CUSTOM, LAW AND SOCIETY IN NEW CALEDONIA:

A SOCIO-ANTHROPOLOGICAL VIEW

On customary civil courts

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(translated by Dr Stephanie Anderson: most of the Introduction, all quotations from the article in Vacarme*, the articles by Elie Poigoune and Isabelle Merle, and part 3, "The Kanak malaise"; other sections and quotations translated by the authors)*
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The question of custom, law and their interrelationship is now the subject of numerous debates both within the Kanak world and in New Caledonian society as a whole. The reasons for this are many, and we cannot claim to analyse them within the necessarily limited context of a conference. To contextualise our comments we shall say only that if the problem of the relations between Kanak custom and French law is an old one, perhaps as old as French colonisation itself, it has come to be posed quite specifically and in the sharpest relief since 1998, that is, since the signing of the Noumea Accord. The reason for this is that, in fact, it is the Accord which sets down the present terms of the debate by laying the foundations, in the same legal document, for a New Caledonian citizenship and for the recognition of a specific status for the Kanak people and its citizens, a "Kanak customary law civil status" [*statut civil coutumier kanak*]. A status very different, at least in principle, from the "specific law civil status" [*statut civil de droit particulier*] which existed up until that time even if it draws on the same legal source. In this presentation we shall limit our remarks to the debate surrounding the customary courts which, in New Caledonia, have responsibility for the settlement of disputes and conflicts involving persons of customary status but which have not been able to be settled amicably by the customary authorities concerned.

There are two reasons for choosing this particular focus. The first is that, if the setting up of the customary courts appears to be an undeniable success, the same cannot be said for how this is viewed in the field, namely in the Kanak world. Far from having increased the trust placed in justice, the action of the customary courts seems rather to have caused a renewed distrust and even resentment on the part of the Kanak citizens in relation to justice in general. This is a paradox, indeed a contradiction, which it is important to try to understand. The second is the publication in June 2013, in the journal *Vacarme* (vol. 64), of an article that strongly criticises the jurisprudential construction of a code of "customary law" in New Caledonia. Co-authored by two French anthropologists, Christine Demmer and Christine Salomon, but explicitly drafted "in collaboration" with others French scholars who are New Caledonia specialists,[1] the article questions the analyses that can be undertaken regarding contemporary debates bearing on law and custom. In the following discussion we shall ask to what extent this article, as well as the rejoinders written in response to it, can provide an explanation for the renewed distrust that can now be observed "in the field".

I. The article that appeared in the journal *Vacarme*.

We begin by examining the arguments advanced by the article that was published in *Vacarme*.

In the very first lines of the introduction, we read that "the establishment of 'customary law' in civil matters – indeed in penal matters through a 'customary penal mediation' that applies exclusively to the Kanaks" is primarily the program of "certain jurists and some magistrates" who are seeking to "establish [...] the principle of legal pluralism at the level of the state". Beyond the violation of republican laws that such a program represents, the whole project would be "debatable" on two points at least: it is "not explicitly desired by the independentists" and its "implications" would be detrimental "for certain categories of Kanak people".

[1] Alban Bensa, Christine Hamelin, Michel Naepels, Marie Salaün, Benoît Trépied and Eric Wittersheim, as stated in the "post-script". The paper in French can be accessed and downloaded at the journal's website: http://www.vacarme.org/article2263.html (no page numbers). Our quotations follow the development of the paper. The bibliographic reference is: "Droit coutumier et indépendance kanak", Christine Demmer et Christine Salomon, *Vacarme 64*, 2013, pp. 63-78.

Let us briefly examine these two arguments.

1) The customary courts and the jurisprudential development of a code of "customary law" are not desired by the Kanak independentists

We have said that, for Demmer and Salomon, this program is primarily the work of some jurists and non-Kanak judges, for the most part inspired by a conservative ideology and a cultural differentialism that are worthy of the directors and officers of the colonial period. For both, the ultimate aim is integrating "natives". This interpretation is clear from the following passage:

> "However, in a line of descent from a legal ethnology concerned about the conditions of integration of the indigenes into the colonial Empire that it aimed to bring about through setting customary codes down in writing, these jurists, likened by their peers to those 'knowing about custom', namely the Kanak assessors, are putting forward a conservative assessment of culture whose project is resolutely inscribed in this same reformist line."

