

# **Custom and the Law**

Paul de Deckker and Jean-Yves Faberon (editors)

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# Abbreviations

ADRAF	Agence de développement rural et d'aménagement foncier
ATPF	Archives du Territoire de la Polynésie française
BSEO	Bulletin de la Société des Etudes
CCCT	The Customary Consulting Council of the Territory
CSCE	Conférence sur la Sécurité et la Coopération en Europe
DOM-TOM	French Overseas Departments and Territories
EEPF	Evangelical Church of French Polynesia
EFO	Etablissements Française de l'Océanie
FLNKS	Front de Libération Nationale Kanak Socialiste
GDPL	Groupeement de Droit Particulier Local
ILO	International Labour Organisation
JSO	Journal de la Société des Océanistes
RPCR	Rassemblement pour la Calédonie dans la République
TOM	French Overseas Territories
UN	United Nations

# Preface

In 1994 we conducted a multidisciplinary research program, combining both law and anthropology, into the place of indigenous custom in the development of law in the South Pacific. At that time we were already convinced, and remain so today, that it was necessary to bring a diversity of approaches to the subject.

Through a diversity of disciplinary approaches, as just intimated, the phenomenon known as 'custom' requires just as much an anthropological analysis as one from a perspective of the discipline of law. Custom is the reality upon which law was originally based. Added to this is the usefulness of a political analysis, provided by both the academic and the practising lawyer. And on top of this is the diversity of the areas of our study. For French academics who are particularly interested in the phenomenon of custom in the French territories of the Pacific, it is unthinkable that we should limit ourselves to the zone of French influence. Obviously, custom is essentially Melanesian or Polynesian, and it would be a very blinkered view to explore only Kanak, Tahitian and Wallisian data, even though they constitute a strong field of interest.

When the French Republic solemnly recognised the rights of the Kanak people, too long spurned, at the time of the signing of the Noumea Accord of 5 May 1998, one could only remember the same steps taken by the Prime Minister of New Zealand in the name of the Crown, on 22 May 1995, with respect to the Maori people.

So it was that we resolutely sought to learn the lessons which we could glean from the Australian, New Zealand and Papua New Guinean worlds. After all, it is Pacific people who are the subject of our study. And we managed to bring together the comments and testimonies of the most qualified people of those countries: a range of well-known people explained their different situations and problems and the ways used to resolve them. They all addressed the same question: how does one affirm and restore the original rights of indigenous peoples?

The studies which are brought together in this volume may be characterised by the diversity of the countries concerned, and by the

diversity of the facets under consideration: land rights, mining rights, legal guarantees which are the very foundations of democracy. They all have a common ambition: to foster the notion of the right to be different, and the peaceful co-existence of the different communities present in the South Pacific.

*Paul de Deckker and Jean-Yves Faberon*



# Custom and the law

Norbert Rouland

One of the biggest and perhaps main foundations of the Republics is to accommodate the State to the character of its citizens, and the edicts and decrees to the nature of places, persons, and times...which means that we must diversify the State of the Republic to fit the diversity of places, following the example of a good architect who accommodates his or her building according to the materials found on site.

J. Bodin, *La République*, V-1 (1577)

...One cannot see why all provinces of a State, or even all States themselves, should not have the same criminal laws, civil laws, commercial laws, etc. A good law should be good for all people, just as a true proposition is true for all.

Condorcet (1780)

## Indigenous custom and the development of European Law in the French territories of the Pacific

In a few words this topic throws us into the turbulence of the French legal tradition.<sup>1</sup> Custom? For Montesquieu, it was the 'reasoning of fools', and the revolutionary legislator, like our current law manuals, sought to efface it as a source of the law. Indigenous? To the annoyance of the United Nations, France refuses to recognise this concept<sup>2</sup> anymore than it accepts that of minorities:<sup>3</sup> Article 2 of the 1958 Constitution proclaims the legal equality of all citizens '...without distinguishing origin, race, or religion', and affirms their linguistic unity.<sup>4</sup>

The territories? The demarcation of territorial administrative regimes and the limited variety of legal regimes in the national territory do not

undermine the indivisibility of the republic, which continues to establish the unity of normative power. Although the 1958 Constitution explicitly refers to the '*territoires d'outre mer*'<sup>5</sup> and their populations,<sup>6</sup> by recognising the right to self-determination, it nevertheless states that '...the principle of the indivisibility of the republic, as well as the principle of equality, insists on the unity of the French people and thus forbids any differentiation between citizens constituting a same people'.<sup>7</sup> The Constitutional Council of 9 May 1991, stated that the concept of the 'Corsican people' was 'contrary to the Constitution, which only recognises the French people, composed of French citizens, without distinguishing origin, race, or religion'.

Custom and the development of the law? Although this question doesn't place law in opposition to custom, it does distinguish between the two concepts. Sliding down the hierarchy of norms, from the Constitution to the most banal of administrative directives, we remain in the mapped out world of the law. When it comes to custom, however, we are disorientated enough that the outline of our familiar idol becomes blurred—is that law, pre-law, or a fact waiting to evolve into a norm? The coarseness of political events further confounds this legal uncertainty. In the French overseas territories, custom is not just an object of theoretical speculation, but can become a political assertion, or a basis for affirmations of identity. In New Caledonia, the drama at Ouvéa led to reforms institutionalising custom and 'custom people', if only on consultative grounds. In Guyana, the Amerindians invoked their indigenous rights to their territories, languages and cultures.<sup>8</sup> The appearance in administrative law of the concept of *collectivité périphérique* could even serve as a basis for the recognition of legal particularism beyond the limitation of overseas territories.<sup>9</sup> Finally, international law provides much room for the confirmation of the rights and specificities of indigenous populations. A project for the declaration of the universal rights of indigenous populations by the United Nations is currently near completion.<sup>10</sup> Within Europe, the concept of indigenous populations is slowly emerging into legal existence.<sup>11</sup> Paragraph 29 of the CSCE conference of 10 July 1992, declares that the States

in recognising that persons belonging to indigenous populations can encounter particular problems in the exercise of their rights, are acknowledging that the engagements they have undertaken within the framework of the CSCE relate to human rights and fundamental liberties which are fully and unconditionally applicable to these persons.<sup>12</sup>

We need then to disentangle the assault on custom instigated by the republican tradition,<sup>13</sup> its contemporary reinterpretations, and an exalted celebration of identities—which is full of potential pitfalls.

We will start by establishing certain definitions. Then, perhaps more surprisingly, we will not describe the norms related to the emergence of custom in the French territories of the Pacific.<sup>14</sup> The following discussion will address, following the concerns of legal anthropology, the all too often forgotten companions of social norms. Representations are what we will first see at work in certain theoretical problems. And then we will try to reveal the practices of the underlying world of politics.

## Introduction: the long haul of definitions

Our research is about indigenous custom. What do each of these terms mean?

### The 'missing' aborigines

Definitions are even more difficult to establish when they have political groundings and ramifications.<sup>15</sup> For example, a declaration by the United Nations (18 December 1992) concerning the rights of minorities fails to define what these are.<sup>16</sup> Indigenous populations are—or deem themselves to be—different to minority groups (they claim the recognition of themselves as a people), but we have to admit a similar kind of inadequacy in these terms.

At its first session in 1982, the UN Working Group on Indigenous Populations drew its definition of indigeneity from the Cobo report and identified several criteria from it<sup>17</sup>—indigenous populations ascribe to value systems which are either different or in competition with those of the State in which they live; they are in a position of inferiority in relation to the dominant society; the legitimacy of their rights is grounded in the continuity of their historical existence on their territories; the attribute of indigeneity depends largely on the individual's self-identification with the group and the acceptance by the group of that individual as one of its members. All these elements confirm the factual data. Indigenous people throughout the world base the legitimacy of their demands in terms of their pre-existing occupation of territories, and in terms of their current position of dependence—the very etymology of the term indigenous\* implies a notion

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of territoriality. Nevertheless, the UN Working Group currently developing the Universal Declaration of the Rights of Indigenous Peoples does not posit any definition of indigeneity. To settle this therefore we need to refer to another international device, Convention 169 of the ILO,<sup>18</sup> passed in 1989, which pertains to indigenous and tribal peoples in independent countries. Article 1, contends that indigeneity applies

(a) to tribal peoples in independent countries who distinguish themselves from other sections of the national community by their social, cultural and economic circumstances and who are totally or partially governed by their own customs or traditions or by a special legislation

(b) to peoples in independent countries who are considered indigenous through their descent from populations who lived in the country, or a geographical region which the country belongs to, at either the time of conquest, colonisation or the establishment of the current State borders, and who, irrespective of their legal status, have maintained either all or some of their own social, economic, cultural and political institutions.

The second paragraph of this same article specifies that

[a] feeling of indigenous or tribal belonging must be considered as an essential criterion in determining the groups to which the provisions of this convention apply.

One could ask whether there is a need to distinguish between indigenous (aboriginal) peoples, as the second group by comparison to the first, have the specific attribute of prior occupation of the land. This would give the Convention a larger field of application than that of indigenous people *stricto sensu*. In fact a detailed study by P. Karpe concludes with the identity of notions of tribal, aboriginal, or indigenous people.<sup>19</sup> The category of tribal people was supposedly instigated under the pressure of newly independent States (particularly in the eastern part of the world) who, for reasons of national unity and territoriality, were opposed to the recognition of the existence of aboriginal people on their land, preferring instead a more neutral qualification which was less likely to lead to demands of autonomy or succession. In any case, Convention 169 contains an important self-limitation of the rights it recognises for tribal or indigenous peoples, because it specifies that the term peoples 'can in no way be interpreted as having implications of any sort on the rights that are attached to this term in international law'.<sup>20</sup> The sovereignty of the States is thus protected.

The main difficulties in elaborating a legal definition of indigenous peoples occur on the political level.

Is custom any freer from these contingencies?

## The polysemy of custom

In principle, any lawyer would define custom as more or less a rule of practice which is consistent and repetitive over a given period of time, and has a restraining characteristic which is recognised by the members of the group to which it is applied. These people validate it more according to its empirical and ancient nature (whether its age is real or not) than its rationality.<sup>21</sup> Habit (custom comes from the Latin term *consuetudo*) does seem to have a determining element. And we must be careful not to exaggerate the irrationality of custom—often the absence of explanations is due to the secret nature of the legitimating accounts and to the restrictions on divulging them. But we are dealing with indigenous customs as they relate to the law—it would therefore be fitting to have knowledge of the indigenous point of view on the meanings that custom holds for them *hic et nunc*, and to undertake linguistic inquiries.<sup>22</sup> Finally, custom is not miraculously protected from the ravages of time. In this respect we need to be reminded of the distinctions put forward by E. Le Roy.<sup>23</sup> Traditional law is that which the indigenous people practiced before colonisation or annexation. Customary practice, *stricto sensu*, consists of a transformation of indigenous law brought into effect through codification and/or jurisprudence. Local laws are laws inspired by the state that are often modified in the conditions of their application at the local level. Popular law takes shape outside of the authority of the state, either in urban or rural areas. It is not to be confused with traditional law, often used to resolve problems that did not exist in traditional society. All of these cases have customary roots—repetition, suitability, autonomy of actors—but their diversity already demonstrates that custom is not just about persistence through time, it is not just a relic. This is one of the theoretical issues we must now examine.

## The mechanics of representation

Legal norms, or standards, exist independently of the observer. It is he or she, however, who gives them coherence by gathering them into systems. These systems depend on representations, which are interpretations presenting themselves as knowledge. Vigilance is therefore required when one wanders into these temples, whose foundation pillars can be hollow. Two of these edifices are worth visiting here—the principle of hierarchy, which is so dear to French law, and the issue of the incompatibility of custom.

### The inflexibility of French law

Custom, as J. Larrieu has demonstrated, has only made cracks into the openings of applied law; in most cases it is only a supplementary source of law, without the weight of *contra legem*.<sup>24</sup> On the one hand, however, historical analysis of our legal model highlights its terms and conditions; and, on the other hand, the supposed subsidiary nature of custom is only one postulation among others.

### The historicity of the legal model

'Custom wins over law; all customs are to be upheld.' These medieval slogans reflect a hierarchy of values which seems distant today. In fact, the history and anthropology of law seem to have shown that the ascension of law in the standard hierarchy went hand in hand with the centralisation and specialisation of political power. The table by E. Le Roy (Table 1.1), shows that complexity favours law to the detriment of custom.<sup>25</sup>

We must be careful, however, not to interpret this general framework too rigidly. First, the diversity of levels of complexity, and of historical traditions, influences the struggle between custom and law (The traditional state left more autonomy to custom than the modern state does, and not all states are shaped in the same mould, so that the Romano-civil conception of the law gives more weight to written law than countries ruled by Common Law'). Second, official representations of the law do not necessarily reflect its practice. Custom dominates in some sections of French law (industrial law, business law, or even international law), in as much as the rules applied and the methods of managing conflict are, by and large, produced by the social groups involved. Likewise, relations between the large bodies at the top levels of administration are regulated by rules that are not always derived from the written codes.<sup>26</sup>

Nevertheless the compelling nature of the law, ideally linked to the force of the state, is typical of the legal representations of the modern state which relegates custom to a kind of (friendly) folklore.<sup>27</sup> The Latin term for law, *ius*, contains this essential characteristic, in so far as it seems to be a derivative of *iussum*, order.<sup>28</sup> The large-scale projects of official codification of the law testify to the link between the law and the political powers that instigate them. In the beginning of the *Digeste*, the Justinian Emperor proclaimed, in his own terms, the closure of 'the gates of effort' (*les portes de l'effort*), just as

**Table 1.1**

Social organisation	Societal structure	Types of relations	Name of the judicial apparatus	Sources of law	Conception of the judicial system	Judicial organisation
Oral and community based	Elementary (kin-based power)	Internal to kin group	Mythical	Original uses or practice		Conciliatory justice internal to group
	Semi-elementary (kin-politico power)	Internal, or internal-external by alliances	Customary	Original practice/use + custom	Accumulation of legal sources and techniques	Conciliatory justice internal to group + inter-family arbitrary justice
	Semi-complex (duality of kin based and political power)	Internal, internal-external, external, by treaty or by agreement between the communities	Legalistic	Original practice/use + custom + oral laws and conventions	Conciliatory justice internal to group + inter-family arbitrary justice + contending political justices	
	Complex (plurality of powers with a weakening of kin based power)	Valorisation of external relations, and to the detriment of internal relations	Legalistic	Development of traditional law and conventions. Use/practice and custom are secondary sources.	Joint utilisation of the relations between human-human, human-object, human-god	
Literate	Complex (plurality of powers which are non kin based)	Private or public, national or international	Legalistic-stately	Law/convention, custom (accessory source)	Weakening or replacing of the oldest sources, reliance on the act of writing	State justice and inter-state justice (international jurisdictions)
Individualistic or communal						

the Muslim doctors would later do themselves.<sup>29</sup> The Middle Ages concluded with the ordinance of Montils-les-Tours, which ordered the official codification of the customs of France, thus transmuting them into royal law. The penetration of Roman law as a tool of unification for the kingdom was favoured by the royal power, under the pretext that the diversity of customs was synonymous with anarchy and that customs were of a lower technical level (in fact, as I have tried to show elsewhere, these were mainly propaganda arguments<sup>30</sup>). The first codifications of French law took place during the reign of Louis XIV, the only monarch that was truly absolute. The Napoleonic codes started at the beginning of the Empire,<sup>31</sup> and we know that Napoleon ordered his prefects to write up inventories of local practices so as to better unify them.<sup>32</sup> But how then to legitimise the authority that the powers at hand invest in the law? The gods, or the unique God, have time and time again brought their precious aid to this aim. This allows, as L.R. Ménager writes, he who proclaims the law to unfold '... the long carpet of prayers on which all the appetites for power come to kneel.'<sup>33</sup> Because it is in God that the law<sup>34</sup> and power come together.<sup>35</sup> God was therefore the first fundamental norm. Later, other principles like Reason, or Progress would strip him of his place, after having been associated with him (at the end of the seventeenth century, Domat contended that legislation was inspired from Faith and from Reason). The idea of progress attached itself to that of the law: the law became a legal instrument of change, which could only be for the good of all people. Thus we come to the credos of nineteenth century evolutionism, taken up during the African independencies by many new states. In the name of economic development and national unity, these states tried to seal the destiny of customs. E. Le Roy has summed up this process geographically.

