Ligue des Droits de l'Homme et du citoyen de Nouvelle-Calédonie

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[translated by Dr Stephanie Anderson, from the text accessible online from the LDH-NC website: http://www.ldhnc.nc/documentation/2-uncategorised/89
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On the same LDH-NC website page it is possible to "download whole document as PDF". When downloaded, the text is identical except that most of the highlighting in bold has disappeared. We retain here the formatting of the text as it appears online.]
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For the attention of Mesdames DEMMER, SALOMON, HAMELIN and SALAUN and Messieurs BENSA, NAEPELS, TREPIED and WITTERSHEIM, authors of the article "Droit coutumier et indépendance kanak" [Customary law and Kanak independence], as well as Vincent CASANOVA, editor of the review *Vacarme*.

Noumea, 9 July 2013

Mesdames, Messieurs,

The Ligue des Droits de l'Homme et du citoyen de Nouvelle-Calédonie [League of the rights of man and the citizen of New Caledonia] of which I am president has learnt of the article "Droit coutumier et indépendance Kanak" [Customary law and Kanak independence] to appear in no. 64 of the review *Vacarme*, in which I am quoted in these terms: "*Elie Poigoune, the president of the League of the Rights of Man in New Caledonia – a Kanak who one day hopes to see the creation of one law applying to everyone in his country – 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). In contradistinction to the sanctification of cultural difference, the voices of those who struggle for the equality of rights in such hierarchical systems must be heard*."

While I am grateful to you for urging your readers to listen to what I have to say, I am deeply concerned that for your part you have taken my words out of context in order to illustrate a position that is contrary to that of the LDH-NC on the question of customary law. On issues as complex as these, and in view of the great respect I have for the work that a number of you

have published on New Caledonia, I would have expected more rigour on your part in the collection of the information that underpins your conclusions and in your presentation of them.

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There is in fact some misinterpretation in your understanding of what I said, and a more thoroughgoing investigation would doubtless have led you to a more precise perception – and therefore to a more faithful reconstruction – of my position, taking account particularly of the following aspects:

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 courts 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.

In the televised interview that you cite as a reference, I emphasise, it is true, that the customary system still has work to do in making a law which would be common to all, by taking into account the statuses of women and children. 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.**

The history of New Caledonia demands that creativity be shown in the development of its institutions in the search for points of reference shared by all of the population. These cannot result from imported models, even if they are declared universal by those who hold their codes. As it happens, in 2009 our League created a Commission of Transculturalism which, in order to contribute to the construction of the common destiny intended by the Noumea Accord, puts forward a pragmatic approach which is interested in

the practices of intercultural dialogue and of innovative models in the different domains of New Caledonian society. The first task of this commission has been to communicate to the general public the establishment of customary law in civil courts composed of customary assessors, through a day of lectures and debates at the Tjibaou Cultural Centre. The proceedings of this conference were published in *Les cahiers de la LDH-NC*, under the title "Transculturalism and Justice", which can be found on our website: http://www.ldhnc/nos-commissions/transculturalité. We did so precisely because it is in these arenas that the transcending of identitarianism is played out through the hybridisation of systems of reference, something which you yourselves fervently hope for!

You describe this endogenous experience, one that is recent and certainly needs improving (but what legal system can claim to be perfect?), by the adjectives "conservative" and then "reformist" in the same sentence. Besides, it is rather difficult to know what exactly you accuse it of, but let me attempt to spell it out, on the theoretical and practical levels:

—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.**

On a pragmatic level you are concerned about the treatment reserved for women of customary status in the courts composed of the customary assessors who are almost all men. And indeed, it is the case that the assessors number only four women amongst them**. We can only hope that one day parity is reached in these legal entities and formulate the same hope for the Western legal entities.**

Concerning the difficulties encountered by the victims, we have certainly noted a breach in equality of access to their rights of the latter, if they are of customary status. However, this breach does not result from the status in itself but from the application of the procedures by the court of Noumea.[1] And the following two situations illustrate this point:

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.

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 complemented by 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.

It is therefore quite clearly the legal practices and the procedures as they are applied, and not the quality of the judgements of the courts described as "customary", or civil status, that are unfavourable to the rights of victims of customary status being taken into account.

As it happens, the basic right to benefit from the same universal rights, while respecting however the legal distinctions which have their basis in the organic law, and beyond that in the Constitution, is objectively challenged. You are right: a situation discriminating between persons of different status is not acceptable, and all the more so when provisions exist but are not applied. A draft law for New Caledonia [*loi de pays*][2] whose aim is facilitate the

[1] [ST]: this sentence does not appear in bold in the online text version but is (and is the only sentence) that appears in bold in the text when it is downloaded.
[2] [ST] A "*loi de pays"*, literally a "law of the country" (the country being "New Caledonia"), meaning in fact a "law *for* the country (New Caledonia)" designates a law drafted and passed

procedures has recently been put before the Congress of New Caledonia by an elected member who is also a senior customary office-holder. But another draft law seeking to remove these questions from the jurisdiction of the customary legal courts was then presented under an opposing initiative in such a way as to block the first, even in the knowledge that it has no chance of succeeding, at least before the end of the Noumea Accord. Were you aware of this? **It is regrettable that your article lends scientific credibility to struggles that use the pretext of the status of the victims to undermine the customary courts, but that put up such resistance to any immediate improvement of this status...**

All things considered, it seems to me that your research is very far from reflecting the realities that you claim to describe, and I regret it all the more because I have a great belief in the usefulness of anthropological work in our country. For a more "inside" perspective on the work performed in the customary courts I refer you to the documentary by Eric Beauducel**,** "Une justice entre deux mondes" ["A system of justice between two worlds"]. In particular it will show you that, in the customary hearings, the claims for recognition of paternity are not refused to women of customary status any more than they are refused to men of customary status, and that this refusal can be explained not by non-respect for rights but rather by the very philosophy of customary justice which is not comparable to that of ordinary law. To different philosophies different rights and procedures, but it is "customary" to make systematic comparison between these two societies to the systematic detriment of one of them.

To conclude, 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.**

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by the Congress of New Caledonia, and not by the French Parliament. It applies within New Caledonia and not in France. Its application is limited to areas that fall within the "responsibilities" [*compétences*] transferred to New Caledonia.

In the hope of being accorded the same attention as if my words supported your argument, I remain, with the greatest respect,

Yours sincerely,

Elie Poigoune, President of the LDH-NC