But, say Demmer and Salomon, "for the independentists",

> "maintaining the particular civil status and thereby the status of the lands of the 'reserves' in which colonisation has quarantined the Kanaks is more an expression of the imperative to protect assets in land than their seeking to have a specific identity recognised."

Moreover, the authors continue:

> "The leaders of the FLNKS have very rarely been defenders of a fetishised tradition and of identity policies which aim to have particular statuses recognised in law; these have instead been taken on by parties who have rapidly emerged from the Front such as the LKS (Libération kanak socialiste) or the FULK (Front uni de libération kanak) or more recently by the 'autochthonous' movement with associations like the Caugern or Rhébuu Nuu whose positions do not exclude remaining within the French Republic."

To fetishise Kanak identity, the authors explain:

> "is to forget that in the context of this former colony that is 'un-decolonised', the identitarian demands of the independentists, although important, remain subordinate to aspirations to full political sovereignty and increased social justice."

2) The implications of the project are detrimental to certain categories of Kanak people

The arguments about this proposition relate to the fact that the essentialisation of Kanak identity by customary courts prevents the acknowledgement of the existence of multiple attachments for individuals . Again a long quotation:

> "To institutionalise a definition of identity through and in the law amounts to a form of assimilationism, but at a lower level than that of the State. Once legalised, identitarian affirmations of 'ethnic' type will make suspect all other possible identifications (of gender, class, profession, political or religious persuasion etc.). But in New Caledonia, as elsewhere, the refusal to think of oneself in terms of cultural belonging does exist, especially when the latter is associated with a given phenotype. Proof of this is the last census of 2009 in which, to the question of 'ethnic' affiliation, 9% of the population gave the answer 'mixed race' (with an even greater proportion among young people). The clan, the chieftainship, language, the commune of residence and, in town, the neighbourhood are all different modes of belonging that people may claim. Already, in the 1980s, a study showed that, beyond these attachments which contribute to shaping their collective identities, young Kanaks also valued autonomous personal spaces (Kohler, Pillon and Wacquant, 1985). And if we take all generations together, there is no reason to think that Kanaks should diverge from the principles of identifications analysed by the social sciences when these are shown to be multiple, continually being constructed and reconstructed. That is why, to have recognised within the State, by means of the elaboration of customary law, *one* Kanak identity that would predominate over the others amounts to an assignation of identity which can be fatal to freedom."

Fatal to freedom for whom?

To prove their point, Demmer and Salomon refer to a series of events that made the headlines. First, the corporal punishment of a number of women by a Kanak chief and

his "customary police" because, as Jehovah's Witnesses, these women rejected certain aspects of "custom". In 2000, the women pressed charges for assault and violence and the chief has been convicted at trial and on appeal. A decision that was upheld by the Supreme Court on behalf of the constitutional principle of freedom of religion.

> "The violent acts perpetrated have nonetheless been presented by the advocates of customary penal justice as a legitimate reaction in the face of an unacceptable endangering of 'custom'."

We shall return briefly to these events later.

Elsewhere in their article, Demmer and Salomon refer to the draft of a "Customary code" drawn up in a "district" of Lifou in 2009

> "that outlined penalties of fines for women who have abortions, 'adulterous women in flight' as they were described being sent back to their husbands for those who leave them, and beatings, fines and the definitive expulsion of homosexuals."

The authors comment on these facts:

> "The rhetoric of the legal experts whose essentialist discourse systematically prejudices certain categories of Kanaks appearing before the law comes down, essentially, to sanctioning 'subjects' (namely people of inferior rank) and the young; for the women who are victims of violence, these legal experts envisage demanding a procedure of indemnification which refers them to the civil code of law to appear before customary assessors who are almost all men more than 45 years old, and not necessarily inclined to support them."

And further: "Overall the inegalitarian principles of the old Kanak sociopolitical system are supported by the proponents of 'judicial custom'."

We shall not quote further from the *Vacarme* article and shall leave aside other aspects of the article which do not directly concern the subject of our discussion, such as considerations that "culture is a construction more than a social fact to be considered by the law", and – even worse – something to be laid down in written form.

II. Responses to the article published in *Vacarme*

The article that appeared in *Vacarme* prompted a number of rejoinders, mainly in New Caledonia, but the editorial board of the journal refused to publish them, saying they fully share the views of the authors of the article. In this section, we summarise three of these responses, focusing particularly on the first of them.

