

# **Environmental Law in the Loyalty Islands: Questioning the Success of Legal Crossbreeding**

## **Derecho ambiental en las islas de la lealtad: cuestionando el éxito del mestizaje legal**

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### **Abstract**

The Loyalty Islands' Environmental Code (New-Caledonia) seeks to merge French and Kanak views of nature. While Western naturalism separates humans and non-humans, Kanak animism sees continuity. Article 110-3 grants legal personality to natural elements, showing this ontological mix. However, France's Council of State annulled key provisions, citing overreach into Caledonian civil law power. This reflects a clash between worldviews and highlights the limits of French environmental law in embracing alternative ontologies. The method used to carry out this study is combinatorial, combining the classic method of research in French law and a survey. The objective is to extract the essence of each vision by questioning the custodians of each.

### **Keywords**

Animism, Environmental Law, Kanak Ontology, Legal Personality, Legal Pluralism, Nature's Rights.

### **Resumen**

El Código Ambiental de las Islas de la Lealtad intenta fusionar visiones francesas y kanak sobre la naturaleza. Mientras que el naturalismo occidental separa humanos y no humanos, el animismo kanak ve continuidad entre ellos. El artículo 110-3 otorga personalidad jurídica a elementos naturales, reflejando esta mezcla ontológica. Sin embargo, el Consejo de Estado anuló disposiciones clave, señalando una invasión del derecho civil. Esta oposición revela el conflicto entre dos concepciones del mundo y los límites del derecho ambiental francés para integrar otras ontologías. El método utilizado para llevar a cabo este estudio es combinatorio, combinando el método clásico de investigación en derecho francés y una encuesta. El objetivo es extraer la esencia de cada visión cuestionando a los custodios de cada una.

### **Palabras clave**

Animismo, Derecho ambiental, Derechos de la naturaleza, Ontología Kanak, Personalidad jurídica, Pluralismo jurídico.

## **1. Introduction**

"The unitary principle of life, which means that man belongs to the natural environment that surrounds him and conceives his identity in the elements of this natural environment, is the founding principle of Kanak society. To take account of this conception of Kanak life and social organization, certain elements of Nature may be recognized as having a juridical personality endowed with their own rights [...]".

New Caledonia is a territory acquired by France in 1853 in the Pacific region and is subject to significant autonomy within the Republic. The distribution of powers between the French State and New Caledonia is defined by the Nouméa Accord (1998) and subsequent organic laws. New Caledonia exercises autonomous authority in key areas such as health, education, and taxation, while the French State retains control over sovereign functions including defense, justice, and foreign affairs. This asymmetrical arrangement reflects a gradual transfer of competencies aimed at fostering self-governance. The institutional framework is unique within the French Republic, combining decentralization with a pathway toward potential independence. Ongoing political dialogue shapes the evolution of this shared governance model. The Province of the Loyalty Islands is one of the three provinces of New Caledonia. The division of powers as established by the Organic Law of 1999 confers on the New Caledonian provinces the jurisdiction in terms of environmental protection, which is an exception among the French regions. Then, an organic law enacted on November 15<sup>th</sup>, 2013 strengthened New Caledonia's jurisdiction in civil law.

The province of the Loyalty Islands adopted its own environmental code in 2016 in which Article 110-3 was inserted, from which the extract quoted above is taken. The terms chosen in this article ("natural environment" in particular) reveal the significant desire that presided over the debates during the drafting of the code: to proceed with a clever mix between the French vision and the Kanak vision of the elements of nature (David, 2021). This article 110-3 is in itself a striking example of an attempt at legal crossbreeding, which has given rise to significant complications. The fate of the provisions that were to be inserted into the said code on the basis of Article 110-3 is proof of this.

