ON THE SUBJECT OF "CUSTOMARY JUSTICE IN NEW CALEDONIA"

OR THE CONDITIONS FOR A POST-COLONIAL DIALOGUE[1]

Isabelle Merle, historian, senior lecturer at the Université de la Nouvelle-Calédonie (UNC/CNEP), on secondment from the CNRS (IRIS)

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Abstract

This article is a reply to a text published by a group of anthropologist colleagues in the journal *Vacarme* (no. 64) on the subject of what, in New Caledonia, are called customary institutions and justice.. These are 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 chambers 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 customary Kanak civil status. The article presented here discusses the very negative perspective on these new institutions and their present mode of operation which is conveyed by these anthropologists, specialists of New Caledonia, by pleading for a more nuanced reading supported by a necessary historical distance.

Article

An article entitled "Customary law and Kanak independence" was published in the last issue of the journal *Vacarme* (no. 64).[2] The text has been circulated in New Caledonia and proves

[1] This article has been read by several people to whom I extend my thanks. I would especially like to thank Jean-Marc Weller, Luc-Henry Choquet and Laurent Duclos for their pertinent remarks and their very careful reading.

that the journal *Vacarme* has thereby adventitiously succeeded in broadening its readership. However, the form and content of the text, far from receiving a favourable reception on the part of those to whom it might seemed to be addressed in the first instance, have tended to result in a hardening of positions and to create a certain unease as shown by the response made by Elie Poigoune as President of the LDH-NC on 3 July 2013,[3] at the risk of closing the debate rather than opening it up. This is a great pity because in doing so this article intervenes in a very polemical way in a complex debate and in the context of a country in the process of emancipation or decolonisation, by choice, in which public debate, as we know, is still difficult and fragile. As a result the question arises of the conditions in which academics and metropolitan researchers enter into dialogue with the representatives and actors of the country in which they conduct their research.

In publishing this article in *Vacarme* – "cultural, political and social quarterly review comprising field research, opinion pieces and literary works" as its internet site indicates – the authors have chosen a widely accessible channel of communication which permits short articles (6 to 7 pages), a critical and engaged tone and a stance which sees itself as informed but which excuses itself, as a result, from scientific analytical rigour demanding argument that is thorough and supported by facts. It must be acknowledged that seven among the eight cosignatories to the article are recognised anthropologists of New Caledonia, having to their name an interest in the country and fieldwork experience, going back more than 10 years in the case of the younger authors and more than 30 for the oldest, that on its own the group so constituted, reputed for the quality of its work, represents a good majority of the metropolitan anthropological milieu working on New Caledonia. No doubt it was a question of strengthening the legitimacy and the weight of what basically resembles a manifesto whose central focus is a response to a concern which can be summarised in the following way. The Noumea Accord signed in 1998 and the organic law which followed on from it in 1999 opened the way to a process of consolidation of "customary law", exclusively reserved for persons said to be of "customary status" [4] and therefore Kanak, but which is liable to veering

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[2] Christine Demmer and Christine Salomon, "Droit coutumier et indépendence kanak" *Vacarme* 64, summer 2013, cosigned by Alban Bensa, Christine Hamelin, Michel Naepels, Marie Salün, Benoît Trépied, Eric Wittersheim.

[3] Elie Poigoune is part of the Kanak independentist vanguard, a founding member of the "group 1878" in the 1970s. He re-established the Ligue des Droits de l'Homme in the country after the events of 1984-1988 to militate in favour of respect for democratic principles. On 3 July 2013 he sent a letter to the authors and to the journal *Vacarme* to take issue over the use of his words from an interview he gave on Youtube (http://www.lecriducagou) and to differentiate himself from the overall position of the text.

[4] As the authors recall, we are, here, in a country which until 1946 was a French colony in the full sense of the term in which "indigenes" lived together with French citizens (and beyond that foreigners and assimilated

dangerously off course since it is supported by institutions and men who privilege a reactionary view of Kanak society, to the detriment of the most vulnerable individuals and in particular women; a view that would, preferably, become established in the form of a written law paying no heed to the flexibility that characterises a society with an oral tradition. To put it differently, it is a matter of denouncing the risks inherent in the assertion of a "legal pluralism" implicitly founded on an essentialist conception of Kanak society. The response which is put forward here seeks to shed light on several aspects of the question that remain problematic.

On the subject of the customary institutions of a neo-customary network

As it happens, the article proceeds from a "wide angle" critique directed at what can be called "customary institutions", a concept that is obscure to a Parisian or metropolitan audience but relatively familiar (if not known in detail) in New Caledonia, covering principally two types of distinct institutions, one dependent on the government, the Customary Senate composed exclusively of Kanak representatives appointed by the Regional Councils [*Conseils d'Aire*s],[5] the other arising from the Magistracy: the customary civil chambers in which at present there are metropolitan judges and Kanak customary assessors.