1--- The first response, undoubtedly the one that received most attention, was that of Elie Poigoune, President of the League of Human Rights of New Caledonia, independence activist of long standing, a founding member of PALIKA , the Kanak Party of Liberation (open letter, signed by "Elie Poigoune, President of LDH-NC", dated July 9, 2013)[2]. Elie Poigoune was described, and quoted, in Demmer and Salomon's article as

> "a Kanak who one day hopes to see the creation of one law applying to everyone in his country – [he] has no hesitation, unlike the experts who are outside his world, in demanding that the rights of Kanak women and children be given greater respect (http://www.youtube.com/watch?v=AUASh9Ophn4). As against the sanctification of cultural difference, the voices of those who struggle for the equality of rights in such hierarchical systems must be heard."

In his response, Elie Poigoune regrets that his remarks were cited in a decontextualised way in order to illustrate a position that is contrary to that of the LDH-NC on the issue of customary law:

> "First of all, in June 2012 the LDH-NC published an open letter to Madame the Chief Prosecutor (attached) which cites the creation of the customary jurisdictions in the first place as the extension of the recognition by the preamble of the Noumea Accord of the existence of a Kanak civilisation, and further as an arrangement seeking to respect the Kanak way of settling conflicts, which involves above all the attempt to ensure the return to equilibrium of the group."

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[2] Not (yet) published. It has been widely circulated within New Caledonia. Free access and download on the website of the LDH-NC, http://www.ldhnc.nc/documentation/7-documentation/72; and on the website of the Law department of UNC (LARJE): http://larje.univ-nc.nc/index.php/15-analyses-arrets-decisions/droit-de-la-nouvelle-caledonie/429-droit-coutumier-justice-coutumiere-et-emancipation-un-debat . An English translation has been undertaken recently through the EHESS@ANU program and will be available in the files of that program : www.pacific-dialogues.fr/home.php [Operation « France in the Pacific 2013-2014 », entry « September 2014, ANU : Working with Legal Pluralism… », file « Debates and studies on legal pluralism in the Francophone Pacific »].

As for the quotation from the television interview given by Elie Poigoune: while he may have emphasised that

> "the customary system still has efforts to make in the direction of a law which would be common to all in the taking into account of the statuses of women and children",

after making that comment he had immediately added, as he now recalls in his open letter, these remarks:

> "But I also mention the values of forgiveness and reconciliation, very strong ones for the Kanak people, which are tools of social regulation that 'one must share with everyone'. In sum, in Kanak society as in every other society, the systems of control include positive aspects as well as weaknesses. I do not defend the recourse to corporal punishment, as I presume you do not defend the daily assaults on the rights and dignity of persons perpetrated in French prisons. And if I express the hope that in New Caledonia we can arrive at a law which is common to all, while specifying that the journey will be long before we reach our end, that does not mean that it must consist of a pre-existing legal system, delivered ready for immediate use."

Indeed, for Elie Poigoune and for the LDH-NC, as he writes in his open letter, "the search for points of reference" shared by all of the population, for all of the country's communities, cannot come about simply by recourse to "imported models, even though they were declared universal by those who are in possession of their codes". The attitude that must prevail in this research must be "a pragmatic approach which is interested in the practices of intercultural dialogue", in all possible forms of "hybridisation of systems of reference" present in New Caledonia today. Beyond these reminders, the main criticism that Elie Poigoune addresses to Demmer and Salomon is that they are conflating two things that should not be confused:

> "On the ideological level it seems that you are confusing this initiative, arising out of the 1982 regulation and strengthened by the organic law of 1999 which consolidated the political gains achieved through brave struggle by the indigenous people of New Caledonia, with marginal words or acts resting on culturalist, conservative and indeed fundamentalist arguments, which you label *in toto* the "neo-customary network". The Ligue des Droits de l'Homme and I myself have a

> duty to warn you of the risks of making unwarranted associations of this kind. On several occasions, moreover, you refer to the Kanaks by the word "community". But the Kanaks are a people. And the withdrawal into one's own community [*repli communautaire*] whose spectre you brandish amounts to the negation of the identity of the Kanak people and the attempts to dissolve that identity in a supposed universalism which will pave the way for this dissolution."