There is a prolific literature on the cultural differences between the West and Indigenous peoples (Lageot, 2023). On the subject of the links between society and nature, the differences are exacerbated, which the environment/nature diptych allows us to represent to a certain extent. In the West, a dualism between humanity and the environment prevails, which is based on the separation between humans and non-humans. In Pacific Indigenous communities, the line is blurred, and it is nature forming a whole that emerges, what some authors call monism (Ehlers, 2003, p. 141). To go further, anthropology is of great help: the concepts of environment and nature respectively represent a specific reality, specific to a particular ontology.

Before looking at these complications, it is first necessary to present the theoretical approaches involved (2.); then to verify the existence of ontologies with the help of the results of a field study (3.); and finally to fully understand the results of this attempt at interbreeding (4.).

## **2. Theoretical approaches present: presentation of New Caledonia's ontologies**

The New Caledonian territory has two different approaches to the relationship between communities and their environment. The French state has imported the European vision of the elements of nature, which coexists with that adopted by the indigenous Kanak community.

The literature commonly distinguishes two main approaches to the perception of the elements of nature and/or the environment. First of all, anthropocentrism considers nature mainly in terms of the resources and services provided to humanity. Second, ecocentrism emphasizes the intrinsic value of nature (Gagnon Thompson, 1994, p.149). While undergoing major changes, the Western tradition is often considered to be anthropocentric, based on utilitarianism, while the Kanak tradition is close to the ecocentric approach, due to its holistic coloring and the historical emphasis on harmony between Humanity and nature (Joachim, 2023, p.20).

The debates of contemporary doctrine focus on the recognition of nature as a subject of law (Hermitte, 2011, p.173) as a solution to be adopted to make its protection more effective. An international movement is taking shape in Europe for the recognition of the rights of nature, and even to confer legal personality on natural entities. The Ecuadorian Constitution of 2008 and the Dutch law of March 20<sup>th</sup>, 2017 are salient examples. However, behind the concepts are traditions, cultures and worldviews: ontologies. The anthropocentrism/ecocentrism diptych is interesting, but it is not enough to reveal the roughness of the Kanak approach. A detour through anthropology is therefore necessary.

In his book *Par-delà Nature et Culture* (Descola, 2005), anthropologist Ph. Descola establishes that there are four main ways of thinking about nature in the world: naturalism, animism, totemism, and analogism. Among them, the first two attract our attention in the New Caledonian context.

Naturalism is the approach taken in the West. It implies a split between human and non-human beings, with a superiority of the former over the latter. This is reflected in the Genesis of Christianity, which establishes a utilitarianism of the elements of nature for the benefit of humans. The idea was taken up by the philosophers of the Enlightenment, and in particular Descartes, who adopted the idea that the animal is an insensible and inanimate thing. Bacon was also a fervent defender of it (2005, p. 229).

Animism implies an imputation by humans to non-humans of an interiority identical to them (Descola, 2005, p. 229). If the similarity of interiorities (the fact of having a conscience, a soul for animals, plants or minerals) is proven, bodies are considered different. As a result, this implies a humanization of animals, plants and minerals since they are holders of a soul in the same way as humans. Also, relationships exist between non-humans but also with humans, all of which can be the subject of social and ethical norms. Here, humanization is not complete: plants, animals and minerals are humans disguised by a different physicality: bark, feathers or hair. If the forms are different, there is a substantial continuity of organisms (2005, p. 231). This is the ecological ontology adopted by the Kanak community in New Caledonia.

The anthropologist M. Leenhardt describes in his book on Kanak culture that "the structure of the plant and the structure of the human body respond to each other: an identity of substance confuses them in the same flow of life"(Leenhardt, 1947, p. 68). The same term, in the Kanak language, designates the bodies of plants and those of animals and humans: "karo". "Karo rhe" refers to the body of water (the mass of a river), "karo boe" refers to the body of the night (the Milky Way) and "karo kamo" refers to the body of the person. The same is true for the hard parts of the body, the skeleton is referred to by the term "ju": the heart of the wood, the debris of coral (the skeleton of the sea), the human skeleton. The identity of structure and substance between the plant world and humans is found in the plant nomenclature of the Melanesians: the intestines are interlacing vines for example (Leenhardt, 1947, p. 62). Thus, in the Kanak tradition, "relations between humans and non-humans are above all person-to-person relationships, maintained and consolidated over the course of the existence of each and every one" (Descola, 2005, p. 54).