These institutions do not play the same role and by no means have the same function even if certain legal questions in the field of public law (organisation of customary hierarchies) and of private law (devolutions by succession on customary lands, for example) have become important in the Customary Senate over recent years. But according to the authors, their members, judges in the customary civil chamber, customary assessors and customary senators, form the central nucleus of a "neo-customary network" composed by a majority of

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persons). As everywhere in the Empire, imperial France endowed the indigenes with a "personal status" which, under cover of respect for their laws and customs subjected them in civil and commercial matters to their "particular laws" in the field of the law of the family (marriage, descent, adoption, the condition of women, succession), of the law of property and of acts and contracts "between indigenes". As such, they could not "enjoy" the civil and political rights accorded to French citizens. The Constitution of 1946 agreed to widen citizenship while maintaining "particular status" in the field of civil matters, considering the latter nevertheless as residual and destined to disappear in favour of the Civil Code. It was necessary to wait until the Noumea Accord and the organic law of 1999 for a true equality of statuses termed "customary and of "common law" to be instituted.

[5] The Customary Senate is made up of 16 members chosen by each customary council, with there being two representatives per customary region of New Caledonia. The customary region is a special subdivision parallel to the administrative subdivisions of New Caledonia, created by the Matignon Accords in 1988 and whose institutional operation is today established under organic law no. 99-209 of 19 March 1999 relating to New Caledonia. Each region is represented by a customary, consultative Council, whose members are chosen according to the rules particular to each region.

elderly and conservative men. Their objectives would finally converge around a programme concerned "with defending adhesion to the 'historical' Christian churches as much as principles of seniority (domination of the 'juniors' by the 'seniors' in the generational sense, but also in status terms, distinguishing between 'chiefly' clans and 'subject' clans)".[6]

We are immediately led to doubt the extreme coherence attributed to this "neo-customary network" when we examine the complexity of the relations between actors who have come from very different professional, familial, political and social backgrounds (assessors, judges, members of the Senate, customary representatives, chiefs, etc.) and working for separate institutions (court and Senate and others), within which we can presume a consequent diversity of opinions and positions.

The supposed coherence of a "neo-customary network" is all the more debatable as the authors seems to support the idea of a recognised split between "neo-customary" participants on the one hand and "independentists" on the other, members of the FLNKS, who are much more concerned with economic questions and mining development than about customary and, by extension, identitarian questions. There is, granted, competition about legitimacy between elective approaches and customary approaches and we can also recognise the potential mistrust of political representatives in relation to the exploitation in the political arena of customary legitimacies (or the opposite). We know too the extent to which functions can be intertwined when politicians can be customary representatives and vice versa, and the hats interchangeable according to the context.

However, it would be more plausible, rather than putting forward a largely unconvincing binary analysis, to examine in precise detail and to rethink the issues and contradictions which can come into play between "the political universe" and "the customary universe" in the exercise of "contemporary governance" in New Caledonia.

The authors rightly recall the aspirations that emerged in the 1980s in the case of independentists who were in favour of a new deal setting aside "the 'customary' figures in favour of new local leaders, indeed, in a Marxist understanding, to aspire to chieftainships 'without class and without rank'".[7] But it is just as pertinent to recall that the independentist leaders, and among them the most famous, Yéweiné Yéweiné and Eloi Machoro, in 1982 supported the ruling making it possible for customary assessors to participate in the Civil

[6] Reference to the article.
[7] Reference to the article.

Chambers.[8] These same independentists, at the time, in the name of recognition of the Kanak people and of the particularities of its culture, strongly supported all the initiatives that strengthened the customary institutions and their improved representation. In the wake of the conference held in 1980 on "Melanesian Promotion", the independentists put forward the creation of a Clan Council, a council of Clan Chiefs and a Council of the Great Chiefs[9] which, during the signing of the Matignon-Oudinot Accords in 1988, ended with the creation of a customary consultative council bringing together the great chiefs of the customary regions, predecessor of the present Customary Senate of which it must be noted that it is in the end more broadly based (the Senators not being obligatorily "great chiefs").

That is why we can by no means assert in a peremptory and too narrow way that: "For the independentists, maintaining the specific law 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."[10]

If the land issues have undeniably been crucial in the 1980s, as have been the issues related to the preliminary condition about mining during the signing of the Noumea Accord in 1998, they do not thereby completely obscure questions relating to the recognition of customary structures, customary law civil status and the issues concerning a justice that is more respectful of Kanak identity.