Later in his open letter, Elie Poigoune responds to worries about the treatment of women of customary status. Indeed, there are only four women among the customary assessors and it is possible to do better. Women certainly do encounter difficulties in pursuing legal redress for their claims; the LDH-NC has found breaches of equality in women's access to their rights, but these are not the result of the customary status, or even of the operations of the customary courts, but that of the application of the procedures by the Court of Noumea. And Elie Poigoune refers to two situations:

> "Firstly, in Noumea the necessary steps for the referral of a case to the civil court complemented by customary assessors, described as a "customary court", are often a normal sequel to a rejection because of incompetence of the penal court; they are long and complex. On the other hand, in the court of Koné the victims are summoned to a customary civil hearing immediately following the end of the penal hearing, resulting in a uniformity of procedure which avoids unnecessary delays, steps and costs.
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> Secondly, article 12 of Decision no. 482 of 1994 reforming legal aid makes provision that '*if the jurisdiction before which a case is heard and for which legal aid assistance has been granted is incompetent, this assistance remains in place before the new jurisdiction called upon to hear the case without there being the need for a new application*.' However, the practice of the office of legal aid, in the case of incompetence of the penal court and of referral to the civil court which includes customary assessors, is to demand a new application for legal aid. This is why the steps that have to be taken are certainly prolonged and made more complex, and despite the existing provisions."

The situation is paradoxical in many ways:

> "the basic right to benefit from the same universal rights, while still respecting the legal distinctions which have their basis in the organic law, and beyond that in the Constitution, is objectively challenged."
>
> "To conclude," writes Elie Poigoune "in response to your fear that the recognition within the state of a Kanak identity results, for the population concerned, in an '*assignation of identity*' and to your assertion according to which '*in New Caledonia, as elsewhere, the refusal to think of oneself in terms of cultural belonging does exist*', I shall simply say to you that it is a characteristic of minorities (women, immigrants, children of immigrants, indigenous people, homosexuals...) to be obliged to have their existence and their particularities recognised institutionally. And it is a characteristic of dominant groups to be able – and too often to want – to avoid having to do so."

2--- The second response to the article published by *Vacarme* is from Isabelle Merle, a historian close to the writers of the article and their group, lecturer in 2013 at the University of New Caledonia (UNC / CNEP) on secondment from the CNRS (IRIS). The author has written a detailed discussion, a full-length article, entitled "Au sujet de la "justice coutumière en Nouvelle-Calédonie ou les conditions d'un dialogue post-colonial" [On the subject of 'customary justice in New-Caledonia, or the conditions for a post-colonial dialogue][3]. The article is not yet published but it has been circulated in New Caledonia and is available from the same online sources as Poigoune's open letter (see note above). The author herself, at the beginning, provides an abstract of her paper. The so-called customary institutions and justice in New Caledonia are historically

> "the result of delayed recognition by the French State of an effective place allocated to custom and to its Kanak representatives in the legal organisation of New Caledonia. The process was set in train in 1982 with the introduction of customary assessors in civil courts but did not really take effect until the Noumea Accord of 1998 and the organic law of 1999 which fully recognise the role of new institutions like the Customary Senate and give effect to 'custom' through Kanak customary law civil status. The article presented here discusses the very negative perspective

[3] An English translation has been recently completed through the EHESS@ANU program and will be available in the same files as the translation of Elie Poigoune's open letter (see note above).

> on these new institutions and their present mode of operation which is conveyed by these anthropologists, New Caledonia specialists, by pleading for a more nuanced reading supported by a necessary historical distance."

We do not have time here to consider Merle's astute analysis of the historical conditions leading to the emergence of issues relating to the recognition of customary structures and of a customary status, or her remarks about the administration of justice in Noumea, or the training that judges undertake. We shall only quote her discussion of the transfer of civil law and its implications:

> "The Noumea Accord as well as the organic law of 1999 have reinforced the principle that 'the individuals of customary status are ruled by custom'. The creation of the detached judicial sections in 1989, in the [Loyalty] islands and in North Province, had already allowed the ruling of 1982, which had not been applied up until then, to be given effect by introducing customary assessors into customary civil chambers. Finally, the transfer of responsibility in the matter of civil law was realised on 1 July 2013.
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> All these elements constitute a new challenge which cannot be reduced to a simple question of 'legal translation' since it is actually a question of instituting a local civil law which will be able to liberate itself progressively from the metropolitan ordinary law[4]. The authors in any case agree on this point when they call for 'the invention of another – New Caledonian – law, which would be neither a reproduction of colonial law nor a law that was simply 'customary' '.
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> That is as maybe, but this is not the reality because, for the time being, the situation obtaining in the country is, on the one hand, that of a customary civil law in the process of jurisprudential construction coexisting with the established civil law on the other.
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> Moreover, one cannot, in my view, describe as 'colonial law' the civil ordinary law applied today in New Caledonia to persons subject to the status of ordinary law because, from a strictly historical viewpoint, it is an anachronism. On the other hand, in a country like New Caledonia, one cannot deny the persistent idea – borne