France, where the state was made a nation as early as the Middle-ages, is one of the western countries which has pushed the principle of a hierarchy of norms furthest. This hierarchy is arranged in a strictly vertical model. In a recent thesis, D. de Béchillon<sup>38</sup> clearly demonstrates how this principle works as a powerful organising force while relegating custom to the side.<sup>39</sup> While deconstructing the mechanisms involved, the author highlights how the acceptance of this model by most French lawyers shows a representation of the law which is radically hostile to pluralism.

What are we aiding and abetting? Nothing less than the removal of layers. Everything happens as if upholding an organic and formal model of the



**Ancient and traditional societies**

**Socio-cosmic order**

*Invisible world*

God  
The Gods  
Fetishes, Idols

**Socio-legal order** -----

(that which is permitted)

*Visible world*

(tolerated, defended)

Central structure: myths, customs

Residential  
organisation

**Modern societies**

anthropomorphic representations

Nature  
Chance  
Reason

**Socio-legal order** -----

Central structure

The law, the pontiff, text

---

hierarchy of norms allowed for a progressive completion, more or less romantic image, one that is frozen off from legal realities. Nothing moves, nor escapes, from this terse order of predetermined forms<sup>40</sup>...Relative to pluralism, the true power of the reference to hierarchy depends on its ultimate annihilation of the multiplicity within its sphere, rather than just a framing of it.' As a result, a hierarchy of norms, which is conceived of as an a priori form of juricity within the State, can be understood as a state instrument for the negation of pluralism, a convenient method for a bridat d'emergence. The perfect tool for the flattening of multiplicities. That is the essence of the modern continental State; that is the consubstantial nature of the hierarchy of its norms.<sup>41</sup>

These reflections from D. de Béchillon lead us to think about the link between the level of specialisation of political power and the principle of legal hierarchy, and they do so by pointing to anthropological data. In fact, this principle of legal hierarchy can be exercised in an opposite direction to that with which we are familiar. In a system where political units are kept

isolated, the heads of the largest units may have less power than those of the smaller political units. The principle of legal hierarchy can also be implemented in the way to which we are accustomed

...authority and power increase from the base to the summit; the superior power has a reserved power of decision making and can modify, or even eliminate, the decisions of an inferior power.<sup>42</sup>

We are dealing here with non-state societies, which have individualised governance. The state appears with the existence of a specialised tool of government—relations of patronage or of administrative subordination. The traditional state is based more on patronage and is more segmentary. The principle of legal hierarchy is less pronounced than in a unitary state, the more common form of governance for modern societies. If the theories of W. Lapierre are correct, the determining factor for the appearance/emergence of a state is the level of heterogeneity that the society has achieved, and the consequent invention of a new political form which can ensure its unity. We can thus understand why the legal system tends to react to increased social and political complexification with a corresponding increase in hierarchies (or uniformities). But not all modern states follow the same path as France, which has clearly demonstrated this tendency. This points to the fact that aside from structural factors, the history, traditions, and mentalities/perspectives of each country also have a role to play, which may or may not compensate for these structural determinations. We can only note how difficult it is to do research on custom—especially native custom—in terms of reference which are familiar to French lawyers.

### **The relativity of the legalistic model**

By accepting to move in a world of legal pluralism we are giving ourselves more breathing space.<sup>43</sup> To sum up, we could say that the representations of the law that emerge from it tend to be horizontal, or circular, rather than vertical. The role of state law tends to become more relativised through different theories. These models no longer show the romantic (*soldatesque*) nature of the French vision—individuals behave as actors, strategically adapting and readapting their inclusion in the different legal systems.<sup>44</sup> Finally, as the Japanese legal anthropologist Chiba has convincingly demonstrated, different judicial orders permeate one another.<sup>45</sup> Through

the unfolding of history, and thus of political relations of force/power, unofficial laws become official, and vice versa.<sup>46</sup>

Within this system of references, custom, as an autonomous mode of legal production, can not only have the same weight as, or be equivalent to, the law, but can even go beyond it.<sup>47</sup> State law can be less constraining than the internal law of one of the groups to which an individual belongs.

Have we just described two extreme and inherently incompatible models, from which an observer could choose according to what he or she seeks? That is extremely unlikely, because the model of modernity and its French interpretation, now seems to have several shortcomings. As P. Issalys notes, the link between law and reason has been stretched.<sup>48</sup> Legal authority is founded on the suffrage of a representative majority. The logic of dealing with social conflicts is tending more and more towards notions of transaction and compromise (as opposed to the enunciation and application of pre-established norms). The renewal of the ideology of natural human rights weakens the prominence of law by showing how it can be unjust or irrational. Over a century ago, Marx claimed that the law was only a superstructure of the dominant relations of production. Today, neoliberals are more ready to put the control of law in the hands of judges than the state (for Hayek, 'true' law is customary before it is anything else). On a more general level, individuals, including those in France, are less likely to accept the state as the only producer of collective norms (hence the emergence of the distinction between 'civil society' and the 'state'). In a recent work, M. Delmas-Marty demonstrates how, in terms of internal law, the hierarchy of norms is not absolute.<sup>49</sup> The European legal order leaves a lot of autonomy to the various normative and jurisprudential entities that compose it—we will have to learn to live with multiple hierarchies (some of which are incomplete), which brings us back to the vision of legal pluralism.<sup>50</sup>

Finally, we can note that, although the revolutionary vision according to which '...the deified statue of the Law must be erected, without any rivals, on the ruins of old fashioned customs'<sup>51</sup> still permeates the civilist doctrine, this representation is no longer unanimously shared by all of the privatists.<sup>52</sup> The theses of the *École Sociologique*, which contend that the law does not have the monopoly of legal production, have been particularly noted by the commercial sector. And we can note that, in accordance with the decline of custom in the classical sense, 'a growing section in private law of a sort of

soft law, with non-formal modes of establishing rules of conduct<sup>53</sup> corresponds.

The French vision of the hierarchy of norms, and its apparent inflexibility, does not therefore present unsurmountable and eternal obstacles for those who are interested in indigenous customs in our state.

But what, in fact, is custom?

### Immutable custom

Custom is no less subject to the entanglements of representation than the law. Do we want to legitimise it? When we do legitimise it, we invoke its ancientness, its repetition—in other words, its trustworthiness. Immutability thus becomes the dominant image—custom persists by surviving. And do we wish to safeguard it? We would then insist on the harmony between a custom and the needs of the group which generated it, on its infinite capacity to adapt. Immutability would become substituted by flexibility ('custom stirs itself up/moves about (*se remuer*)' said the lawyers of the Middle Ages); its chronological underpinning, essential to the classical definitions, could even quasi-evaporate.<sup>54</sup> In such terms, neither of these are true or false—it all depends on the context in which custom is appealed to, and what people want to make it say.

Custom belongs to the sparkling universe of 'floating signifiers', and we need to ask the pertinent questions of J. Combacau.

A suspicion then emerges: and what if more dissimilar realities underlie all these uniform words? If the apparent homogeneity of customary process, with its unwavering partner—practice, *opinio iuris*—was only a facade to cover various modes of the formation of law? What if even the qualification of custom made improper assumptions of certain procedures in which there is neither the issue of time, that of repetition, nor any of the properties which normally characterise it in common language?<sup>55</sup>

The fact is that custom like the law, suffers from the attractiveness of dominant representations which a priori, render such observations irreverent.

### Representations of ancientness

In the terms of the great divide put forward by A. Comte in the nineteenth century between ethnology, the study of primitive people, and sociology, which is dedicated to civilised societies, most lawyers have deduced a series of binary oppositions whereby custom is systematically devalourised.

A summary typology can be drawn up as below.<sup>56</sup>

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<b>Custom</b>	:	<b>Law</b>
Pre-law	:	Law
Oral	:	Written
Empirical	:	Rational
Archaic	:	Modern

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Legal ethnology, a kind of ancillary history of exotic laws, was consigned to the study of custom, whereas most real lawyers maintained more pure sources. Thus, the importance of both oral and written customs was (and still is) diminished within modern Western legal systems. In the same vein, during the 1930s the *École du Folklore Juridique* (School of Legal Folklore), created by Maunier in the wake of his studies of colonial law at the University of Algiers, sought to research the survival of ancient systems of norms and legal behaviours in the practices of rural France. Here, again, custom is defined in terms of ancientness.

At the same time, nineteenth century social anthropology was dominated by Anglo-Saxons, and the diverse modalities of functionalism. These presented a vision of traditional society that was distortingly stable, thus reinforcing the archetype of the immutability of custom and myth. G. Balandier has made an inventory of these representations of traditional society so as to criticise them better.

- (a) It is a society that conforms to the models implied by the mythical charter ('traditions'), which follows the initial, and ongoing, conception of the order of the world and the order of humanity...
- (b) It is a society of conformity and consensus which leaves little (or no) room for dissension, and thus to contestation. It uses effective mechanisms of conflict resolution to eclipse all the elements of dissension...
- (c) It is a repetitive society, reproduced from generation to generation without any significant variation to its structures. This pure and simple reproduction is explained by nature and the consistent functioning of social instruments. These are used as a resource by both tradition and its agents, and by the impossibility of an alternative, of different forms of social agency...
- (d) It is a society situated out of history or on its margins, a 'cold' society, fixed at zero degrees of historical temperature...<sup>57</sup>

All of that has changed.

### The construction of customary identity

Let us make a rapid inventory of some of these mutations.

The dynamic school, ethnohistory, has shown that traditional societies were not immutable entities, closed off in themselves. Instead it insists on the irreversibility of acculturation initiated by colonialism, and on the fact that the political independencies of the new states have not hindered these acculturations. If customs were appealed to in anti-colonial struggles, the leaders of the new states were quick to bury them (and in that sense, the contemporary resurgence of customs in the French Overseas Territories may not have a long future). In the same way, the current renewal of phenomena of identification allow us to discern two concepts of identity. The first makes identity an objective reality—in this case, it pulls together a number of cultural traits which have been acquired through essentially historical processes, as is expressed in the concept of customs. It is identity as lived by those who claim it. On a scientific level, however, we must take note of the fact that identity is first and foremost instrumental—it is the result of a *montage*, which works *hic et nunc*, by actors who *bricolent*\* the past, reinterpreting their traditions so as to modify the present (as many fundamentalist movements do). Thus, customs that are presented as immemorial and constant, are often likely not to be so.

The School of Legal Folklore disappeared at the end of World War II. Its themes had been incorporated into Vichyist mythology, which keenly sought to revive a golden age prior to the Revolution and the Civil Code.

French legal anthropology was born in the 1960s. Its theoreticians wanted to discontinue the old evolutionist slicing up of peoples. Anthropology included modern societies in its field of observation. We believe, following Levi-Strauss, that there is not a *pensee des sauvages* (thinking of the savages) and a *pensee des civilisés* (thinking of the civilised). Rather the *pensee sauvage* and the *pensee civilisé* exist, in different degrees, in all forms of humanity—rationality is not our privileged domain, any more than custom belongs exclusively to exotic societies, it can be as 'modern' as the law.

In fact, we would do well to substitute the term custom, a word that is encumbered with too many abusive uses and representations, with that of 'a customary mode of the production of law'. In that way, custom would denote autonomous modes of engendering the law, allowing for the

recuperation, reinterpretation, and/or combination of ancient elements (traditions) with new elements, rather than their partial, or total, elimination. Custom is not necessarily restrained by the past.

Indeed, has it ever been? Here we should sum up the refined observations of J. Pouillon.<sup>58</sup> Oral traditions, like writing, allow for a variability of customs in terms of processes of transmission, but with different processes. Ethnographers have long noted that there is no unique version of a narrative, or exact codifications of rituals, but, rather, 'a structured ensemble which tolerates, and even favours, a form of creativity.'<sup>59</sup> Everything seems to change with writing, which instigates a model, thus privileging a conforming reproduction of practice—the official codification of customs freezes them. In fact, developments are possible, but only through a chronological accumulation of textual interpretations. These texts have to be reorganised, and it is sometimes necessary to make choices between them. The agents of change, however, are no longer the same. Customs continue to develop, but under the influence of lawyers and the powers that they serve, they move away from those that are supposed to observe them.