Furthermore, the Customary Senate cannot be reduced to the "sub-state political orders" created under the colonial period as the administrative chiefdoms in which great and small chiefs were appointed in the period of Governor Feuillet at the end of the 19th century.[11] This would be to ignore or discredit the longstanding Kanak claims that have been maintained with persistence as attested by the debates of the territorial assembly in 1981 which recall "the principle many times called for of the creation of a Council of Great Chiefs bringing

[8] ATNC 818W178, Assemblée Territoriale, 27 July 1982.
[9] ATNC 818W177, Assemblée Territoriale, 10 December 1981.
[10] Reference to the article.
[11] By the decree of 9 August 1898 Governor Feuillet established in New Caledonia the districts controlled by the Great Chiefs appointed by the colonial administration which cover a certain number of Tribes controlled by Small Chiefs likewise appointed. Let us recall that Governor Feuillet generalised the cantonment of the Kanak population in reserves, that he instituted the poll tax and hardened the restrictive rules on movement. Lastly, he entrusted to the Great Chiefs and under their control to the Small Chiefs, police powers within districts and reserves, the responsibility for maintaining order and that of collecting the poll tax and, too, the application of the rules of hygiene and preventive medicine.

together the highest customary authorities and the guardians of the Melanesian oral tradition, those whom the old men describe in each language as 'the sacred baskets'".[12]

The Customary Senate is the fruit of this long demand for recognition and self-determination of a customary Kanak world. That is why there are many people today who consider that the issue is not that of discrediting an institution but rather of reflecting on how to improve its working, the methods of recruitment of its members, its representative status in the Kanak world, the possibility of making it a fulcrum of debate in the context of emancipation in which a series of new and complex questions are raised.

In search "of a New Caledonian law" or the issues of the transfer of the civil law

Among these questions there remains that of the transfer of responsibility [*transfert de compétence*] in the domain of the civil law. The Noumea Accord as well as the organic law of 1999 have reinforced the principle that "the individuals of customary law status are ruled by custom". The creation of the detached judicial sections in 1989, in the Islands and in North Province, had already allowed the ruling of 1982, which had not be applied up until then, to be given effect by introducing customary assessors into customary civil . Finally, the transfer of responsibility in the matter of civil law was realised on 1 July 2013.

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. 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'".[13]

That is as maybe, but such is not the reality because, for the time being, there are in the country a civil customary law in the process of jurisprudential construction on the one hand, and the established [ordinary] civil law on the other.

Moreover, one cannot, in my view, describe as "colonial law" the civil ordinary law applied today in New Caledonia to persons subject to the ordinary law civil status because, from a

[12] Setting up of the clan councils. Deliberation no.351 of 10 December 1981. ATNC 12W67.
[13] Reference to the article.

strictly historical viewpoint, it is an anachronism. On the other hand, in a country like New Caledonia, one cannot deny the persistent idea —borne 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. I shall make three observations on this point.

1 - By demanding the application of a New Caledonian law that is "neither colonial, nor customary" in such a context, without the authors 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 common law which they describe as colonial in their writings but which in their minds nevertheless remains the best protection for the most vulnerable in Kanak society, namely women.

2- 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 regulation of conflicts 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. It must be noted that the Kanaks, especially discredited in the colonial period, have only had a little time in which to express collectively the way in which they intend to become organised legally in order to face the multiple questions which concern persons placed under "personal status". The efforts in relation to the "codification of customs" that came to fruition in French Indochina and West Africa, and too in Algeria through the lengthy debates about "Muslim law", which certainly need to be analysed with the benefit of hindsight given the extent to which the thinking of colonial domination predominated at the time, nevertheless allowed the beginnings of an internal debate led by local elites attempting to reflect on what a local law and its functioning might be. If these old debates are now obsolete, they were part of a reflection and a *conversation* which the Kanaks in their colonial situation were deprived of until the Second World War. This *conversation* began in the 1950s under the aegis, as we know, of the missionary associations and has since evolved. Customary justice and the Customary Senate are, in this sense, the product of this

long journey aiming towards a debate that is autonomous but linked to the problematic of contemporary issues.

3 – Whether one reflects, today, on the mode of functioning of these institutions, on the crucial question of 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", these are clearly essential issues for the future. Finding expression in these examples are diverse positions and, among them, conservative options but, equally, positions that are open as to evolving ways of life, whether this concerns young people living in Noumea, the protection of women, the dissolution of marriages, the place of fathers, the responsibilities of the clans or the variability of customary practices according to regions etc. I remain convinced that 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. 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.

Between Anthropology and Law. The issues of an interdisciplinary dialogue and case by case study

My last point bears on the way in which the authors engage debate with the legal discipline, its practices and its practitioners. The frontal attack they wage against the jurists who, today, practise in the framework of these customary civil chambers and, in particular, against Régis Lafargue, currently a magistrate at the Court of Appeal, seems to me problematic. Lafargue has published several works which demand due and considered attention and being subjected to thorough-going critical debate. By sweeping aside the efforts undertaken by means of a radical discrediting of pseudo ethnologists "knowing about custom"[14] who would seek thus "to enter history", the authors fail to respond to the demands of this critique and cast doubt on their credibility and position as anthropologists. On the one hand one can see in it an extremely damaging disciplinary rivalry between "expert" academics (moreover metropolitan

[14] Reference to the article.

ones) who defend their own position in the field by attack. On the other hand the article is not up to the task of carrying its theoretical critique to its ultimate conclusion any more than it is up to the task of conducting a serious analysis of the arguments of the cases to which it refers.