[4] "Statut de droit commun", literally "common law status" in the sense of "applicable to all", and translated in legal terminology as "ordinary law status".

> by the vocabulary of a 'France one and indivisible' – of the superiority of the French written law and its legal norms which is still at this point in time present in contemporary debate and within the local magistracy.
>
> In this context 'customary law' is the product of a fight for recognition of legal pluralism and for the creation of authorities like the customary civil chambers where civil matters concerning persons of customary law can be debated between Kanak customary assessors and judges."

Merle continues with three observations that we can only summarise here with the help of a few quotations:

First observation:

> "By demanding the application of a New Caledonian law that is 'neither colonial, nor customary' in such a context, without the authors [of the article published in *Vacarme*] being concerned to add some content to the proposition, they in fact give support to a well-known implicit idea which consists of perpetuating the predominance of the French ordinary law."

Second observation:

> "We can observe, however, if we agree to adopt a sufficient historical perspective, that the customary civil Chambers and Customary Senate are places in which can be discussed modes of conflict settlement and *adjustments* of customary practices within the Kanak world and in relation to the rapid developments that New Caledonian society is experiencing as a whole, on the legal level and beyond."

Third observation:

> "[To reflect upon] "the mode of functioning of these institutions, on […] their representativeness and their legitimacy, on the methods of appointment of their members, on their openness to young people and to women, on the meaning that should be given to the word 'customary', and on the introduction of assessors who are 'non customary' but 'representatives of civil society'…"

is important for the future, but it should not discredit the steps already taken in developing this legal framework:

> "[…] these institutions can be the drivers of positive reflections on condition that true debates are held, thus allowing them to become interesting places of innovation and legal experiment."

Isabelle Merle's conclusion:

> "However that may be, it seems completely inappropriate to think that there could now be a return to the past by imagining 'a New Caledonian law' which would flout what has been put in place by the Noumea Accord."

3--- The third and final response was not published but circulated in the limited circle of a number of French anthropologists, Oceanist specialists. It was written in 2013 by Serge Tcherkézoff, who does not have to be introduced at this symposium in Canberra. His approach is more theoretical and goes far beyond the scope of our presentation here:

> "The issue is very broad," writes Serge Tcherkézoff, "and that is the reason I am speaking out although I am not a specialist in New Caledonian society and history. Can a political project built on 'custom' be anything other than an archaism promoting injustice and domination by a small social elite (often male), as the article suggests? If the answer to this question must be affirmative, we will have to stop discussing any progress towards a 'common destiny' for a multicultural society, in any region of the world. The only acceptable social political and legal model then being the modern individual in the moral and political sense, comparative reflection on the social models is no longer of any use."

It is not necessary to develop here the line of thought relating to the ethics of the professional anthropologists or the actual work of the judges attacked by the article published in *Vacarme*, especially as Serge Tcherkézoff is present at this symposium and can enlarge on these points if he wishes to do so.

However, it is useful to quote the passages in which he sharply denounces the vision of Kanak custom and new customary institutions in New Caledonia presented by Demmer and Salomon. He writes ironically: "So we did not know that every 'customary' institution is merely used in a power game where some natives, themselves manipulated by the colonial state, oppress other natives?" The authors return repeatedly to this same

point: a Senate that claims a monopoly over the discourse of identity is the voice of men drawn from elite clans, the clan political model being thus incorporated within the state; customary values in fact penalise the dominated, etc. If we are to believe the authors of the article published in *Vacarme*, writes Serge Tcherkézoff, "the inegalitarian principles of the old Kanak sociopolitical system are supported by proponents of judicial custom." They see "custom" as a colonial concept as well as a cultural identity that is at the same time a "denial of multiple affiliations." The mind boggles when one considers that these statements are those made by professional anthropologists. Tcherkézoff speaks of ideological blindness:

> "Where is the problem?" he asks. "Ensure that a future New Caledonia Kanaky 'customary' law is not only the jurisprudential sum of the decisions taken by customary assessors? But this is precisely why the system combines the presence of the official judges (like Régis Lafargue and others) and customary assessors. But isn't Régis Lafargue right? One must first create an opening in a mechanism that only recognises French metropolitan law, thus 'decolonise the law', then one can combine the perspectives."