So we are sent back to the notion of a customary mode of the production of law—real custom is defined more by its degree of autonomy than its age, to the point that, as J. Pouillon notes, the very act of institutionalising a custom risks rendering it obsolete.<sup>60</sup> In this sense, the 'renewal' of customs in the French overseas territories can only be directed towards the future. J.M. Tjibaou understood this well, when he declared that

[t]he return to tradition is a myth. No people have ever realised this. This search for identity, the model, for me it is in front of us, never behind; and I would say that our present struggle is about being able to put more aspects of our past, of our culture, into the construction of a model of humanity and society that we want for the betterment of the city. Our identity is in front of us.<sup>61</sup>

This shows that the study of customs is inextricably linked to the perception of problems of a political order.

## The political constraints

The problem of the existence of indigenous custom is not new. The history of colonial laws attests to this. But the issue becomes different after independence, and in accordance with recent initiatives in international law, which do not represent the official position of the French government.

Furthermore, it is not sufficient to proclaim respect for indigenous custom to assure it a place—particularist models can just as easily lead to apartheid as to an authentic pluralism, because models become what people make of them.

### The troubling evolution of international law

During the last 15 years, international law has seen transformations that have moved it away from the official French position. More recently, the reinterpretation of the treaties made between indigenous peoples and the European nations during the period of colonisation has acted as a vector for the promotion of indigenous rights.

### The valorisation of identities and its limitations

Who needs to worry about the transformations in international law? As we will see, probably not indigenous people, but more the lawyers who are committed to the French classical tradition.<sup>62</sup> Indeed, immediately after World War II, the major international bodies were silent on the rights of minorities and indigenous people, who were called upon to dissolve themselves within states and dominant societies. In particular, this was related to the integrating effect of economic development and the common guarantee of human rights, which were mainly considered in their individualistic aspects.

Things turned out differently. Since the 1970s, international law (European law and that of the CSCE followed a similar path<sup>63</sup>) has been criss-crossed with normative fluxes concerning minorities and indigenous people and declares their right to the preservation of cultural specificities, their customs, and their territories. Moreover, some of these rights, against French recommendations, are expressed in a collective/communal form.<sup>64</sup>

This recognition of indigenous rights has its limits however. On the one hand, the range of rights recognised is generally tempered by its remoteness from legal process. On the other hand, these texts are declarative, and only bind states that wish to adhere to them. Often, the obligations they are held to are about methods, not results. Finally, one has to notice that the cultural values, specificities, and tradition protected by these instruments, are not defined. It is therefore up to the indigenous group itself to clarify the content of it. As I mentioned above, however, custom is more 'containing' than



'content'—nothing is certain, and it is impossible that the specificities in question correspond to the observations made by ethnographers of old, some several centuries ago. History has also passed by these people, who have had to redefine their identities.

This leads to at least three questions. How can potential conflicts of norms be resolved? The legislative autonomy of indigenous people can lead to a formulation of norms which do not correspond to the civil order of the states concerned, or even to human rights and fundamental liberties. At the moment, the response of the international bodies is clear—indigenous norms must conform with internationally recognised norms in the area of human rights. Yet, the internal laws of the states also do not allow manifest violations of law and order. And it is not at all clear that these answers are those of all indigenous groups. Furthermore, what are the criteria for the qualification 'indigenous'? In general, they refer to features of a cultural order (language, religion), to a territorial link, and, more and more frequently, to subjective elements, in order to insure the respective rights of communities and individuals. Is an indigenous person one that considers him or herself indigenous, and is accepted as such by a group?<sup>65</sup> Besides, how representative are those that pretend to speak for their community? It is important to be careful here, every answer must be given on a case by case basis. Finally, it is necessary to be aware of the fact that the relative uniformity of international law on the rights of indigenous people does not at all exclude the very large diversity of their by-laws in the internal laws of the states (the eventual absence of a corresponding by-law actually reflects a position of principle on the question, as is the case for France). Generally speaking, indigenous people have the most beneficial legal arrangements (in North America and Scandinavia). In fact, 'the indigenous movements that have had the most success are those that have most integrated modernity'<sup>66</sup>—proof that the renewal of customs is less a return to the past than a reinterpretation of it. This can also serve as an explanation for the renewal of interest in the treaties.

### **A legal archaeology of the treaties**

In 1982, Canada put the rights of Amerindians (Indian, Inuit and mixed bloods) into the constitution in the shape of ancestral laws and rights stemming from the treaties.

The rights that exist—either ancestrally or as a result of treaties—for the indigenous peoples of Canada are recognised and confirmed...the rights stemming from agreements about territorial claims or areas that could be acquired in such a way...are understood to belong to the rights that emerge from the treaties.<sup>67</sup>

One can see how this updating of the past represents a possible source of benefits for indigenous people in the present and the future. Until the middle of the nineteenth century, international doctrine was dominated by the idea that, in making treaties with the indigenous populations of America at the time of colonisation, the European states understood these to be contractual ties with sovereign nations.<sup>68</sup> This updating of the treaties does not concern Canada. In the United Nations, the subcommittee of the struggle against discriminatory measures and for the protection of minorities has undertaken the project of writing reports on the legal history of the treaties and their implications in the present.<sup>69</sup>

Of course, France's position towards its indigenous population is much less developed than that of Canada. This kind of research on the history of the treaties France made with its overseas possessions may, however, prove fruitful. In French Polynesia, the administrative court of Papeete recently heard a case where the Government Commissioner based his argument on certain arrangements in the Treaty of Annexation of 1880. On 5 November 1991, the same courthouse passed a judgment which recognised a family's ownership of a portion of a lagoon. This was in consideration of the fact that the title deeds (the registration had been done in 1862) were previous to the French Treaty of Annexation of 1880. The government commissioner declared that

...[t]he Treaty of Annexation of 1880 specifies clearly that Polynesian customs must be preserved, which in our opinion, refers primarily to the rules of land ownership that are so important to Polynesian society.<sup>70</sup> It is therefore not at all obvious, considering the higher status of treaties over laws, that the definition of the public domain in the Territory...is legal.<sup>71</sup>

Which leads us to reflect on the different meanings of the notion of 'the respect of indigenous custom'.

### **Respect of indigenous customs**

The principle of legislative specificity allows for a certain number of particularities to be manifest in the French Overseas Territories; Article 75 of the Constitution recognises the existence of a dualism between the statute

of local law and that of common law. The development of the legislation applying to New Caledonia gives new impetus to Melanesian customs and, in the Department of Guyana, Amerindians claim their indigenous rights.<sup>72</sup> Indigenous customs are emerging from obscurity.

This movement takes shape within a much larger framework—that of the acceptance of cultural diversity in French law. As for actual indigenous customs, the New Caledonian example seems to demonstrate that it is mainly up to the judges to determine how they can be reconciled with the law.

### The acceptance of cultural diversity in French law

Cultural diversity stems from many different phenomena, and the law takes these into account in different ways and to different degrees.<sup>73</sup> Colonisation was a situation which necessarily highlighted the manifestation of cultural diversity

Following B.W. Morse, one can distinguish four ways of articulating the relation between indigenous laws and those of the colonisers.<sup>74</sup>

- Total separation (the solution adopted by some eighteenth century British colonies in North America in respect to certain Indian nations with which they had signed treaties).
- Cooperation—some criteria (territorial, personal, *ratione materiae*, etc.) can determine respective fields of expertise of several jurisdictional systems. One can thus decide that the law and colonial courthouses apply to both colonisers and indigenous people in all cases in the colonised areas. On the other hand, indigenous law only applies where the population of the territory in question is almost completely indigenous (the solution adopted for relations between the federal government, the states, and the tribal courts in the United States).
- Incorporation—the dominant society integrates those aspects of the indigenous law that are not in flagrant contradiction with its fundamental values into its own system of internal law. Thus it admits the validity of certain forms of traditional marriage or adoption, or else it applies indigenous law through courts established by the colonisers (the solution adopted in Canada, in New Zealand at the moment, or in the old English colonies of Africa and Asia).

- Dismissal of indigenous law by the colonisers (the solution that has long been held by the Australian courts in relation to aboriginal law, or by some new states (the Ivory Coast) as a reaction against old customs). Of course, these models can be misleading.

[T]he recognition of Indian and Inuit customary marriages by the Canadian courts is not well known by the Amerindian population, and has little actual effect on their lives. The dismissal of traditional aboriginal law by the Australian courts<sup>75</sup> has not lead to its disappearance insofar as a lot of aborigines and inhabitants of the Torres Strait Islands continue to adhere to its principles, even though it may provoke conflicts with state-controlled law. In other words, geographical isolation can diminish the impact of legal and legislative decisions.<sup>76</sup>

Moreover, as the cases of certain Indian reservations in the United States demonstrate, the existence of an indigenous jurisdiction does not necessarily imply that traditional legal solutions are always sought out. On the contrary, a lot of justiciables have adopted western models.<sup>77</sup>

All of this is food for thought for those of us who are interested in the renewal of customs in the French Overseas Territories. The chosen path seems to be that of incorporation, with the motif of respecting indigenous custom. Not all the ambiguities have been highlighted. On one hand, as we will see later,<sup>78</sup> jurisprudential observations of customs can strongly modify them. On the other hand, the old experiences of colonial law show that respect for indigenous custom does not necessarily benefit the indigenous people.<sup>79</sup> In his recent thesis, P. Ngom argues that in fact, behind the veil of the principle of respecting indigenous custom, the duality of statutes was mainly a technique of colonisation.<sup>80</sup> It allowed for an uneven distribution of power and of economic advantages between the mass of the indigenous population, who were by and large left to their original laws and the European minority and the indigenous élite, who were thus able to reap the benefits of modern law. We know that the French empire was, in principle, assimilationist. In fact, assimilation was rejected by the colonials in the name of respecting customs, or on the grounds that the desired transition towards civilisation needed a lot of time and required the planning of a dualistic regime. Under these conditions, valorisation of custom was the political tool of a colonialism which sought an alliance with the indigenous élite, who had a vested interest in appearing to respect customary law, insofar as the colonisation of customs comforted the authority of the

'traditional' chiefs, whose powers had in fact been deeply modified by the colonisers. Of course, the contexts have changed, and one would like to believe, alongside Y. Pimont, that<sup>81</sup>

...the duality of statutes gives the legal systems of the TOM a complex and generally unrecognised character, but it also reveals that France did not, as it has often been accused of, systematically ignore the other in its politics of colonisation. It reveals that France knew how to maintain existing customs, to pay attention to the traditions of the countries and their populations, and was sometimes able to refuse the imposition of all aspects of what was considered to be modernity.

However we must remain prudent here and continually ask who it is that benefits—or will benefit—from the renewal of customs.

On a more general level, one can wonder how far the recognition of cultural particularism can extend in our legal system. The French ideological context is generally unfavourable to its wide extension.<sup>82</sup> A real rampart of constitutionality has been erected to repel any temptation of discrimination, which is constantly being surveyed by the constitutional judge.

- Article I of the Declaration of Human Rights of 1789 says: 'All people are born and remain free and equal before the law...'
- The preamble to the Constitution of 1946 says: '...The French people proclaim once again that all human beings, without distinction of race, religion, or belief, possess inalienable and sacred rights.'
- Article 2, paragraph 1, of the Constitution of 1958 says: 'She [France] insures equality before the law for all citizens, without distinction of origin, race, or religion.'

Then, the Code of criminal law, like the labour laws (Auroux laws of 1982), contains several dispositions condemning discriminatory practices based on ethnicity or race.<sup>83</sup> What democrat would complain about this?

If, however, insistence on the equality of the law can lead to a reduction of actual inequalities (the developments of the status of Jewish people is a good example), it can also conceal, and even permit, the increase of these same inequalities. Many examples throughout the world show that this is all too often the case for indigenous populations. The constitutional judge has ascertained that the principle of equal treatment does not prevent the legislator from treating differently certain categories of people in different situations. Positive discrimination, however, is still much less widely

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accepted in French law than in North America, where indigenous people benefit from a more favourable status, at least on a legal level.

Despite all of this, there are some signs that the French model is susceptible to reinterpretation.<sup>84</sup> The recognition of indigenous particularism seems to have been thwarted by the reiteration of the condemnation of ethnic discrimination. In France, ethnicity is almost synonymous with race. In fact, as I have attempted to show, ethnicity is a floating signifier—one can read into it whatever one wants.<sup>85</sup> We must take note of the fact that from a scientific perspective, it is mainly cultural elements (notably linguistic) that define the notion of ethnicity.<sup>86</sup> In itself, ethnicity is not a racist concept, but it can obviously become so according to the use that one intends to make of it. French law does not in fact use the notion of ethnicity in an exclusively prohibitive way. D. Lochak notes that

...ethnicities have been defined by the legislator as specific administrative—and therefore legal—categories, thus determining the setting up of specific structures (such as the customary consultative councils instigated by the law of November 9, 1968, relating to the statute of New Caledonia).<sup>87</sup>

In the same way, the constitutional judge who was summoned by a request for the annulment of a government bill aiming to define the regions of New Caledonia, and was criticised by the authors of the summons who argued that it sanctified ethnic difference did not annul the aforesaid project. Without either taking up, nor condemning, the word ethnicities, the council decided that

...the legislator, in defining the regions of a TOM, can take into account all aspects worthy of consideration, particularly that of the geographical distribution<sup>88</sup> of populations.<sup>89</sup>

Without it being possible to properly discuss the term of 'origin' here, which is the subject of Article 2 of the Constitution of 1958, there is a need for more research which seeks to explicate its content.<sup>90</sup>

On a more general level, various indicators<sup>91</sup> testify to a softening of the French model. As Dean Favoreu has noted

[b]efore the decision of May 9, 1991, [relating to the statute of Corsica], the indivisibility of public life was supported, according to the jurisprudence of the Council, by two main pillars: the unity of normative power and institutional identity. Today, only the first really remains....<sup>92</sup>

Indeed, the legislator can now extract an existing territorial community from the category to which it belongs and put it into a new category, in which it is the only example. If the TOM, according to Article 74 of the

Constitution, were already able to benefit from specific forms of organisation, the legislator was, on the other hand, until then bound/compelled to respect the unity of every category of territorial community. The unity of normative power itself does not correlate with a uniformity of laws applicable in the territory, to the point that one could speak of France as a pluri-legislative State.<sup>93</sup> The principle of legislative specificity proves this for the TOM—Article 73 of the Constitution allows the Overseas Departments to make derogations and adaptations of metropolitan common law.