The naturalistic ontology, specific to Western societies, has different characteristics. Ph. Descola notes that in modern thought "nature has meaning only in opposition to human works" (Descola, 2005, p. 31). We find the primary meaning of the term "environment" established by the French Academy: an outline, what surrounds humans and their activities. A detour through religion is necessary here. According to Genesis (as interpreted by historian Lynn White Jr. in 1967) human beings were created in the image of God, which gave them superiority over nature. Both Jewish and Christian human beings saw themselves as separate from the rest of nature and allowed to subjugate it (White Jr, 1967, p.1203). While several different interpretations have been proposed (Joachim, 2023, p.20), this is the one that prevailed in Christianity, at least until 2015, when an attempt to change the way through the

publication of Pope Francis' encyclical "Laudato si'" (Aeschimann, 2023, p.8). The gap between humans and nature was therefore formed in the West on the basis of Christianity.

The fifteenth and sixteenth centuries widened this gap further, with the theories of Bacon ("man must, through his science and his work, triumph over the elements of nature and thus erase original sin"), or Descartes (nature is "a passive substance", the animal is an "automaton without a soul")(Aeschimann, 2023, p.8). The great colonial conquests and the exponential use of energy crystallized this gap between man and nature. European law was influenced by a synergy between this dominant philosophical climate centered on "despotism" and three legal sources: custom, canon law and Roman law. Both the rights of the Romano-Germanic tradition and those belonging to the common law family are irrigated by these three sources. The combination of each of them, on the dominant philosophical soil, founds a particular approach to the environment: a utilitarian approach. Christian, customary and Romanist postulates, even in common law countries, appear to be major factors (Fisher, 2008, p. 168). Canon law is largely influenced by the beliefs of Christianity, for which the functional aspect of the environment is clearly identifiable.

This approach is found in French law as well as in European Union law: legal systems for environmental protection are based on this utilitarian approach. Their purpose is to protect natural resources that need to be managed and conserved for use. For example, as far as water protection is concerned, the logic reaches its apex in Recital 1 of the Water Framework Directive of 23 October 2000, which states that "water is not a commercial good like any other [...]". This suggests that if it is not a commercial good like any other, it is still a commercial good. An integrated water resources management (IWRM) system based on watershed protection has been set up in France as well as in the Union as a whole. This approach implies a separation between humans and non-humans specific to naturalistic ontology. We find the etymology of the term "environment": what surrounds humans, who are in fact separated from non-humans.

### **3. Two ecological ontologies in New Caledonia: results of a field study**

It appeared necessary to go beyond the theoretical aspects and to analyse the situation on the ground, going beyond the classic methods of research in comparative law to use methods from other social sciences (Vigour, 2005, p. 37). The research question we have tried to answer is the following: do we find in the New Caledonian population<sup>1</sup> the different ecological ontologies identified during the theoretical phase, and based on different concepts? To answer this question, we opted for a comparative study based on a questionnaire distributed in New Caledonia. The empirical dimension of the study brings an innovative side and stands out from purely conceptual and syllogistic analyses. Moreover, collecting the opinion or beliefs of the New Caledonian population is crucial to determine what underpinnings are at work in this multicultural society, which are decisive for the effectiveness of environmental law in this territory. Finally, the study of the institutional response in addition to the survey (the opinion of the Council of State) reveals the openness of the French judicial system to alternative ontologies.