And he adds:

> "However, to combine, one must still accept the two worlds, that of the modern individual and that of 'custom'. But when the concept of 'culture' (and the rest) is rejected, no combination is possible. Throughout the text, the authors suggest no path that would allow the different views to be combined, and simply hammer the point that their criticism essentially targets any process of setting customary law down in writing. But this is hard to understand: as if writing would ipso facto mean an eternal freeze, as if written codes could never be changed at a future date. What is it that so concerns our authors about a project that aims to draft a text in written form stemming from the jurisprudence of the cases treated by the customary assessors? The answer remains obscure, but we can throw some light on it.
>
> It is that this perspective is an affront to their anti-sociological credo. Setting down, even temporarily, a customary law is to recognise the reality of custom and therefore of a cultural identity. To recognise this does not imply that everything must be frozen, but it is an acknowledgement that the members of a community do see themselves as belonging to that identity. The content, debates about the

content and the evolution of what constitutes their identity in the eyes of those who claim such belonging, all that is changing and will constantly change. But this self-representation of belonging to a 'we' is a fact and will remain so. And that is what exasperates our authors. Because, for them, a sociocultural 'we' has no meaning and can only be an illusion, something propagated by a colonial discourse or, within a process of emancipation, by the discourse of 'dominant' groups seeking to establish the power of their social status, class and/or their gender category."

3. The Kanak malaise, towards another reading

We do not need to take the exposition of the responses made to Demmer and Salomon's article any further. The question we must now tackle in concluding this paper touches on the malaise that, despite the setting up of the customary courts, the Kanaks continue to feel in relation to justice, including sometimes in relation to the customary courts themselves. The idea that these have been imposed by a number of jurists and magistrates from outside, besides the fact that it has strange echoes with the conservative theory of Kanaks politically manipulated by foreign forces, a theory which is very much in vogue in the anti-independentist circles in Noumea, is not convincing. Throughout the whole of the colonial period, the Kanak social order has been gradually invested in and reworked by the French political, judicial and administrative system, without being really taken into account before 1946. It was not until 1982 that French justice began to incorporate custom into its thinking and its sources and to apply it to the Kanaks under its rule. The presence of a Kanak independentist at the head of the government of New Caledonia was a factor in this.[5] This recognition was given concrete form, as the critiques made of Demmer and Salomon and these authors themselves have mentioned, with the statute of 15 October 1982. The Noumea Accord and the organic statutory law have only confirmed the existence of the customary courts by giving effect to the presence of customary assessors in this French jurisdiction which applies customary law in civil cases, but not in penal cases. The mere fact that the recognition of

[5] And it is just as pertinent to recall, as does Isabelle Merle, "that the independentist leaders, and among them the most famous, Yéweiné Yéweiné and Eloi Machoro, in 1982 supported the statute opening up the possibility for customary assessors to take part in the civil Chambers" (ATNC 818W178, Assemblée Territoriale, 27 July 1982).

customary civil status is set down in the first pages of the Noumea Accord as of the organic law which flows from it is enough to show that this was indeed a matter of the will of the Kanak signatories and therefore of the FLNKS.