In terms of the right to self-determination, R. Debbasch and A. Roux have noted that during the decision on Corsica the Constitutional Council referred to the Constitution of 1958, affirming that it ‘distinguishes between the French people and people overseas, who are recognised as benefiting from the right to self-determination’, whereas, in fact, Article I of the Constitution refers to the people of overseas territories. They conclude that

[t]he Constitutional Council certainly implies that people of the DOM also benefit from this right, which on the other hand is excluded for communities in metropolitan France.

As we all know, however, these various considerations do not signify the existence of several French peoples, as was decided by the Council in the case of Corsica. This case founded the unity of the French people much more on Article 2 (paragraph I) of the Constitution, prohibiting distinctions of origin, race and religion, than on the notion of the indivisibility of the Republic. In our understanding, one cannot avoid noting that this runs into an important problem. If the overseas populations are the only ones to benefit from the right to self-determination, how can we reconcile the unity of the French people with the fact that the Constitution (Preamble and Article I), in mentioning the Republic and the populations of the overseas territories, makes a clear distinction between these two concepts, though it does not oppose them, even though they are both clearly part of the Republic? The problem doesn’t appear to have been properly resolved yet, and the attention given to indigenous custom brings the need for solutions into focus. Will the new jurisprudence on these customs allow us to progress on this front?

### **The jurisprudential observation of customs**

The New Caledonian example—the creation of customary assessors in 1982, the planning of separated sections for the islands and within the Grande Terre by a law of 1989—seems to show that in the renewal of customary

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practices, judges will increasingly become the intermediaries for the institutionalisation of custom.

The role of the judge has always been essential to the theory of custom—it is understood that the judge does not create the rules, but limits him or herself to deciding what are already perfectly legal norms.<sup>94</sup> Along the same lines, at the time of the installation of the Customary Consultative Council in New Caledonia in 1992

...the minister of the DOMS-TOM declared that the French government did not actually create the legitimacy of the customary authorities, but that it only recognised it...<sup>95</sup>

Yet, although custom is certainly of foreign origin in relation to a judge, it would be delusional to believe that the judges only reveal custom.<sup>96</sup> The jurisprudentialisation of custom necessarily transforms it. This is because judges must qualify custom to keep some of its elements or entrench others according to the litigation upon which they are acting. The history of colonial law,<sup>97</sup> once more, requires vigilance. Under the pretence of clarifying (clarification has always been one of the arguments for opponents of custom, which quickly slips from the issue of rationalisation), one can easily succeed in creating rules where previously there were none. A judge can (and even has to) separate customs deemed contrary to public law and order; in which case he or she would have to choose (on what criteria?) between different customs.

Moreover, the proof of a custom can require the judge to have a type of ethnographic and anthropological knowledge that he or she does not necessarily possess. These customs descend from traditional oral cultures, and could be proven by references to myths, proverbs, and to ethno-historical data.<sup>98</sup> Clearly, it would not be easy for a judge to appreciate the value of historical or anthropological proof. The nature of sources correlates with the capacity for interpretation, and one can easily see how he or she could become a co-creator of the custom. Thus, it is necessary to properly take into account the degree to which a judge is representative of the indigenous population whose customs he or she is called on to express.

Condorcet wrote that

[u]niformity, in all objects of public law and order, is an added good between men; all difference is a seed of dissidence.<sup>99</sup>



At the end of the twentieth century, which has seen so many false ecumenisms erected and then destroyed, one can only hope that the message of the famous mathematician won't be heard, because an imposed standardisation can lead to conflict, as can a rejected difference. In today's world, a culture cannot hope to fully preserve its specificity any more than customs express an impermeable past. Any customary revival that takes a bygone past for a model is *ipso facto* doomed to failure. This does not mean that dissolution into the uniformity imposed by the stronger or most numerous is desirable. It is more fitting, on the contrary, for every culture to enter into the great game of exchange and mutual reinterpretation, accepting that its own autonomy is only relative. 'To start with diversities so as to transcend them better'—this is the biggest stake for legal anthropology today.

## Notes

- 1 Cf. N. Rouland, 'La tradition juridique française et la diversité culturelle, à par', 1994, in *Droit et Société*.
- 2 In 1989, representatives of the French government defended France's position of being only an observer in the UN Work Group on Indigenous Populations, by stating that France was 'constituted only of citizens and as such had no indigenous population' (cited by F. Morin, 'Vers une déclaration universelle des droits des peuples autochtones', in H. Giordan (ed.), *Les droits des minorités en Europe* (Paris, Kimé, 1992), 505. In 1990 (decree No. 90-917 of Oct. 8). France also refrained from Article 30 of the Convention Relating to the Rights of the Child, which made a provision to specifically protect the rights of children belonging to ethnic minorities or of indigenous origins.
- 3 'The French people...recognise no distinctions based on ethnicity and therefore distance themselves from any concept of minority' (letter from the French Permanent Mission to the Director of Human Rights at the UN, 16 Sept. 1976, cited by J. Deschenes, 'Qu'est-ce qu'une minorité?', *Les Cahiers du droit*, 27/1, March 1986:286); 'In accordance with its constitution, France has had to reaffirm, whenever necessary, that there are no legally recognised minorities on its territory...it is only individuals who hold rights and obligations...it is appropriate to reject any reference to the collective rights of minority groups' (Rapport du ministère français des Affaires étrangères, cited in 'Commission nationale consultative des Droits de l'homme', 1991. *La lutte contre le racisme et la xénophobie*, La Documentation française, Paris, 1992:208-9, 346). This tradition has been consistent. Thirty years ago, France was already showing reservations concerning Article 27 of the UN treaty on civil and political rights which prescribed that '...In States where there are ethnic, religious or linguistic minorities, the people belonging to these minorities can not be deprived of the right to have, with the other members of their group, their own religion or to use their own language.'

- 4 Cf. R. Debbasch, 'La reconnaissance constitutionnelle de la langue française', *Revue française de droit constitutionnel*, 11, 1992:457-68.
- 5 Cf. *Préambule*.
- 6 Cf. Article 1.
- 7 R. Debbasch - A. Roux, *La République en droit français (1792-1992)*, in press, from conference on 'l'indivisibilité de la République', Dijon, 10-11 December 1992.
- 8 Cf. F. Bobin, 'Le réveil des Amérindiens de Guyane', *Le Monde*, 21 March 1994:7; and especially J.-P. Martres and J. Larrieu (eds), 1993. *Coutumes et droit en Guyane*, Economica, Paris; A. Touraine, 1992. *Critique de la modernité*, Fayard, Paris.
- 9 'A 'collectivité périphérique' is a territory belonging to the nation, but whose historical, geographical, economic and political characteristics justify a different institutional organisation, which administers the organisation of local collectivities. Today this definition includes not only the overseas territories, but also Corsica. There is nothing to prevent future application of this concept to areas of the metropolitan territory' (J.F. Auby, 1992. *Droit des collectivités périphériques françaises*, PUF, Paris:10).
- 10 For more on this, Cf. N. Rouland, 1994. 'Les fondements anthropologiques des droits de l'Homme', in *Revue Générale de Droit* (Faculté de droit d'Ottawa), 25-1, March.
- 11 Slowly because these proclamations belong to a type of consensual law: states dispose of different judicial means to diminish their range/reach (reserve techniques), or can deem themselves unaffected. Moreover, by mentioning the rights of persons, and from the perspective of the French official 'line', these rights are recognised on the basis of individuals, and not towards collective judicial entities.
- 12 Cited by E. Decaux, 1992. 'Le droit international et les populations autochtones', *Etudes Inuit*, 16(1-2):298.
- 13 And often, at moments of independence, by the new post colonial states.
- 14 There is an overview in N. Rouland, 1994. 'L'inscription juridique des identités', in *Revue trimestrielle de droit civil*. Un upcoming work will also address the rights of minorities and indigenous people. Cf. N. Rouland (ed.), 1995. *Droit des minorités et des peuples autochtones*, PUF, Paris.
- 15 Cf. J. Crawford, 1987. 'The Aborigine in comparative law', *Law and Anthropology*, 2:5-27; B. Cortez, 1993. 'Les enjeux politiques d'une définition juridique des peuples autochtones', *Droit et Cultures*, 25:749.
- 16 Cf. I.O. Bokatola, 1993. 'La Déclaration des Nations Unies sur les droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques', *Revue générale de droit international public*, 3:749.
- 17 'By indigenous community, population or nation, we refer to those who judge themselves to be distinct from elements of the societies that currently dominate on their territory or parts thereof, and who are linked by historical continuity with a society that existed prior to invasion and with the precolonial societies that developed on their territory. Presently, they do not dominate in society and they are determined to preserve, develop, and transmit to future generations both their ancestral territories and their ethnic identities. These are fundamental to their continuation and existence as peoples, conforming to their own cultural models, social institutions and judicial systems' (J.M. Cobo, *Etude sur le problème de la discrimination contre les peuples autochtones*, Document E/CN4/Sub 2/1983/21/Add 8, § 379). Cobe also contends (*ibid.*, § 369) that we must 'respect the right of indigenous populations to determine themselves the criteria for indigeneity, in regards to both persons and things'.

- \* Translators note: the French word used is *autochtone*.
- 18 Cf. R.L. Barsh, 1990. 'An advocate's guide to the Convention on Indigenous and Tribal Peoples', *Oklahoma City University Law Review*, 15:209 sq.; L. Swepston, 1989. 'The adoption of the Indigenous and Tribal Peoples Convention', *Law and Anthropology*, 5:221-35.
- 19 Cf. P. Karpe, *La situation des peuples tribaux par rapport aux peuples autochtones*, nd.
- 20 Article 1, par. 3.
- 21 An ethnographic description of the Iglulik Inuits (Canada) presents a similar kind of reasoning: 'Too much thinking leads to disorder...We Inuits do not pretend to have the solutions to all the mysteries. We repeat the old stories as they were told to us and with the words we remember...You always want the supernatural to make sense, but we do not linger on this issue. We are content not to understand' (K. Rasmussen, 1931. 'Intellectual culture of the Iglulik Eskimos', *Reports of the 5th Thule Expedition*, VIII, 1-2, Copenhagen:502).
- 22 On the theoretical difficulties of applying concepts of law and customary law to non-state societies, see M.E Handman, 1990. 'Regard anthropologique sur le droit, la coutume et le droit coutumier', *Droit et Cultures*, 20:119-32.
- 23 They are cited in *Anthropologie Juridique*, 1988, PUF, Paris:364-6.
- 24 Cf. J. Larrieu, 'La place des usages et des coutumes dans l'ordre juridique national', in *Coutumes et droit en guyane (op. cit. supra. No. 8)*, 35-46.
- 25 Cf. E. Le Roy, 1974. 'Justice africaine et oralité juridique', *Bulletin de l'Institut français d'Afrique noire*, XXXVI, série B, No. 3:574. The table is a slightly revised version of the one in E. Le Roy's text, as we quoted it in *Anthropologie Juridique (op.cit.)*, p. 200.
- \* Translators note: Common Law is capitalised here as it refers to the Common Law system in the United Kingdom and other countries (the original is in italicised English). It is not to be confused with the French '*droit commun*' which I have translated throughout the volume as 'common law' (without capitals).
- 26 '...the mythical system of textbook law does not come into play when it is a matter of defining positions and taking decisions at the highest levels. It does come into play immediately after, so as to avoid revealing to fifty four million French citizens that the law is the product of the visions and conflicts of a handful of people, and to make them admit that it must be obeyed as it expresses their expectations. For the whole of society, as for each of its members, the rational and unitary appearance of the system of the law manuals hides a counter-reality: they are pluralist, conflicting, and multi-shaped. Anthropology helps to reveal this when it recognises that to think the world is to think the law' (M. Alliot, 1983. 'L'anthropologie juridique et le droit des manuels', *Archiv für Rechts und Sozialphilosophie*, 24:81).
- 27 Cf. E. Le Roy, 1974. 'Justice africaine et oralité juridique', *Bulletin de l'Institut français d'Afrique noire*, XXXVI, série B, No. 3:574. The table is a slightly revised version of the one in E. Le Roy's text, as we quoted it in *Anthropologie Juridique (op.cit.)*, p. 200.
- 28 The etymologists have not really penetrated the mystery of the origin of the term *ius*. Here I have used the opinion put forward by L.R. Ménager, 1983. 'Prolégomènes. Introduction à une phénoménologie historique de la contrainte sociale, *Procès*, 11:37-75 (cf. especially n. 17).
- 29 After invoking the protection of God and thanking Him for making possible the codification of the collected views of the judiciary over several centuries, the Emperor warned the commission in charge of writing it up: 'The law , which until now was a confused affair, will be reformed by our authority, and the text which will emanate from it will constitute the final word beyond

- which nothing further is to be sought' (*Dig. praef. paras.*). 'We expressly forbid our practitioners of jurisprudence to have the boldness to add their commentary and to spread confusion within the volume through their verbiage' (*ibid.* para. 12). In general Cf. J. Gaudemet, *La codification, ses formes et ses fins, Indépendance et coopération*, 3-4 (1986): 238-60.
- 30 Cf. N. Rouland, 1990. 'Les colonisations juridiques', *Journal of Legal Pluralism*, 29:122-3.
- 31 It was also during the Empire that houses were first numbered.
- 32 Cf. A. Negri, 1983. *Il giurista dell' area romanistica di fronte all' etnologia Giuridica*, Giuffrè, Milan:84-6.
- 33 L.R. Ménager, *op. cit.*
- 34 L.R. Ménager adds a number of quotes relative to this theme: 'The Law, the true and first Law, designed to order and to prohibit, is the absolute right of the supreme God' (Cicéron, *Les Lois*, II, 4, 10); 'There has been no extraordinary legislator within a people who did not claim some divine right or inspiration because otherwise his laws would not have been accepted' (Machiavelli, *Discorsi Sopra Tito Livio*, I, II); 'This sublime reason which is elevated beyond the reach of mere mortals consists in the legislator putting his decisions into the mouths of the immortals so as to convince by divine authority those who would be unshakeable if human pudence were involved' (J.J. Rousseau, *Le Contrat Social*, II, 7, 11).
- 35 The account continues: 'It is through me that kings rule and it is through me that tyrants possess the Earth' (Proverbs VIII, 15); 'All power comes from God and all those which exist are instituted by Him' (Paul, Epistle to the Romans, XIII, 1); 'Supreme power is accorded by none other than the providence of the sovereign God' (St. Augustine, *The City of God*, V, 19; 'Beware of violating these precepts, they emanate from an omnipotent and merciful God' (Koran, IV, 16).
- 36 Cf. P. Fitzpatrick, 1992. *The Mythology of Modern Law*, Routledge, London.
- 37 Cf. E. Le Roy, 1984. 'Le 'Sujet' dans tous ses 'Etats'', *Interculture*, September:11-22.
- 38 Cf. D. de Béchillon, 1993. *Hiérarchie des normes et hiérarchie des fonctions normatives de l'Etat*, Thesis, Law, Pau.
- 39 *Ibid.*, 668-9.
- 40 D. de Béchillon, 1994. 'Sur la conception française de la hiérarchie des normes. Anatomie d'une représentation', *RIEJ*, 3:15-16
- 41 *Ibid.*, 27, 32.
- 42 W. La Pierre, 1977. *Vivre sans Etat?*, LeSeuil, Paris:112. This paragraph refers to the classification of forms of political powers developed by this author. According to him (*ibid.*:123), writing only appears at a certain level of political organisation and at a certain stage of the economic system. (In the same vein, C. Levi-Strauss, 1955. *Tristes Tropiques*, Plon, Paris:324-44, links writing to the complexification of political power).
- 43 I have explored the theories elsewhere (*Anthropologie Juridique, op. cit.*, 74-107). For us, legal pluralism is the '...current doctrine which insists on the facts of multiple judicial systems that correspond to the plurality of social groups. They have agency according to their relations of collaboration, coexistence, competition, or negation. Individuals are actors of legal pluralism in so far as they can position themselves in relation to their belonging to several of these social and legal networks' (N. Rouland, 1993. 'Pluralism juridique', in A.J. Arnaud (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2nd ed., LGDJ, Paris:449).
- 44 Cf. J. Vanderlinden, 1993. 'Vers une nouvelle conception du pluralisme juridique', *RRJ*, 2:573-83.