#### **3.1 Methodological elements of the study**

Our fieldwork is based on a mixed method combining quantitative and qualitative approaches. The results presented here are from the first phase: a quantitative survey highlighting variables. It is a question of selecting the variables that seem the most important and relevant given the problem chosen (2005, p. 204). This assumes a greater level of generality than in a

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<sup>1</sup> The Caledonian population is composed of Kanak (41 %), European (24%), mixed (11%), Polynesian and Wallisian (9%) communities. People named "New Caledonians" can be descendants of Europeans, Kanak or mixed people.

case-based approach, and makes it possible to test abstract hypotheses, confirm or refute theoretical statements (Dogan, 1982, p. 111). The quantitative approach also presupposes the use of causal imputation problems in a hypothetico-deductive approach. Before the investigation phase, we established a theoretical hypothesis according to which there is a causal link between an individual's culture of origin and his or her vision of life. Thus, the terms "environment" and "nature" do not have the same meaning depending on the ontology chosen (in this case Western naturalism and traditional Kanak animism). The objective of this work is to experiment in the field with the distinction made by Ph. Descola between the two above-mentioned ontologies. We carried out a quantitative micro-comparison in New Caledonia using an identical open-ended questionnaire.

According to A. Desrosières, the quantitative approach involving the use of a questionnaire implies first of all the use of a comparable representative sample (Desrosières, 1989). The sample chosen is from the university community, teacher-researchers (around 10% of each sample, who are not specialists in comparative law or environmental law) and the student population in the Faculty of Law (90%) at the University of New Caledonia<sup>2</sup>. The questionnaire provides an analysis grid to identify the similarities and divergences according to the community to which this sample belongs.

### 3.2 Protocol

<b>Presentation</b>	You: <ul style="list-style-type: none"> <li>- Melanesian</li> <li>- Japanese</li> <li>- European</li> <li>- Polynesian</li> <li>- Other (specify: South Asia, Australia..):</li> </ul>
<b>General</b>	<ol style="list-style-type: none"> <li>1. What do you think about environmental protection around the world (e.g. the fight against climate change and water protection)?</li> <li>2. And at the national level?</li> <li>3. Do you think that COPs (intergovernmental climate conferences, such as COP21 in Paris in 2015) are useful?</li> </ol>
<b>Ecological ontology</b>	<ol style="list-style-type: none"> <li>1. For you, what is the difference between the environment and nature?</li> <li>2. Many researchers in the life sciences and the humanities believe that the distinction between humans and non-humans needs to be rethought. What do you think of this and why?</li> </ol>
<b>Feedback</b>	Additional elements that would be useful to the project:

### 3.3 Results

The following emerges from the data collection carried out in New Caledonia from June to October, 2024. We extracted the raw responses and then made a comparative analysis.

First, the question was asked about the differences between the concepts "environment" and "nature". Common points in New Caledonia's responses emerge in terms of the fact that the concepts are different<sup>3</sup>. In the majority of responses, across any

<sup>2</sup> The New Caledonian sample included 7 Europeans, 2 Polynesians, 4 Melanesians (Kanak and Wallisians) and 4 New Caledonians. The interest of having a student majority in each sample lies in the fact that it is young and that it makes it possible to represent the different cultural sensitivities present in each territory. New Caledonia also allows us to collect very different opinions because of the cultural diversity that the territory knows. The sample size of the population is small due to the student population present and available in the territory in 2024, the year of the riots in New Caledonia.

<sup>3</sup> Extract from the answers to the questionnaire deployed between June and October 2024, question n°3.

community, nature refers to the natural elements of the Earth, such as ecosystems and natural dynamism, without human intervention. Also, the environment is mostly understood as a broad and abstract concept that integrates the effects of human activity on nature.

It also emerges that the environment is considered by some respondents as a part of nature or a broader notion: nature is associated with concrete elements (trees, rivers, etc.), whereas the environment encompasses larger-scale phenomena on a global scale. Many of the responses are similar, with a few responses similarly stating that the environment can include things such as carbon dioxide levels and is considered broader than nature and subject to human-induced changes.