Some, among these cases, owe nothing to the intervention of the judges described as customary, nor to that of assessors who, in 2000, had no say when the small chief of Xenepenehe (Lifou) and "his customary police" decided to "polish" [*astiquer*: to "beat" in local French] a man and two women for belonging to the movement of the Jehovah's Witnesses. The case in any event was not a matter for civil justice but a matter for penal justice which, to the present, does not include any customary representation and remains under the principle of the uniformity of the ordinary law. The article does mention that, following on from what occurred, the Jehova's Witnesses pressed charges and won, but does not indicate that in this case the question is raised of 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. 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. But this case is also a reminder that, in the colonial period, police powers were entrusted to the great chiefs of the district and by extension to the "small chiefs", both being able to surround themselves with a "tribal police" that the missionary associations, in particular the UICALO, wanted to make official in the 1950s. The case of Xenepenehe points to the possible continuities and their realisation of a conception of public order in the tribal setting constructed in the colonial period. It is true that today some would look favourably on according official status to new "police powers" given to the chiefs and exercised by a recognised body of "customary police". These options, however, are subject to serious discussions and arouse real differences of opinion. The debate is far from being closed.

Again, the judges described as "customary" and the assessors were not consulted during the writing of a customary code in 2006 by a district of Lifou which defended fines against women who have abortions, forbade women from leaving their husband under threat of prosecution and declared in favour of "the public beating [*astiquage*] and banishing of homosexuals". However the reference to this code which has remained very marginal and without real effect makes the inference, by association, that the "legal experts" according to the terms used, judges and assessors, are militating for this type of programme. Such an inference is misplaced unless proven otherwise.

I shall not return here to the question of the indemnification of the victims at the end of a penal trial and to the referral to appear before the customary civil chamber. Elie Poigoune, in his reply of 3 July 2013, explains the improvements that have been proposed to facilitate and accelerate the procedures. This point being accepted, nothing proves that there is, at present, inequality of treatment in financial terms between victims of customary law status and victims of ordinary law status.

No doubt of more interest is the allusion to the question of paternity and the modes of its recognition and the conditions under which the dissolution of customary marriages, which at present require the agreement of the clan chiefs, are given effect. Here again the manner of presentation, which is too imprecise, is completely inadequate for elucidating the arguments put forward and the questions raised. An enquiry and a constructive dialogue with the judges, the assessors and the petitioners would be essential in order to work thoroughly on the cases of jurisprudence thus elaborated. But this enquiry still remains to be carried out and should be supported.[16] One would have expected a real project on the part of researchers in the field of anthropology in close collaboration with the actors in question and not a judgement from above which condemns in advance dialogue and the putting forward of ideas, propositions and interpretations.

Finally and to conclude, we cannot today seriously enquire into the operation of the customary civil chambers while treating with contempt any reflection about the body of the magistracy in general, its recruiting and its present functioning in New Caledonia. It has to be observed that there is, in the judicial world, a clear under-representation of judges and lawyers from New Caledonia, Kanaks, New Caledonians, people from the Wallis Islands and Tahitians. The body of magistrates and lawyers is overwhelmingly represented by metropolitan public servants. The only Kanak judge, Fote Trolue, who was appointed in 1983, has now retired. This patently obvious imbalance weighs considerably on the exercise of justice in the country and is an unfortunate reminder of the chronic inequalities resulting from a colonial and post-colonial situation. The need to train "in-country" jurists and among them Kanak jurists is urgent and essential but we know the difficulties inherent in a course of training that demands success in extremely difficult and specific competitive examinations in which the criteria of excellence are predominantly those favouring reproduction of the social status quo. There exist, however, third ways that could profitably be pursued as demonstrated

[16] For my part, I have begun a project of listening and observation in the hearings of the Customary Civil Chamber of Noumea.

by the career path of Fote Trolue who was appointed judge on the basis of professional experience. However that may be, the importance of the training of Kanak magistrates and lawyers is a fundamental issue for the representation and participation of the Kanaks in the practice of the law, not only in the customary civil chambers but *also* in all courts of justice: there can be no question of restricting Kanaks solely to the set of issues surrounding customary law. Kanak judges and lawyers will in that case be well equipped to discuss the local “ordinary law” and “customary law” from the perspective of the future construction of a judicial system, of a country and of a common destiny in accord with present thinking regarding the transfer of responsibilities.