- 45 Cf. M. Chiba (ed.), 1986. *Asian Indigenous Law*, Routledge, London/New York:5-9, 389-92.
- 46 New Caledonian custom is surely engaged in this process following the recent reforms on the organisation of justice and the creation of a customary council for consultation.
- 47 Cf. The examples cited by J. Vanderlinden, *op. cit.*:580-1.
- 48 Cf. P. Issalys, 1993. 'La loi dans le droit: tradition, critique et transformation', in J.G. Belley (ed), *Aux frontières du juridique*, Univ. Laval, Quebec:185-219.
- 49 Cf. M. Delmas-Marty, 1994. *Pour un droit commun*, Le Seuil, Paris, particularly pp. 90-112.
- 50 'As reassuring as it can be, the metaphor of the pyramid makes it difficult to account for the actual landscape...if the planned composition is unclear, it is not that all hierarchy has disappeared, but rather that the drawing itself has changed. Instead of a continuous and linear hierarchy, expressed in the image of the pyramid, discontinuous hierarchies appear as unfinished pyramids, and entangled hierarchies emerge forming 'strange loops'...' (M. Demas-Marty, *op. cit.*:91-2).
- 51 This expression is from J.M. Carbasse, 1986. 'La coutume de droit privé jusqu'à la révolution', *Droits*, 3:37. (The journal *Droits* dedicated one of its 1986 editions to the theme of custom. For a more comparative analysis of the same subject the reader is referred to *Recueils de la Sté J. Bodin pour l'histoire comparative des institutions*, De Boeck University, Brussels, 1990.)
- 52 Cf. The arguments of B. Oppetit, 1986. 'Sur la coutume en droit privé', *Droits*, 3:40-6.
- 53 *Ibid.*:46.
- 54 B. Starck ruled that in regards to the obligatory nature of a protocol of agreement between the *patronat* (employers group) and the syndicates, a collective decision that generates collective practices can suffice to create a rapid-formation, or quasi-instantaneous, custom (cf. B. Starck (1970), regarding the *Accords de Grenelle*, in *Semaine Juridique*, I:2,363).
- 55 J. Combacau, 1986. 'Ouverture: de la régularité à la règle', *Droits*, 3:8.
- 56 Cf. E. Le Roy.
- 57 G. Balandier, 1985. *Anthropo-logiques*, Librairie générale française:250-1.
- \* Translators note: I have left both *montage* and *bricoler* in the original French, as both words have entered into English useage. The first mainly in the world of cinematography, and the second in the much more exclusive world of sociocultural anthropology, where the translators of Levi-Strauss have tended to leave the concept of *bricolage* in the original French.
- 58 Cf. J. Puillon, 1991. Sub v. 'Tradition', in P. Bonte and M. Izard (eds), *Dictionnaire de l'ethnologie et de l'anthropologie*, PUF, Paris:710-12.
- 59 *Ibid.*:711.
- 60 'This paradox sends us back to the one of tradition itself: it only exists unknown by those who follow it...When indeed should one speak of tradition? One can only ask this question from the moment where it is no longer self-evident...One does not speak of a living tradition...A tradition of which one is conscious, is a tradition that is no longer followed, or at least which one is ready to detach oneself from' (*ibid.*:712).
- 61 *Les temps modernes*, March 1985.
- 62 Having already exposed the data relating to this development, and the main international bodies that have cemented it, in other publications (*Les fondements anthropologiques des droits de l'Homme* (in press); *Revue générale de droit* (1994); *La tradition juridique française face à la diversité culturelle*, (in press); *Droit et Société* (1994); 'Statut juridique des minorités et traditions culturelles', *Communication à la Conférence internationale sur la question des nationalités et des*

- minorités en Europe centrale*, Budapest, 3–5 Dec. 1993, nd.; 'L'archipel des droits de l'Homme', *Communication au Colloque de la Commission des droits de la personne du Québec*, Montréal, 10 Dec. 1993; 'Le développement devrait-il tuer la culture?', *Le Monde Diplomatique*, June 1993, 17; 'La France dans l'archipel des Droits de l'homme', *Libération*, March 22 1993, 6. I only give a summary of some of the conclusions here.
- 63 Cfs. *supra*.
- 64 For minorities, cf. I.E. Bokotola, *op. cit. supra* n. 16,754 sq. For indigenous people, cf., in appendix, the Onusian project of Declaration of universal indigenous rights. Some of the UN texts deserve some commentaries in relation to the French position on the indigenous question. In 1992, The Assemblée Générale adopted resolution 47/26 without a vote, which takes into account '...the decision to create a Melanesian cultural centre in order to preserve the indigenous culture of New Caledonia' (the same terms of indigenous culture itself are found in resolution 48/50 the following year). Can we see in this, the beginning of a recognition, at least implicit, by France, of the notion of autochthonous? Note that the word 'autochthonous' is not used, and that it is only a question of indigenous culture. It would be necessary to think then, as P. Karpe (cf. *supra*, n. 19) that the two terms are synonymous. The hypothesis is not unreasonable, because the task group of the UN on autochthonous populations uses the expression 'indigenous populations' to define these (cf J. Burger, (1987), *Report from the Frontier: the stage of the world's indigenous peoples*, London, Zed Books:6–11). But the resolutions in question have been adopted without a vote. However consensus has the effect of erasing abstentions. So that one can argue that although France may not be opposed to the adopted text, nor is she necessarily for it....Finally, it is about non coercive legal acts. Nevertheless supporters of the autochthonous cause will always be able to interpret these texts as a first step towards the recognition of a specificity that has been admitted by the UN.
- 65 Cfs. J.M. Cobo, *Etude de la question de la discrimination à l'égard des populations autochtones*, E/CN.4/Sub. 2/1982/2/Add.6, p. 35–9, § 210–35; E/CN.4/Sub. 2/1986/7/Add. 4, pp.31–2, § 368–71, 381–2.
- 66 This is the thesis sustained in a convincing way by G.F.A. Werther (1992), *Self Determination in Western Democracies*, Greenwood Press, London.
- 67 Annex B of the *Law of 1982 on Canada*, Art. 35, § 1 and 3.
- 68 Cf. R.A. Williams Jr., (1990), 'The right and status of indigenous peoples under international law during the classical era treaty period (1600–1840)', *Law and Anthropology*, 5:237–55. An approach confirmed in 1990 by the Supreme Court of Canada: cf. the analysis of the jurisprudence by A. Bissonnette, (1993), on the 'foundational' alliances of the modern treaties, *Récherches amérindiennes au Québec*, XX111–1:2–4.
- 69 Cf. M.A. Martinez, *Study on Treaties. Agreements and other Constructive Arrangements between States and Indigenous Peoples*, E/CN. 4/Sub. 2/1992/32, 25 Aug. 1992, which makes a loud call for legal anthropological data (cf. pp. 6–19). Cf. also: 'Schulte-Tenckhoff, Herrschaft nach Gesetz. Verträge mit indianern, gestern und heute', in P.R. Gerber (ed.), 1993. *500 Jahre danach*, Zurich:353–73.
- 70 Cf., 'La terre et le Pacifique', *Etudes rurales*, Nos 127–8, 1992:250 p.
- 71 Cited in *La Tribune Polynésienne* (18 Nov. 1993:8). It seems that the treaties made by France in Black Africa at the time of the colonial period were often only artefacts: '...these conventions made with the indigenous leaders that were not imbued with a real sovereignty, which they didn't even think of, and that do not represent States in the sense that international law uses the term. These conventions are only a makeshift solution to facilitate colonial

- expansion' (F. Despagnet (1896), *Essais sur les protectorats*, Paris:210). The 'real' treaties were only concluded with the States deemed worthy of this name, as they existed in the Far East, in Tunisia or in Morocco. The fictional agreements made in Black Africa often used the pretext of not being violent to indigenous customs. (On treaties passed by France in Black Africa, cf. Paul Ngom, 1993. *L'école de droit colonial et le principe du respect des coutumes indigènes en AOF. Analyse historique d'une théorie de l'innapplicabilité du Code civile au colonisé, des origines à l'indépendance*, Law Thesis, Dakar, June:41-6.)
- 72 Cf. *supra*, n. 8.
- 73 I have explored this topic in 'La tradition juridique française face à la diversité culturelle', (1994), in *Droit et Société*, and will only use some of the findings here.
- 74 Cf. B.W. Walrus, 1988. 'Indigenous law and state legal systems: conflict and compatibility', in B.W. Morse and G.R. Woodman (eds), *Indigenous Law and the State*, Foris Pub., Dordrecht:101-20. Cf. also F. von Benda-Beckmann, 1981. 'Some comments on the problems of comparing the relationship between traditional and state systems of administration of justice in Africa and Indonesia', *Journal of Legal Pluralism*, 19:165-75.
- 75 The Mabo decision opened Australian law to acknowledging the indigenous laws of Aborigines, particularly on the territorial level.
- 76 B.W. Morse, *op. cit.*, 106-7.
- 77 *Ibid.*, 113.
- 78 Cf. *infra*.
- 79 Cf. J. Suret-Canale, 1991. 'Apartheid à la française (1885-1960)', *La Pensée*, 284 (Nov.-Dec.):93-9.
- 80 Cf. P. Ngom, *op.cit. supra* n. 69.
- 81 Y. Pimont, 1994. *Les territoires d'outre-mer*, PUF, Paris:56.
- 82 Cf. *supra*.
- 83 Cf. D. Mayer, 1992. 'L'appréhension du racisme par le code pénal', *Mots. Les langages du politique*, 33 (Dec.):331-8.
- 84 Cf. *supra*, n. 71.
- 85 Cf. N. Rouland, 1994. L'inscripton juridique des identités, nd. in the *Revue trimestrielle de droit civil*.
- 86 Biological aspects can appear in the concept of ethnicity. but these are also interpreted culturally: '...certain biological features such as skin colour or eye shape are quite unimportant by themselves and only become important in human relationships when a given society attributes cultural and social significance to them' (R. Stavenhagen (1990), *The Ethnic Question*, United Nations Univ. Press:3).
- 87 Cfs. D. Lochak, 1992. 'La race: une categorie juridique?', *Mots. Les langages du politique*, 33 (Dec.):296
- 88 As D. Lochak noticed, 1987. 'Réflexions sur la notion de discrimination', *Droit Social*, 11 (Nov.):784 sq. and Note 18, the use of the plural here is revealing.
- 89 Decision of August 8, 1985 on New Caledonia.
- 90 F. Borella tends towards an historical explanation. (F. Borella, 1992. 'Le mot "race" dans les Constitutions françaises et étrangères', *Mots. Les langages du politique*, 33 (Dec.):316).
- 91 I borrow them from R. Debbasch and A. Roux, *The Republic in French Law (1792-1992)*, *op cit. supra* Note 7.
- 92 *Revue française du droit constitutionnel*, (1991), 6:315.
- 93 Cf. L. Favoreu, 1983. 'Les bases constitutionnelles du droit des collectivités locales', in *La nouvelle décentralisation*, Sirey, Paris:20; V.P. Lampue, 1969. *Droit d'outre-mer*, Dalloz, Paris:4.
- 94 Cfs. J. Combacau, 1986. 'Ouverture: de la régularité à la règle', *Droits*, 3:45.

- 95 Y. Pimont, *op. cit.*:75.
- 96 Several experiences under different skies testify to this. E. Schechter (1987), 'Paix arctique et justice danoise au Groënland', *Droit et Société*, 5:7,588; N. Rouland (1990), 'Les colonisations juridiques: de l'Arctique à l'Afrique noire', *Journal of Legal Pluralism*, 29:39-136; E. Le Roy (1992), 'L'adieu au droit coutumier', in E. RudeAntoine (ed.), *L'immigration face aux lois de la République*, Karthala, Paris:2,033.
- 97 Cf. E. Le Roy, 1990. 'La coutume et la réception des droits romanistes en Afrique noire', in *La Coutume*, LI, Recueils de la StÈ Jean Bodin, De Boeck Université, Bruxelles:129-32, 137-8.
- 98 As a comparison, cf. R. Morin, 1989. 'Le droit des peuples autochtones au Canada et au Québec. Ses exigences pour l'avocat et le juge du procès', *Recherches amérindiennes au Québec*, XIX-4:29-35.
- 99 Antoine Condorcet, 1847. 'Sur les assemblées provinciales', appendix, *Oeuvres complètes*, VIII, 658.