Secondly, the question was raised of the relevance of reconsidering the distinction between humans and non-humans. It is a marker of the differences between naturalistic ontology and animist ontology. The results here are interesting because they highlight a cohabitation between the two ontologies in New Caledonia<sup>4</sup>.

First of all, the opinion that the distinction should be reconsidered is not very well represented in the New Caledonian responses (around 3 responses). The argument that humans are part of the natural environment and that the survival of humanity cannot be discussed without reference to nature is prevalent among Melanesian respondents (Kanak and Wallisian). In addition, it is considered necessary to reconsider the distinction as artificial intelligence and life science technologies progress in a European response.

Secondly, several other responses expressed the view that this distinction is unnecessary or meaningless. Firstly, from the point of view of environmental protection, several respondents consider that it is not necessary to make a distinction, since non-human organisms also benefit from the environment. Secondly, in the field of life sciences, some respondents believe that there is no significant distinction because human beings are in continuity with other living organisms. An argument specific to Kanak respondents in New Caledonia is that humans belong to nature and not the other way around. Thus, the distinction between humans and non-humans is irrelevant from this point of view.

Finally, two specific items stand out in the New Caledonian responses: on the one hand, the idea of a domination of humans over nature, which imposes relationships that need to be rethought; on the other hand, the assertion that the distinction between humans and non-humans should not be rethought because it corresponds to reality. It should be noted that the respondents responsible for these two items are exclusively European. This highlights the importance of the naturalist approach in the European field and verifies our initial hypothesis.

There is therefore a diversity of views on the need to reconsider the distinction, which is perceived in different ways with regard to the environment, morality and technology.

Thirdly, and in the legal and political fields, three items were raised. First of all, the general question: "What do you think about the protection of the environment in the world?" offers an interesting first observation. There are many common points among New Caledonia's responses. Here is a summary: efforts are being made but, on the one hand, they are uneven depending on the country, and, on the other hand, their impacts remain ineffective. As a result, some respondents admit to being concerned about this situation and believe that urgent measures must be taken. In addition, it appears that governments do not pay attention to the right environmental issues (electric cars, industrial activities, etc.) and therefore do not provide adequate solutions. It would be better to focus on really pressing topics such as water, plastic, and reforestation.

Regarding the second general question: "What do you think about environmental protection at the national level?", we observe that the answers vary greatly among respondents from all communities. Part of the sample considers that their country stands out for its important and effective efforts such as: reducing the use of plastic, waste treatment and

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<sup>4</sup> Excerpts from the responses to the questionnaire deployed between June and October 2024, question n°4.

widespread awareness among the population. Conversely, another party considers that the efforts are insufficient and that their country is lagging behind, particularly in terms of the use of coal and energy, electric vehicles, and waste. But it should be pointed out, from the Kanak point of view, it is stressed that the traditional way of life is based on respect for the environment and that it should therefore be possible to harmonize the two positions. Adopting principles from this animist tradition for the protection of the environment seems relevant. Thus, in the management of environmental protection by law and policy, it appears that borrowings from the animist approach would be relevant to ensure a more advanced effectiveness of the latter.

Finally, with regard to the third question: "Do you think the COPs are useful?", the answers among the communities are similar. Indeed, the international framework for coordination and debate is considered important and useful by many participants. It is particularly appreciated for its ability to reach consensus on environmental protection from a global perspective and to share common goals. However, some expressed doubts about the achievement of the objectives of the treaty and the effectiveness of its implementation. Holding these conferences helps to raise awareness of the issues and raise awareness among the general public, which is considered beneficial. Nevertheless, questions remain about the real impact of these conferences. Moreover, the usefulness of such frameworks may be limited by the restriction of the number of participating countries, according to some opinions. Thus, opinions are unanimous in New Caledonia as to the legal and political responsibility for environmental protection.

