge through a highly developed sense and skill of hearing (appreciation sound), deeply relational, community based, all of which constitute an important form of cultural diversity that enables Ong to characterize oral cultures as 'close to the human lifeworld' by nature (Ong, 1982).

This is why commentary on the African Genius underscores the fact that 'the *sophisticated* native genius that has carried Africans through centuries of change is vital to an understanding of modern Africa'. The diversity generated by this interplay between orality and literacy in modern Africa is part of this sophistication.

Indigenous orality was, and remains, in harmony with indigenous literacy: **media such as the human body, vegetal and clay materials** were in use by them. Indigenous communities all over the world and Africa in particular have always appreciated the relationship between themselves and the rest of nature. The oral legal-governance system is constituted by sacred relationships with all members of Earth community. Totems and taboos expressing this relationship have governed clearly defined social entities and their territories such as clan and tribal regions, kingdoms and empires.

‘Primitive’ communities first settled in matriarchies that Massey (1907) refers to as ‘food districts’ which later became sovereign territories. Here people identifying with an animal totem followed sets of rules on what they could or could not eat. Food restrictions also matched sexual restriction, hence taboos on eating young animals and under-age sex. There is a complex governance system in a food sovereignty already.

### **Wilderness is recognized as law (hence ‘wild law’)**

‘Wild laws are laws that regulate humans in a manner that creates the freedom for all the members of the Earth Community to play a role in the continuing co-evolution of the planet’ (Cullinan, 2011). They govern other forms of nature and they should be recognized too. Cullinan narrates the story of termites constructing anthills: by what law is their order achieved? Do they have a complex language and legal system that enables them to build an anthill? In A Further Discovery of Bees (1679), Rusden discusses whether bees are organized into social hierarchies with a king, dukes and plebeians?

Recognizing wild law involves overcoming the rigidity in the false dichotomy between ‘Wild’ (nature) and ‘Law’ (culture); wilderness and

civilization. 'Wildness is valid as an independent form of self-organization of other beings that are not human. Human cultures considered 'wild' by modernity also fall in this category. Wild Law expresses Earth jurisprudence. As an approach it seeks both to foster passionate and intimate connections between people and nature and to deepen our connection with the wild aspect of our own natures' (Cullinan, 2011).

### **The Earth is a being**

Earth is a being that can be identified as a subject capable of suffering cognizable harm (Koons, 2009). As a subject it has intrinsic worth which warrants moral and legal consideration. Systems and entities like mountains, rivers, forests, caves, earth's atmosphere, in nature are legal 'persons' in the same sense as 'ship,' 'trusts,' 'municipalities,' 'estates,' 'joint ventures,' 'universities,' 'churches,' 'states,' and 'business corporations.'

Legal expression for the intrinsic value of the Earth can be given through the doctrine of standing as valued participants (Koons, 2009). Currently this doctrine is denied other-than-human entities. Earth entities can be represented in law as trusts. After all guardians and trustees regularly appear in our legal system to give voice to people and entities who are unable to speak.

### **To be is to be related: humans are in sacred relationship with Earth**

According to Koons (2009) healthy natural systems function according to whole-maintaining (inter-related) characteristics so that each part of a system acts in a way that supports the well-being of the entire

system. In this circle of interdependence, humankind is only one part of the whole.

*Humankind is endowed with special capacities of thought and consciousness that are a means for the universe to reflect on itself, with gratitude and wonder.* This is our obligation to Earth: 'Nurtured by Earth humanity has developed abilities to establish systems of law and governance that should reflect our role on Earth that birthed, clothed and fed us.' Humankind is the conscious part of Earth community. Thus the relationship between humans and Earth is sacred.

Hence *our relationship with Earth is a trust and we are the trustees.* Examples in law today are: the public trust doctrine for conservation, scenic resources, open space, generation of energy and preservation of ecosystems and historical sites.

## **Earth Democracy**

To be according to the universe is to be different. In Earth Jurisprudence this translates as Earth democracy that supports, at all levels of governance, legal recognition of all *varied* components of our Earth community, both present and future. Hence we need to move away from the democracy of 'of the people, by the people, for the people'; 'to of the people by the people for the whole Earth Community.' This avoids making economic gains at the expense of Earth's biosphere, species and ecosystem.

Earth democracy connects the particular to the universal (humans to the entire earth), local to the global (one village to the whole world) and the diverse to the common (unknown to the well-known). Subsidiarity involves decision-making at the most appropriate level.

Different levels in the world system play particular roles, for example: at the local / national level people there can deal with – air pollution; at the regional level – trans-boundary air pollution; at the global level– atmospheric pollution can be dealt with. Earth democracy at the global and national levels translates into the need to recognize humankind’s duty to future generations.

### **Summation of relevant principles**

Wild law as a premise for jurisprudence unites nature and culture and eliminates the dichotomies on which human-centered law and governance are based, thus paving the way for Earth and social justice.

Oral and literate traditions of the world are complementary parts of human culture both of which are relevant sources of Jurisprudence.

Earth Jurisprudence as it relates to social justice at a deeper level also embodies territorial sovereignty. Through subsidiarity, Earth democracy guarantees independent local-level decision-making but it also allows for interdependence at the global level, hence global and national (glocal) connectedness of independent territories.

### **Earth Democracy challenges in Uganda**

1900 agreement introduces human-centered law that opens up social and environmental injustice. Since then both forms have gone hand-in-hand.

*Human-centered constitutions:* Sovereignty belongs to the people as an overriding, albeit unrealized, principle in all the constitutions of Uganda. The current constitution of Uganda reflects jurisprudential crisis: All power belongs to the people but...; people have a right to

development but...; all land belongs to the people but...; Oil belongs to... on behalf of... Betty Kanya only hints on the abnormal powers of the president.

Administrative demarcations (districts etc.) do not reflect the felt needs of human/environmental justice. The environment is managed for the sake of human exploitation. How possible is the unity of the gods across the worlds?

The crisis of globalization (climate change, end of the nation-state and economic crisis) now threatens to make all Ugandans potential squatters.

### **Way forward (short-term, long-term?)**

*The Constitutional moment in Ecuador:* 'The experience on the territorial defense of the national origins and the Amazonian peoples of Ecuador has been greatly rich in the last decade. Thanks to a set of legal and political strategies based on human rights, the Shuar, Achuar nationalities and the Kichwa People from Sarayaku in the south-central part of the Ecuadorian Amazon Region have accomplished to stop the eagerness of different governments and transnational companies from turning the extraordinarily biodiverse forests, which constitute their ancestral territory, into oil fields (Fundación Pachamama).

*Calls for new thinking in Africa:* Afrikology: restorative governance, and justice at all localities. 'Afrikology therefore becomes the basis for the reassertion of the moral order through the reminder that the word as originally conceived has remained a divine source of a holistic just order. It is through this recovery of the divine word from the heart that

an ethical order can reemerge through restorative learning and understanding' (Nabudere, 2012).

*Restorative food systems: From Agriculture to Agricolgy* (Nabudere, 2010). *Agricolgy: farming, God's way* (Rev. Sam Ebukarin, P'KWI, Bukedea).

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