# **Part One**

The position of indigenous custom in the rules applying to the French Overseas Territories



# Legal adaptations to local sociological particularities

Guy Agniel

...A Melanesian is attached by the very fabric of his being to the group...his worth is relative to the group and the specific position he occupies within it...he is qualified by this position, and is only 'real' through it and the role attached to it; he is one of the personas in the large game of the group...which must insure its own perpetuation and glory...

M. Leenhardt, *Do kamo*.

When the large European powers decided to set up colonial dependencies, the dominant doctrine for relations with the colonised society was that of assimilation.<sup>1</sup> It had the systematic effect of directly transposing the metropolitan laws to the newly acquired territory.

France, which has a written law inspired by Christianity, did not escape this influence. But, when the French administration was confronted with populations who often had an elaborate social and legal organisation, but whose basis was noticeably different (such as, for an example of an irreconcilable case, the practice of polygamy), it tried to imagine a legal framework which would allow it to apply the essentials of French laws, while maintaining, as far as possible, the reality of the sociological identities of the indigenous populations. Obviously this did not stop a certain amount of acculturation in the colonised society, and even sometimes a quasi-total legal deculturation. The issue is important, and here we will only explore the initiatives that were undertaken to at least recognise, if not integrate,

the specifics of the populations France had decided to administer when it took control of New Caledonia on 24 September 1853.

It was essentially the civil code that was adapted for New Caledonia, either along the same lines as for other Overseas Territories, or by giving itself, or being given, new legal structures.

In order to discern the initiatives which led towards a recognition of these rights to be different, we explore the tools used for implementation. Thus, this chapter examines the actions undertaken by

- the constituent
- the legislator
- the territorial organs.

## The work of the constituent—particular civil status

This is the centrepiece of compromise—currently it only exists in the Overseas Territories, and then only in New Caledonia<sup>2</sup> and in Wallis and Futuna.<sup>3</sup> It no longer exists in French Polynesia as a result of the application of the decree of 24 March 1945, which decided on the unification of statutes, and was finalised by the decree of implementation of 5 April 1945.

### Reminder of the origins of particular civil status<sup>4</sup>

Particular civil status can be seen as being centred on the 1946 Constitution, which eliminated the word ‘colonies’ in favour of ‘Overseas Territories’.

**Before 1946.** At that stage the distinction between status corresponded to a distinction between citizens and non-citizens. People who were subject to French common law in its entirety were considered citizens, and non-citizens were governed by a different set of laws.

This distinction was grounded in the law of 24 April 1833, which was essentially created with the so-called plantation colonies in mind. In practice it led to difficulties in certain other territories, particularly Africa and India.

**After 1946.** The constitution of 1946 marked an important turning point in the conception of the civil status of persons, because the qualifications of a citizen were to be generalised. Article 80 of the constitution declared that

all the inhabitants of the Overseas Territories will be classed as citizens, on the same level as French nationals in the metropolis or in the Overseas Territories.

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Thus citizenship and nationality became perfectly assimilated. Yet this did not entail a unification of civil status—the two regimes would continue to co-exist, representing two different categories of people.

### The duality of status in the constitutional texts

**In the 1946 constitution.** Article 82 of the constitution stated that

Citizens who do not have French civil status, maintain their personal status as long as they have not renounced it.

People who maintained their personal status were sometimes called citizens of local status. As far as the category of citizens of French status was concerned, it included

- people originating from the Metropole, the French West Indies, Guiana, Reunion Island, Saint Pierre and Miquelon, Sainté Marie, and the French establishments of Oceania
- people of foreign origin who acquired French nationality either by law or by naturalisation
- people who, through the application of previous texts, had obtained a legal recognition of citizenship and those who were given this qualification by decree or as the result of a judgment
- the descendants of all of these people.

As Article 82 indicated, the two categories were not rigidly separated—it was possible to move from one to the other by abandoning local status in favour of French status. This one-way movement is typical of the doctrine of assimilation—the indigenous person can only evolve along the lines of one model, that which is exemplified by 'French status'.

**The duality of status after 1958.** The 1958 Constitution retained the principle of the duality of status by virtually copying the formula of Article 82 of the 1946 constitutional texts. Thus, in the words of Article 75 of the new constitution

Citizens of the Republic who do not have a common law civil status, retain their personal status as long as they have not renounced it.

The only modification is the introduction of the expression common law civil status to replace French civil status.

The possibility of moving from one category to the other has been maintained, with the same restriction—according to the constitution, the

renunciation of status is only open to citizens with a particular (personal) status and not to citizens of common law status.

### The modalities of moving from one category to the other

The main objective of the writers of the constitutional text was to allow people who had retained their own status to obtain common law civil status as soon as their lifestyle was close enough to metropolitan concepts and thus to the characteristics of common law status citizens.

The possibility of changing categories had been long foreseen. Even before the 1946 constitution it was possible to pass from a non-citizen status to that of citizen. There were three procedures used for this, in the countries that were attached to France.

**Admission to citizenship by decree.** According to this procedure, the passage from one category to the other came from an individual administrative decision, as it was instigated by a statement declaring 'admission to the benefits of the rights of French citizens' (for New Caledonia, it was the decree of 3 September 1932). The government would only apply this measure if certain conditions were met

- level of assimilation (language knowledge, lifestyle and social habits similar to those of the metropolis)
- moral condition (lack of condemnation)
- sometimes, level of qualification (diploma, accomplished services, military grades, state decorations).

When these conditions were amassed, the government was able to decide whether to bestow citizenship.

**Admission by judgment.** This technique was only applied in two territories (West Africa and Madagascar); it did not exclude admission by decree but it was more rigorous, because it required the condition of qualifications. On the other hand, the court had only to verify whether the conditions were met, and if so they were obliged to bestow the change of category.

**Renunciation of personal status.** This procedure was already controlled by a decree of 21 September 1881, which only concerned the settlements in India. It was not an admission to citizenship, only a renunciation of personal status. Any doubts which could have emerged were dissipated by the Cour de Cassation which confirmed that the effects of the two procedures were identical.<sup>5</sup>

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The change of category stemmed neither from an administrative act, nor from a legal decision, but from a simple declaration by the person wishing to change status. This renunciation could be made before an officer of the state, or before a judge or solicitor. The option was open to minors as long as they were accompanied by a person whose agreement was required to attest to the validity of a marriage.

Whatever the procedure (renunciation or admission), the consequences were identical—complete change of personal status. If this situation was of consequence to future events, however, it had no effect on the validity of past acts, or of situations acquired under the old status.

With regard to New Caledonia, people who come under a particular status can still, to this day, renounce it. The procedure involved was the subject of a memorandum of 15 January 1963, which was a reminder that the competent authority for the renunciation of personal status is the civil court of Noumea, which should be presented with a written statement detailing the motives for the request. It also stated that the request of the head of a family includes the change of status of all of his children who are not yet of legal age, and of his wife, should she appear in the request and sign it with him.

The automatic change of the status of children has been criticised because it has been deemed contrary to the principle of individual choice of renunciation.<sup>6</sup> If this contestation were to be sustained, however, it would entail resolving the problem of the homogeneity of the family, as a child born after the renunciation of his or her parents would come under a common law status that would not apply to his or her elder siblings. The competence of the court was confirmed by the code of legal organisation which gave the Court of Great Instance (*tribunal de grande instance*) exclusive competence in matters of the status of persons (Decree 78-329 of March 16, 1978 which became article L-311-2).

### The effectiveness of particular civil status in New Caledonia

This corresponds to the existence of two civil states—common law civil state, and civil state of citizens of particular status—whose acts and procedures differ notably (marriage, birth, adoption, death). But its daily implementation poses a number of problems, which are amplified in several hypotheses of the encounter between the two.<sup>7</sup>

The field of application of particular civil status can be approached in two ways, according to the criteria used.

- **Material criterion.** The main effects of the difference between statuses are in the realm of civil law. This applies both to persons, whose status differs notably (birth-adoption-marriage-death), and to goods, as inheritance is regulated for citizens of particular status, by rules which are outside the realm of common law.
- **Personal criterion.** Particular status applies to Melanesians who have not articulated a renunciation of their status. In 1990, the services of the particular civil state estimated them to comprise a population of about 78,000; taking the birth rates given by this service into account, we can reasonably estimate them to number about 86,000 in 1994. In contrast to contemporary administrative practice, it also applies to people originating from Wallis and Futuna, who were either born in, or came to, the territory. In fact, following Article 2 of the law of 29 July 1960, Wallisians and Futunese retain their particular status as long as they have not formally forsaken it. To the best of our knowledge, the acquisition of a maritime or aerial transport licence and the fact of being born outside of a TOM have never had the legal effect of a remission of status. The communal administration, which is responsible for managing the civil state, currently bases many of its actions on a misunderstanding of applicable law. Having said this, it is easy to discern the explicitly political dimension of this attitude in Noumea and the bordering/surrounding communities.

The situation is problematic when citizens of particular status migrate from New Caledonia or Wallis and Futuna, even if only temporarily. Studies, military service and professional activities are only some of the possibilities which can instigate civil acts. Because of the absence of a register for particular status outside these two territories, this can lead to a situation where, for example, a child born of parents of particular status is in fact a future common law citizen. The problem will be amplified when the citizen concerned returns to New Caledonia, or Wallis and Futuna, and tries to obtain a particular civil status which, judicially speaking, he



never lost, but which the administration will not recognise, or will only grant with great difficulty. Yet the solution is simple. Ratification of a regulatory text which would complement the current dispositions on civil matters would suffice to resolve the problem.

### Disputes that arise from the encounter of the two statuses

These types of conflicts, which are relatively frequent, have often been the focus of administrative initiatives, a fact which allows us to discern some practices. For a number of years the civil jurisdiction and the Noumea court of appeal have attempted to build a coherent system of jurisprudence by trying to impose the principle of the equality of civil status whilst still adhering to the rights of children.<sup>8</sup> Actually, as we will explore, the long-standing applied rule, although it has been contested, has been the primacy of common law status.

Here we will limit ourselves to the problems encountered in mixed unions and adoptions, thus setting aside the difficulties encountered in land tenure matters which could easily justify a specific symposium themselves.

- The consequences of mixed unions. The absence of any regulatory or legislative text other than the Resolution 424 of the Territorial Assembly (3 April 1967)<sup>9</sup> relating to the state of citizens of particular status, means that vast areas of uncertainty plague the issue. Administrative practice has attempted to overcome these gaps for reasons of pragmatism. The difficulties can be divided into two large categories, depending on whether the mixed union is legitimate or 'free' (*libre*).
- Legitimate mixed unions. According to Article 42 of the resolution of 3 April 1967, 'mixed marriages...can only take place in front of an officer of the state of common law'. The primacy of common law is affirmed—even if the spouses ask for it, they cannot follow the procedures which apply to particular status citizens. These allow the marriage to be celebrated according to customary practice before being certified, within 30 days of the event, by the mayor of the place where it happened.

One may also wonder what would happen should two citizens of particular status wish to celebrate their marriage in front of the mayor according to the procedures set out for common law citizens? Lacking a choice, it appears that one would have to refer to the words of the extremely restrictive Article 40, which stipulates that '[m]arriages of particular status citizens are regulated by custom'.

We can extract two outcomes from this text

- a mixed marriage entails common law effects and thus involves a partial renunciation of status by the spouse of particular status (so that, for example, the marriage could only be dissolved by judgment)
- any acts that stem from the marriage (including births) are registered under common law.

However, we must take note of the fact that this situation does not lead to a change of status for the particular status spouse, which is quite logical as the renunciation of particular status in favour of a common law status can only be made by a personal declaration presented to the civil court/tribunal.

Children born of such a union are therefore registered under common law status. The attitude of the applied law marks a radical change. According to a memorandum of 9 August 1959, it was the father who was the determining element.

...[A] child born of a mixed marriage will be of common law status if the father is also of common law status, and of particular status if the father is of that status.

There is still one major problem with this—when the child attains legal age, he or she will not have the option of choosing whether to maintain his or her common law status or reject it in favour of particular status. The absence of any choice has to be conceived of within the hypothesis that the difference in status has no other effect than that of being inscribed in one or the other civil register. This is a disturbing gap as it is perfectly reasonable to assume that the lifestyle of the child could lead him or her to prefer a customary social structure over a European one. As this is a regulatory text, the only necessity for its modification is the desire to do so by the competent authority. However, the recognition of customary rights would probably allow for a complete re-analysis of this state of affairs and of the law.

## Defacto mixed unions

In the above case there are no real problems for the parents who can, of course, maintain their personal status. The two issues that can become controversial are

- the civil status of the child
- choosing the name that the child must have.

**The status of a natural (biological) child of a de-facto mixed union.** The silence of the texts on this issue leaves much room for doubt, which is further compounded by the administrative practice of relying on two points whose legal foundations are shaky. The first is the primacy of common law status over particular status, and the second is the implicit existence of a link between the recognition and the civil status of the child.

Practice has interwoven these two elements so much that it is often admitted that the recognition of a natural/biological child by the parent who is of common law status entails the attribution of this status to the child, whatever the means of recognition (simultaneous, deferred, with or without prior recognition by the parent of common law status). This unwritten rule was a potential source of serious problems in cases of deferred or later recognition by the parent of common law status.

In reality, this case is quite common. A mother of particular status recognises the child at birth, and the father only does so later. In this situation, according to current administrative practice, the child will be of particular status when recognised by the mother, but will move to a common law status once the father has recognised it.<sup>10</sup> There is thus an implicit link between recognition and civil status, along the same lines as the link between legitimation and nationality. Yet there was nothing to confirm this theory, and it could be maintained that the child in this case retains his or her particular status. This rationale was finally adopted by the Noumea Court of Appeal, which passed a judgement on 3 September 1990<sup>11</sup> deciding that, in this case, the child was of particular status and could not be changed for circumstances which were beyond his or her own desire. The only exception for this rule, which now seems firmly established in the court, relates to (natural) children who are later legitimised by a marriage—the change of status (to a common law status) allows for consistency in the statuses of children born before and during the marriage.<sup>12</sup>

**The name of a child of a defacto mixed union.** If there is a simultaneous recognition of the child by both parents, then the situation presents no problems. Difficulties arise when the case is as cited above (posterior recognition by the parent of common law status). In fact, the solution differs according to whether the child is of particular status or not.