This comparative study highlights two main elements. First of all, the two ontologies identified during the theoretical phase are indeed present in New Caledonia, and it is from the use of the concepts of environment and nature that the salient points of the study emerge. Secondly, the two ontologies do not correspond specifically to one of the two concepts, they coexist within society. A cohabitation of visions of the living therefore takes place in New Caledonia, which does not necessarily mean that hybridization is established. That is what we looked for in the provincial environmental protection legislation. The drafters of the Loyalty Islands' environmental code have tried to innovate on this point.

#### **4. The attempt at ontological cross-fertilization in the provincial code: a missed opportunity**

By a deliberation of June 29th, 2023, the province of the Loyalty Islands enriched its environmental code with articles 242-16 to 242-25, which create "natural entities subject to law" (in this case certain species of sharks and sea turtles). The lexical field is interesting here: these are "natural" entities and not environmental or ecological. It is a perfect representation of a legal mix. Indeed, inserted into a Western and naturalistic legal straitjacket, a code of the "environment", there is a provision whose substance comes from another ontology, the animist ontology. The rest of the story represents well the problems that this can create: resistance to legal miscegenation.

Indeed, the High Commission of New Caledonia (representing the French State on the territory) has referred the matter to the administrative court for the annulment of deliberation no. 2023-28. The reason for this is a problem of jurisdiction: the said new provisions would not fall under the jurisdiction of the province but of the government of New Caledonia, which is competent in civil matters. The administrative court of Nouméa referred the matter to the French Council of State for an opinion, a decision rendered on May 31, 2024. The High Administrative Court shifts the focus of the debate. The public rapporteur Laurent Domingo clearly announces it at the beginning of his conclusions<sup>5</sup>: if the subject is fascinating (the

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<sup>5</sup> In the French Council of State, the public rapporteur is an independent magistrate, he/she publicly pronounces his/her "conclusions": he/she presents the case law and the law in force as well as the solution that seems most

attribution of legal personality to animals), we must know how to distance ourselves from it, because it is only a question of sharing jurisdictions between the provinces and New Caledonia. It is a question of modifying the legal regime applicable to animals, which is not in the environmental field but in the field of civil law. This may come as a surprise because the Council of State is accustomed in its case law to retaining the criterion of the purpose pursued by a text in the event of a conflict of jurisdictions. The example given by the public rapporteur is edifying: in terms of "noise control, the provinces will have power if the measures are adopted with the aim of protecting the environment". New Caledonia will only have power for the purpose of protecting public health.

In the present case, the rapporteur Domingo points out that "there is no doubt that the province [...] adopted the provisions [...] with the aim of preserving the environment". But "the methods it has chosen in order to achieve the objective pursued go beyond the strict framework of environmental law". The Council of State followed suit.

## 5. Conclusion

Beyond purely technical considerations, there is something else at stake: it goes beyond the framework of environmental law because it goes beyond the naturalistic ontology prevailing in French environmental law. Granting legal personality to animals in order to better protect them and their habitat is a legal encroachment on New Caledonia's civil law jurisdiction. But there is also a conflict of ontologies behind this reasoning. This would be to introduce into a tool specific to naturalistic ontology, an environmental code, animist provisions likely to upset the dominant ontology. The French Council of State refuses extensive environmental jurisdiction to the province of the Islands, but it also refuses to allow interbreeding, an ontological hybridization, to take place. The rapporteur L. Domingo confirms that "this shakes up the classifications of law". In reality, it goes beyond that: it is an attempt to bring nature into a legal regime centered on the environment. The public rapporteur was not mistaken: "the assembly of the province of the Loyalty Islands has innovated", this is a major "conceptual advance". This is why it is the subject of resistance.

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appropriate to him/her. Often, the arguments presented by the public rapporteur are followed by the magistrates of the Council of State to render their decision.

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