The idea of assigning identity in such a way as to deny the plurality of ways in which Kanaks today can claim belonging and identity and which would be damaging to certain categories of the Kanak population is really no longer admissible. First of all because it is always possible for a person in the present legal context to renounce their customary law civil status and to opt for the ordinary law civil status if they clearly show their will to do so. Conversely, the Noumea Accord allows any person coming under ordinary law status to return to customary status. It is sufficient for them to prove that they live, in a lasting way, in accordance with the rules of Kanak custom. It is up to the judge to determine whether a person lives in an old and continuous way, even if the acts of the civil state say the opposite. It is important to emphasise this, because the criticism levelled against the magistrates of wanting to assign to each person subject to trial a reified, essentialised identity, rests almost solely on an erroneous interpretation of a text by the jurist Régis Lafargue (2010: 215) in which he asserts that in the case of customary civil law "the criteria of traditional society take precedence over any other consideration, [that] the Kanak employee is Kanak and subject to custom, before being an employee." The interpretation is erroneous because it covers over the fact that the assertion is of a legal nature and touches on the consistency of customary law. Transposing this text into a French context enables it to be quickly understood: in the case of civil law the criteria of French law take precedence over any other consideration, the French employee is French and subject to trial under French law, before being an employee. In what sense would such a reformulation be the negation of the multiple modes of belonging identified by sociologists? In what sense is it a matter of an assignation of identity? Régis Lafargue's comment only sought to affirm a principle. With the Noumea Accord the French legal system effectively becomes pluralist, at least in the case of civil law.

Where then does the malaise referred to spring from? We do not have time here to go into the detail of the discussions that are being conducted at present around justice in the Kanak world. We can nevertheless point to the fact that they bring out three major

currents revealing points of tension that are felt at the very heart of contemporary Kanak society.

1. The first is that what, in the beginning, was to be a recognition of Kanak custom and of its place in the future common destiny for New Caledonia that was in the process of being constructed appears today to be most often experienced as the opening up of a new front in the struggle of the Kanak people for its sovereignty. The tensions which are revealed here are multiple: the opposition between a custom whose place one claims to recognise and a judicial system which, in reality, at the local level, continues to reaffirm the primacy of French law; the position, which at the very least is uncomfortable, of the customary assessors who must confront the suspicion of the judges, but also the mistrust of the person subject to trial who is of customary status; and the difficulties for Kanak society itself of gaining full recognition in the working of the courts, which are restricted to the treatment of individual cases and are obliged to ignore the social issues that the setting up of a project of customary jurisprudence inevitably presupposes. As one of us (Jone Passa) very aptly remarked during discussions as we prepared this presentation: the future is troubled when the Kanak dimension is locked away in a backward-looking vision. In considering, as it often does, law as a private law, justice deprives itself of the tools needed to understand the overarching issues which drive Kanak society. By confining customary law as a secondary law, legal thinking really undermines its ability to respond to legal alterity, which is essential in the present context.

The case at Lifou of the physical punishment inflicted on a number of Kanak women by a chief and his police officers because, being Jehovah's Witnesses, the women rejected certain aspects of custom can serve to illustrate the issues involved. It resulted as we have seen in a conviction in the name of the constitutional principle of the freedom of religion and in the rejection of any customary interference and representation in the matters considered under penal law. What Demmer and Salomon do not say, but which is recalled in a very timely fashion by Isabelle Merle, is

> "the role of the police force in the tribal situation which 'let this happen', authorising what is called the 'customary police', formerly called the 'indigenous police', to exercise punishments that are illegal in respect of the law that is in force."

As Isabelle Merle writes,

> "The conditions as regards the 'maintaining of public order' in the tribes and the responsibilities and room for manoeuvre of the police must certainly be subject to questioning."

Moreover, what the critics of customary law do not seem to realise is that the judgement left the question of the boundaries of custom up in the air, and with no real possibility of an answer being given to it. As all the anthropological studies of the Kanak world show, in that world the access to land and the right to live as a member of a tribe proceed from the statutory relations of exchange between extended families and from the participation of people in these exchanges. What is to be done when some Kanaks claim to be liberated from these social obligations? The answer to these questions is certainly not a simple one in the present context, but it should be understood that the legal response provided has been deemed to be inadequate by many Kanaks, so much so that it has left a bitter taste in the mouth for a good number of them. The customary courts have not been given a say in this. For many Kanaks the two laws, customary and French, today stand face to face but – to borrow the expression of an assessor – do not look in the same direction. It is all as if the cost of the recognition of the Other is that it has to be mediated by knowledge of the Kanak political situation. Today the central issue for the law in New Caledonia involves this capacity to make room for pluralism without brushing aside, or at least minimising, the Other.

2. The second current of tension in contemporary Kanak discourse is that which is becoming more and more marked in the political struggle. Here again it is pertinent to quote some comments made by Jone Passa in the preparing this paper. According to him – from our notes,

> "the establishment of a customary court has thrown up a permanent dilemma for the Kanak between a political identity and a 'country identity'. In other words, the Kanak man is facing the reality of a political progression and the desire to perpetuate a culture. And this evolution is not without consequences for the future of the country. Between the literal reading of the Noumea Accord and its application, between the reading of the spirit of the Accord and its translation [in

terms of its practical implementation], justice is playing an active part in providing more fodder to the contested issues deriving from the colonial legacy."