If the child is of particular status, the rule in use is that put forward by the decree of 25 August 1967 which states that 'the child always takes the father's name if it has been recognised by him, even if it was registered under the mother's name at birth'.

If the child, according to the above theory, changed status when the father recognised it then the following pattern applies.

- After recognition by the mother, the child is of particular status and carries the maternal patrynomic name.
- After recognition by the father, the child becomes a common law citizen and Article 334-1 of the civil code applies—he or she will keep the mother's name. To take his or her father's name the child would have to be situated within the scope of Articles 334-2 and 334-3 of the civil code.<sup>13</sup> Although the situation has not given rise to an abundance of cases, there is still an interesting invalidating decision by the Noumea Court of Appeal,<sup>14</sup> which had to decide that 'in the absence of specific measures for the naming of children of mixed unions, it is appropriate to apply the measures of the civil code'.

### **The problem of adoption**

The problem is similar to that of mixed unions/marriages, because in this case as well administrative practice sought to sidestep the inadequacy of the rule of law before the civil jurisdiction elaborated a number of rules of jurisprudence. Three situations are possible.

**Adoption of a person of particular status by people of the same status.** Article 37 of the ruling of 3 April 1967 is clear on this point—the adoption is managed according to customary rules and a consensual agreement between the involved families. The administration consults the involved families or clans through a statement of agreement drawn up by the Syndicate of Melanesian Affairs.

But in most cases the adoption is not brought to the administration's knowledge unless there are financial consequences (for example, family

allowance grants). Customary adoptions can therefore happen without the acknowledgment of the civil state, particularly as customary practice recognises two forms of adoption, these being

- the straightforward gift of a child, which can be seen as provisional care situation, but as more than the western mechanism of parental delegation
- the permanent giving of the child, which can be classed as adoption but without the French legal distinction between simple adoption and plenary adoption—customary adoption must therefore be considered plenary in light of its implications.

**Adoption of a person of particular status by common law citizens.** The rules of adoption in common law apply here, meaning those delineated in the text of the civil code (Articles 343 to 370–2). The difficulty lies in determining the status of the adopted child. Legal and administrative practice agree on this point—the adopted child takes the status of the parents, thus that of common law. Because there are no specific regulations, or legislation, however, uncertainty clouds the issue. If we admit that there is a change of status in the case of a plenary adoption, the case of a simple adoption still poses problems.

**Adoption of a person of common law status by people of particular status.** This situation is delicate and has not been categorically resolved, either by the administration or by the civil judiciary.

If one starts from the principal of the superiority of common law (as the administration does), and bases oneself on the letter of the constitution, which only makes provisions for a change of status from particular status to that of common law and not in the other direction, then one ends in a double bind.

In relation to the civil status of the adopted party: if we follow the position outlined above then the adopted party must carry the status of the adopting party (parties). In practice, however, that would mean moving from a common law status to a particular status, which is not provisioned for by the Constitution; this outcome would in fact be considered contrary to the word of the Constitution.<sup>15</sup>

In relation to the form and procedures of the adoption: as outlined above, it is the status of the adopters that decides the procedures to be followed. But this principle cannot be applied to the case in question, for it

is hard to see how a person of common law status could be adopted according to customary rules because of the primacy of common law.

The Court of Appeal of Noumea, in an audacious judgement,<sup>16</sup> decided that a child of common law status who has been the subject of a plenary adoption by parents of particular status acquires the status of the parents for three reasons

- the change of status follows the logic of plenary adoption which entails the complete integration of the adopted person into the family of the adopters
- the initial difference of status between the adopted person and the adopters does not block this consequence, because in those terms no status has prominence over the other
- the identity of the statuses after the adoption offers the adopted party the best conditions for integration into his or her adopted family.

### The work of the legislator

The right to difference, expressed by the constituent, has been applied throughout the work of the legislator, particularly the laws relating to the status of the Territory and the chain of decrees between 1982 and 1985.

This legislative intervention can be seen to have come late. That is perhaps due to the idea that regulatory initiatives, or the proposal of a law, should have stemmed from the proceedings of the Territory or its parliamentary representatives. Whatever the case, we will limit ourselves here to three particularly interesting legal aspects

- the institution of customary assessors
- the creation of the customary consulting council
- the creation of the concept of grouping particular local laws.

### The institution of customary assessors

The institution of customary assessors is founded, it seems, on the observation of the absence of written local law and of the primacy given to the practice of writing in common law.

**The postulate—the quasi-absence of writing in local law.** The absence of a written local law,<sup>17</sup> or of a sufficiently codified legal system to serve as a reference base, creates the greatest difficulty in establishing an approach which recognises the right to difference.

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Indeed, while common law has its own codes and a jurisprudence based on supporting cases, this is not the case for local customary norms. We might speculate on the consultation of customary wise-men, the only ones able to describe a customary rule, evaluate a transgression of it, and inflict a punishment for the transgression. But we are confronted with the difficulty of adequately specifying what the real structures of the customary organs are. On top of that, it is nearly impossible to unite the conditions of repetition in space and time of elements that would allow us to rationally elaborate the functioning customary norms—custom also involves silence on procedure, which often makes it impenetrable to the outside observer. **The primacy of common law.** We have already mentioned that common law seems to have primacy over local law. That stems on the one hand from a quasi-absence of knowledge (and thus of recognition) of local law, and from the theory according to which the situation of a particular civil status person does not conform to the general rule when it involves a relationship with another person of the same status, but not in their relationships with persons of a common law status.

This means that in the context of a difference between two particular status persons, the possibility of opting for a jurisdiction does not exist. This has caused some surprising confusions, particularly in criminal matters when a person who, having violated the customary rules, was punished by the customary authorities, goes to the common law jurisdiction and presents the punishment received as a violation of his or her rights. The common law jurisdiction, ignoring the existence of customary punishment *de jure*, functions not as a jurisdiction of appeal but as the first degree jurisdiction that it really is—it will thus refuse to acknowledge the customary procedure, and will only consider the alleged violation of rights.

It would be desirable to consider creating a jurisdictional body—a kind of court of conflicts—which would be able to establish whether a dispute should be brought to the common law jurisdiction, mixed jurisdiction, or purely customary jurisdiction (if this could be institutionalised). Other than its purely legal benefits, the creation of such a body would bring a certain clarity to the problem of the entanglement of particular civil status with that of common law.

In the absence of this, the administration and the legal institutions have tried to resolve the problems presented to them pragmatically. This is how the practice of inserting the notion of a prior agreement by the concerned

local law collectivity into hearings was born. It is the so called *proces-verbale de palabre* procedure, an authentic act established by a syndicate of Melanesian Affairs<sup>18</sup> (a clerk who writes down the wishes of the collectivity—lineage, clan, tribe). The range and strength of such an act can be subject to controversy—the *proces-verbale de palabre* is not a legal act but a simple means of proof, which can still be contested within 30 days of it being established. Nevertheless, whilst it may not have an absolute legal value, the *proces-verbale de palabre* has a moral, or even political, force. The importance given to this practice should be influential for the development of a customary legal system which is still trying to define itself.

For some years now, the legal profession has made laudable efforts to try and find solutions to disputes between persons of particular status which draw on, or at least respect, customary rules. Having said this, there has been no defined perspective seeking to put a jurisprudential conception of customary local law into place.

Thus, an interesting initiative was proposed in 1982 to take pro-active steps in this direction.

**The indirect recognition of local law—the ordinance (decree) of 15 October 1982.** It was not until 1982 that the phenomenon of customary law was recognised, and even then only implicitly. This was through ordinance Number 82–877 of 15 October 1982,<sup>19</sup> which introduced customary assessors to the first degree court and the court of appeal of Noumea.

The motivation for the ordinance is clear—having observed the existence of two civil statuses in which ‘...local law civil status draws on customary rules’, the writers of the ordinance recognise that litigation between two persons of particular civil status can be settled by customary authorities or deferred by the plaintiffs to the civil court.

The decree thus notes, first, that the customary authorities have the conciliatory powers in anything touching on matters governed by particular civil status (Article one). It is worth noting that this affirmation, at the beginning of the decree, is voluntarily symbolic—it is a recognition of customary rules as norms of reference for a certain type of jurisdiction. In some ways, customary rules are institutionalised in New Caledonia.

Second, the decree opens the summoning of the first degree (premiere instance) civil court by either of the parties, within the framework of litigation discussed in Article 1. In this case the court is complemented with an even number of particular status assessors (Article 3), so that the



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custom of each party is represented by at least one assessor (Article 5). The procedure for the court of appeal is the same.

Yet the parties can, if there is a consensual agreement, renounce this option and request that their dispute be judged by a straightforward common law jurisdiction (that is, without the particular status assessors). The meaning of this consensual condition for the two parties is obvious—the normal process for matters of disputes over issues pertaining to customary norms is with the institution of the assessors; the appeal to the common law jurisdiction should therefore be the exception. Innovation is important—these customary assessors, who have full voting rights, will shed new light on the functioning of justice. The reason for these measures, according to the presentation of the report, is based in the extremely complex nature of customs, which ‘...being oral, are difficult for the professional judges posted to the Territory to apprehend’.

Whether it was based on the aversion of the judges, or the ignorance of the concerned parties, this mechanism was virtually never used until the 1990s. Since then, the institution has started to function satisfactorily since the jurisprudential solutions cited above, in terms of the application of particular civil status, have been rendered by formations which include customary assessors.

### Customary consulting proceedings

A first observation is necessary—their instigation by the law is quite recent, because their form and responsibilities were extremely variable until the referendum of 9 November 1988 owing to the statutory instability that the territory experienced between 1984–88.

It was not until the dispositions of the Statut Lemoine of 6 September 1984<sup>20</sup> that we could see, in Section 3 of Chapter III, a customary representation—L’Assemblée des Pays. This institution, however, is not a true customary institution, because it is a mixed body, comprised equally of commune and customary representatives.

These are from the six districts which correspond to the eight linguistic areas in the Territory. Proof, if we need it, of the arbitrary use of sociological realities when it is convenient to adapt them to politics—the three linguistic areas of the Loyalty Islands are regrouped under one district. The specific regrouping of the representatives of custom constitutes the customary chamber which is defined by three main attributes

- a consulting competence for matters of ‘particular civil law’
- a conciliatory mission between citizens of particular civil status
- the establishment of relationships with Pacific Melanesian communities sharing the same culture.

Because of time constraints, this structure will not see the light of day, as is the case for those that follow.

- The law of 24 August 1985<sup>21</sup> refined the structure by making provisions for the creation, in each of the regions, of a regional customary consulting council with general consulting powers.
- These general powers disappeared with the decree of 20 September 1985<sup>22</sup> which created a customary consulting council in each district of each region. These councils had their traditional consulting powers enhanced with two new domains—land tenure reform and the teaching of vernacular languages at the level of the Territory. The customary body took the name of Territorial Consulting Council.
- The law of 22 January 1988<sup>23</sup> created a customary assembly which must be consulted for all matters of land tenure. It can also be consulted on matters of planning and economic, social, and cultural policy.

This hurried series of texts had only one consequence—the impossibility of the customary body constituting itself in an operational way. For that, a period of institutional stability was needed—the referendum of 9 November 1988<sup>24</sup> presented this opportunity.

### **The referendum of 9 November 1988**

This law created two hierarchical bodies with consulting powers.

**The Customary Consulting Council of the Territory (CCCT).** This council must be consulted on all matters concerning particular law civil status (we can note that the legislator, even if it is the sovereign people, is not too concerned with respecting the constitution to the letter, which may mean taking a new approach to certain legal concepts) and land tenure. It can also be consulted on any other matter. This point is very interesting—the council has important powers in that it can summon the Territory Congress, or a provincial assembly, for matters of statute concerning Melanesian land

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reserves. One can wonder whether this may have been set up so as to get a proposal for a solution to the problem of the reservations, a real impediment to economic development, which would not incur the kind of scepticism which may have surrounded any initiative coming from another, more politicised, organisation.

**A customary council by customary area.** This body is consulted by the customary consulting council of the Territory for projects and proposals for debates in the provincial assemblies concerning 'particular civil law status' and land tenure, and by the provincial presidents on any other matter.

These 'area councils' were all set up relatively slowly, and the last one, of Xaracuu, was only formally set in place at the end of 1992. As for the Customary Consulting Council of the Territory, which was set up a little hastily and on the margins of legal procedure, appointment of its members was annulled by a judgement of the administrative court (19 September 1991<sup>25</sup>) on the request of its own president. It was, however, legally reconstituted on 29 January 1993.

### **Particular local law groups (GDPL)**

This is probably one of the most original inventions that the legislator has come up with. The concept appeared for the first time in the ordinance of 15 October 1982 relating to the organisation of land tenure,<sup>26</sup> which was called 'groups under particular law'. It had the effect of not corresponding to anything concrete in terms of written law

- all known groups come under common law
- 'particular law' only concerns individuals and not groups.

The decree of 13 November 1985 was supposed to make the issue clearer: the report referred to the '...needs of particular local law groupings and common law owners'. By contrast, the GDPL seems to consist of a group of physical persons who are subject to particular civil status, unless, in a more restricted manner, it refers only to 'owners' whose needs do not go out of the particular law domain.

The concept was taken up again in Article 42 of the law of 17 July 1986.<sup>27</sup> Since then it has found its place in written law as a midpoint between a commercial company and an association of the '1901 law' type. It is surprising, however, that it espouses neither the constraints nor the

obligations of either of these other forms, precisely because of the extremely concise nature of the definition of its functions: 'a moral personality is recognised for the GDPL, who have put forward a declaration to the provincial assembly and have designated an attorney'. As this kind of group had long been shunned by the banking establishments, it had the effect of mitigating a deficiency—the clan had no legal standing, and through this action it now has one.

### The regulatory work of local authorities

Although it is more discrete, this form of regulation originated as much from the initiatives of the state as from the locally elected authorities. It has the merit of trying to organise reality into legal terms that delight the ethnologist but cause despair to the jurist and the administrator. How can these last two translate into practice what Leenhardt has described?

...Melanesians are attached by the very fabric of their being to their group; they are substantiated by it and their place in it; they are defined by that place and have 'reality' through it and the role attached to it; they are a person in the big game of the group...which must insure its continuation and its glory....<sup>28</sup>

We should therefore not be surprised or offended that the terms used by the administration (reservations, tribes, high chiefs, petty chiefs, Council of Elders, Clan Council) often have a meaning or substance which has no link with the original concept.