This tension may appear surprising. For the Kanak nationalists of 1984 and 1988 the construction of a different relationship to justice could not be separated either from the ushering in of new relations between Kanak people and the non-indigenous communities or from the demand for independence. It is any case in this light that we need to see the emergence, in the New Caledonia of the 1990s, of different sets of local problems affecting the rights of the indigenous people and the development of the customary courts. In the eyes of the nationalists the creation of a "common destiny" only seemed viable if there was added to the resolution of the issues arising from the colonial legacy (independence, achieving economic equilibrium, the end of the most blatant inequalities and discriminations...) the recognition of specific rights for the Kanak people enabling it not only to preserve its values and its institutions, but also to negotiate completely autonomously its adjustments to the changing realities of today's world. And as it happens similar concerns still seem to be influencing some of the thinking and the current political debates about the coming exit from the Noumea Accord. But it is also true that a fair portion of the political class seems now to have bowed out of the legal struggle that has been left to the customary assessors alone and the Senate. The present context, with its political ambushes and the pitfalls of a tense process of decolonisation, is gradually tending to become frozen. The development of the customary court is the victim of these tensions and incoherencies which are becoming more pronounced, each day giving a little more ballast to the infamous colonial legacy. The profound changes which are running through Kanak society increasingly reveal the battle scars of a colonial relationship that we thought was relegated to the annals of history.

3. The third current of tension is experienced by the actors of customary law themselves. Contemporary transformations prompt the central actor of the customary chamber, that is the customary assessor, to mix legal genres, to state the law of the place to "a Kanak" and not to the individual person belonging to that place. And the Kanak political situation pressures the assessors themselves often to their cost. So how is a court whose first principle is independence to be made to operate? There is much tension between the political Kanak and the "customary" Kanak, even if this remark needs to be nuanced somewhat. The entry of customary law into French law in practice occurs through a

formalisation of the relations between the judge and the assessor. These relations need to be deciphered in order to grasp as fully as possible the political issues which are at play in the legal domain, with some impact on Kanak society and the Kanak people as Elie Poigoune spelt out earlier. In this regard it is necessary to distinguish clearly, even if briefly, Kanak society and the Kanak people if one wishes to understand, for example, the approach of the Customary Senate which is seeking a place for itself outside of the well-worn administrative and institutional pathways in various ways: looking into the place of young people in contemporary society, for example, or setting itself to drafting both for Kanaks and non-Kanaks a foundation of common Kanak values and working for it to be given recognition and taken up by the New Caledonian political and legal system as a whole[6]. The absence of a real analysis of the differing impact of customary law on local thinking, Kanak and non-Kanak alike, is indicative of the obstacles which remain in the realisation of the common destiny that was aspired to in the Noumea Accord.

In their article Demmer and Salomon are right on one point: "if the 1998 Accord clearly represents a 'road map' for the future, this does not mean that it constitutes an untouchable foundation; it deliberately leaves room for different interpretations." But as against what they assert, we can see clearly that precisely what has been lacking is a valid interpretation of the link which needed to be established between the customary courts and the judicial system as a whole on the one hand, and between this system and the political project of constructing a true New Caledonian citizenship on the other. In a Maussian idiom the problem could be summarised by saying that thinking about the whole has been lacking in the confident implementation of the part.

That is our conclusion. How could it seriously be imagined that the recognition of a Kanak legal specificity could be instituted without there being any effect or repercussion on the rest of New Caledonian law? And how could it be thought that the law as a whole would not be impacted at all by the project of emancipation born out of the Noumea Accord? Through having failed to take seriously the need to build this integration at every level of the common destiny that is under construction, the Accord, at least at the

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[6] See the recent publication of the "*Charte* du Peuple *kanak* – Socle commun des *valeurs* et principes fondamentaux de la civilisation *kanak*", access and download (an English translation is also provided) at: http://www.senat-coutumier.nc/le-senat-coutumier/actualites/61-la-charte-du-peuple-kanak-a-ete-proclamee

legal level, has given birth to new tensions and new conflicts which are very likely to weigh heavily in the crucial years ahead.