### Gubernatorial effects

This consists of quite old legal concepts—reservations, tribe, district and chiefly system.

**Reservations.** Reservations are still considered by many to be a 'Kanak institution', whereas they are in fact the creation of an administration motivated by the principle of colonisation—'for all colonies we need settlers, and these settlers need land'.<sup>29</sup>

This attribution of land went hand in hand with a 'dispossession' of traditional owners. Although certain measures were taken to ensure Kanak rights to land, these were usually ignored by the administration that was in charge of enforcing them. One of these measures was Governor Du Bouzet's declaration of 20 January 1855, which recognised indigenous land

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ownership on occupied land and provided for state ownership of all unoccupied land. Later, the decree of 10 April 1855 made it compulsory to set aside ten per cent of the state land intended for sale for the benefit of Kanaks. The aim of this was to augment the land Kanaks already owned. Finally, the decree of 24 December 1867 gave the tribe a legal existence and confirmed its right of ownership of the land that it occupied.

Then came the decree of 22 January 1868, made by the governor of the time, Guillaïn, which created the indigenous reservations. This decree, which set out the principles of the delineation of lands by villages and of the inalienability and collectivity of tribal land ownership, made some serious errors due to a total misunderstanding of Kanak social systems, a mistake which persists today.<sup>30</sup> Based on the principles of the 'Fourieriste' doctrine which he seemed to espouse,<sup>31</sup> Governor Guillaïn judged that the Kanak community did not acknowledge individual property. This decision would thus make official a mistake which was full of consequences because it would give birth to the administrative notion of collective customary goods. In addition to this decree, we should not forget the decree of 6 March 1876, which stated that delineated land would be proportional to the type of ground and the population, but that the delineation would be made '...as much as possible on the territory which the tribe has traditionally benefited from'. For 20 years, based on this text, the administration would only proceed to simply modify some of the reservation boundaries. But, as colonisation evolved, the need for land became more pressing and the decree of 3 November 1897 would mark a radical change. In the dispositions that it set out, the administration proclaimed its right to '...purely and simply appropriate delineated land and to section off tribes on a foreign land, which it can freely choose'. The new territories that were reserved for the indigenous population were delineated on the basis of 3 hectares of land fit for cultivation per head. This practice, commonly called the cantonnement, would continue for the first quarter of the twentieth century.

Since 1950, an effort has been made to enlarge the indigenous reservations, but this is hardly a solution to Kanak reclamations, because the reservation has become a real obstacle to Kanak integration into modern technical civilisation. It is obvious that the creation and maintenance of reservations has played a protective and securing role for Kanaks, but it

seems that they are creating an ever more anaesthetic influence. Enlarging reservations is a poor solution to a false problem, but eliminating them seems inconceivable as long as the individual is not in a position to integrate into the European economic system.

The experimentation with land tenure reform, the last of which was the creation of a state establishment, Agence de développement rural et d'aménagement foncier (ADRAF) by Article 94 of the *loi référendaire* is too recent for us to draw valid conclusions.<sup>32</sup>

**The tribe.** The tribe was quickly recognised as the traditional community in New Caledonia. The decree of 24 December 1867 gave the tribe legal existence—in the terms of the first article

...the indigenous tribe was and continues to be constitutive in New Caledonia; it forms a legal aggregation with attributes of property and organisation under the only form which was and continues to be valid within the indigenous population.

The reports of this decree prove that the administration was in no way unaware of the traditional structures of the population. They state that, if the legislative acts that govern the administration of New Caledonia never mention that its territory is divided into communities, in the decisions and decrees that have been implemented there exists '...irrefutable proof of the recognition by the colonial government of the collectivities of individuals called tribes'. For these collectivities, all that touches on land ownership, the administration, the police, responsibility and submission to the colonial regime is regulated and has been, since the original possession of the Territory, maintained or extended as required.

The principle of responsibility (for the tribe as much as the chief), which was established from tribe to tribe by the indigenous population and confirmed by the colonial government, has often been applied for crimes and misdemeanours committed either by all or some of the individuals constituting the said collectivity. As a result, whilst the tribe must submit to general obligations, it also has rights which it can exercise under the immediate authority of the chief, under the control of the colonial administration, and which consequently can make it responsible for damages caused on its territory due to offences and crimes committed openly, by violence or by armed or unarmed gatherings. The report on the decree states

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[t]he indigenous population linked to all the parties that are subjects of New Caledonia are constituted in distinct tribes. Each of these forms a community with both a common and multiple interest in the cultivation and distribution of foodstuffs, the defence of the community, the guarantee of individual security and the maintenance of public order.

[t]he legal non-existence of the commune for the colonial population does not lead to the conclusion that the tribe has no legal existence for the indigenous population. That would be an unacceptable confusion and a denial of a fact which needs neither decree nor senate vote, for its *raison-d'être*.

[f]rom all the previous and subsequent laws, it is clear that the indigenous groups called tribes are politically and administratively constitutive in New Caledonia. Each of them represents a collective moral being, which is administratively and civilly responsible for offences committed on its territory, either against people or against property.

Soon after, the Kanak tribes would receive the other side of the coin of this recognition of responsibilities—through the decree of 22 January 1868, the tribes obtained the right to initiate legal proceedings; they were represented by their respective chiefs who acted with the authorisation of the secretary general.<sup>33</sup>

**The reorganisation of the tribes and the creation of districts.** The governance decision of 1898 was made as an application of the decree of 18 July 1887, which entrusted the nomination and delineation of the tribes to the head of the colony. Although the decision confirmed the autonomy and the legal existence of the tribes, it also considerably modified the morphology of Kanak organisation because it displaced the framework and the scale of the decree of 24 December 1867—the collection of individuals known as the tribe.

The decree of 1898 turned the old tribe, the sociological grouping mentioned above, into a purely territorial group. A group which, in the terms of Article 19 of the decree, was thereafter called the district. The village, or sub-tribe, was to become the indigenous collectivity recognised as a tribe, with all the corresponding legal attributions that ensued. The creation of the districts was the logical conclusion of the statement made in the first article of the decree of 27 October 1877, which states that

...among the indigenous population of New Caledonia, there are established high chiefs who have authority over several tribes.

**High chiefs and tribal chiefs.** The decree of 1898 established a hierarchy between the high chiefs of the district and the chiefs of the villages (or

the new tribes) and set the respective attributes of high chiefs and tribal chiefs.

[T]he territory of New Caledonia and its dependencies is divided into indigenous districts. Each district is subject to the authority of a high chief who is appointed by the governor (Article 19), [e]ach district is divided into tribes. Each tribe is ruled by a chief of the tribe called a 'petty chief'\* who is also appointed by the governor.

The role of the high chiefs was the subject of Articles 22, 23, 25 and 26 of the 1898 decision. The high chiefs were made responsible for the maintenance of public order in their districts and undertook all necessary measures to ensure that the security and tranquillity of the public was not threatened by indigenous people (Article 22). With this in mind, they could implement punishments against the tribal chiefs and indigenous people who lived on territory under their authority. They were obliged however, to immediately inform the head of the *gendarmerie*, upon whom they were dependent, who then notified the Head of Indigenous Affairs and the Territory Administrator.

Tribal chiefs had a more or less analogous role within the limits of their tribe. They were responsible for maintaining public order and could, in pursuit of this, either impose their own punishments or call in the high chief to impose a sanction. They were also obliged to inform the head of the *gendarmerie* of any punitive measures they implemented, as well as of anything that happened in the territory under their responsibility. This obligation was reaffirmed in the memorandum of 4 December 1880, directed to the *chefs d'arrondissements*, in Article 128, which set out that

...all the indigenous chiefs are to report directly to the *chef d'arrondissement*, as to the general atmosphere and mood (*état d'esprit*) of their tribes, as well as about any happenings or events that they are aware of.

The chiefs therefore remained, as in the past, responsible for administering their subjects. There was an added nuance that, in tandem with their powers as customary and traditional chief, they were invested with particular administrative functions by the colonial authorities. This meant that beyond the responsibility for public order which was incumbent on them, there were several more or less specific functions and obligations. Thus the report of the decree of 24 December 1867 gave them the mission of

...looking after the general well being of the community, as well as ensuring, by the authority given to them, or if need be, the support of the *commandant des circonscriptions*, that there are no offences against persons or their goods.



## Legal adaptations to local sociological particularities

Other ordinances would commission them with ensuring the cleanliness of villages, with maintaining roads (or pathways), ensuring the supply of a work force for European colonisation, managing the implementation of aid projects, collecting the head tax, and ensuring the isolation of lepers.

Nevertheless, this double origin of powers (customary and administrative) could not last for very long. This was partly because of the modes of designation and partly because of the conception held by the administration of what constituted a traditional chief.

In actuality the chiefs were maintained only ‘...by recognising the sovereignty of the emperor’, as outlined the decree of 14 May 1863, which stated that

...their first obligation is obedience to his [the emperor’s] delegate, the governor. Any voluntary non-compliance to this obligation removes all justifications for the chiefs, as instead of serving as intermediaries between the colonial authorities and their ex-subjects, they would present a bad example and undermine the steps taken to civilise the indigenous population and develop colonisation.

Furthermore, the governor was only supposed to intervene in the designation of a chief at the last stage of the process—the official appointment. In principle, therefore, Kanak chiefs were appointed according to traditional rules for the distribution of power. This meant going through the Council of Elders,<sup>34</sup> which still had to notify the Syndicate of Indigenous Affairs. A representative of the Syndicate would then go to the village and ask, at a communal meeting, whether the people would ratify the choice of the elders. If there was any contestation, it was up to the Syndicate to nominate the candidate, who would then be presented to the appointment by the governor.<sup>35</sup> This, of course, contradicted custom. What followed was a deterioration of the customary structure due to the manoeuvring of the colonial administration, which did not show any hesitation in regards to their methods. These methods included creating chiefly systems whose authority had no traditional foundation, disposing of customary chiefs who were not cooperative enough, sectioning off the tribes outside of their geographic and sociological areas and the framework of their mythical habitat. Kanak social organisation vacillated and almost crumbled, but the practice of the administrative chief could only last for a little while.

Gradually the appointment of chiefs returned to more customary ways. The turning point was the law 76-1222 of 28 December 1976. This law

stated that the High Commissioner, the representative of the state in the Territory, would intervene only to acknowledge the appointment of customary authorities.

This principle would be set out by the successive legislative texts relating to the status of the Territory and would no longer be questioned. Furthermore, the non-recognition of this principle was punished by the administrative judge in the decision of 19 September 1991 cited above.

### **The role of local representatives**

The elected Assembly of the Territory<sup>36</sup> became very interested in the manifestation of this right to difference. We have already pointed out the decision of 3 April 1967, relating to the civil status of particular status citizens, but its effects also extended into two other domains—the institutionalisation of the councils and the succession of patrimony.

**The institutionalisation of the councils.** If the Kanak institutions that we have explored here all seem to have a regulatory basis to them, that is not the case for what we usually call the Council of Elders. This council, which seems to be a projection of a European kind of Council of Wise-men or Senate into a Melanesian context, is based on the actual existence of a circle of people with whom a customary chief would surround himself and consult regularly. Although they are currently organised along very administrative lines (president, vice-president, secretary, treasurer), appointments to these positions do not follow any written rule. In 1981, following decision Number 116 of 14 May 1980, which recognised the clans as the functioning structure regrouping all the lineages, two new decisions were adopted.

Decision number 351 of 10 December 1981, relating to the Clan Council and the Council of Clan Chiefs.<sup>37</sup> Three essential characteristics were confirmed in these texts

- the Clan Council consists of the representatives of each family group of the clan
- on the level of the tribe, there can be a Council of Clan Chiefs consisting of the customary representatives of each clan belonging to the tribe
- the Council of Clan Chiefs, when it is fully constituted, substitutes for the existing Council of Elders.

Unfortunately these dispositions have only been partially applied, and there seems to be no current political will to reactivate them. The necessity of creating a customary registrar may provide the occasion for that to happen.

Decision number 352 of 10 December 1981<sup>38</sup> created the Council of High Chiefs, the forerunner to the Customary Council of the Territory, instigated by law number 85–892 of 23 August 1985. Although strictly speaking, the creation of this council does not seem to have been annulled by any subsequent texts, it has not met for several years now.

**The succession/devolution of patrimony.** Patrimonial succession poses no real problems. Its exceptional nature is due to the procedure involved, which indirectly recognises a social system that stands outside common law. This procedure was formalised as early as 1962 by deliberation of the Territorial Assembly.<sup>39</sup> The text, according to its motive, was elaborated so as to acknowledge

...the urgent need to regulate the liquidation of inheritance for particular civil status citizens according to the rules corresponding to their own civil status.

Customary law could have been recognised, but the Assembly preferred to regulate forms of inheritance—the recognition of a legal system which corresponds to a different social order was, once again, sidelined.

On the level of regulations, Article 2 of the decision made provision for the inheritance of a particular status citizen to go through the establishment of a certificate of heredity, or of property, following receipt of a statement of palaver from the concerned tribe. This practice, which was refined by several explanatory memoranda, became codified in the following procedure.

Following the death of a person belonging to particular civil status, the family or any person with a vested interest must solicit the relevant administrative authority to authorise a palaver regrouping the family or clan concerned with the inheritance of the deceased person's goods. A report of the palaver, established by the Syndicate of Melanesian Affairs, states the desire of the concerned collectivity (for example, family, clan). This report can be contested up to 30 days after it has been made public by any person who might have an interest in the affair.

After that time, a certificate of inheritance is made. This designates all the people who have rights over the goods and states the details of the

inheritance. Currently, this certificate is written up *ad hoc* by the service of each province. Once established, it is tacitly understood that no more contestations can be made, at least in front of a common law body. The procedure was mainly based on the desire of the administration to identify clearly the goods being inherited and the persons who have rights to them. The sociological foundation of the transmission of patrimony has been ignored and could only serve as a valid basis if the knowledgeable customary authorities are consulted. At the moment they only have the jurisdiction to collect information and act as observers to a decision. To this day, there has been no jurisprudence to either confirm or reject this administrative construct.

We can also note that according to the written law there is nothing to stop a common law citizen from inheriting goods through the above procedure.

In 1980, an interesting initiative emerged in a decision of the Territorial Assembly, deliberation number 148 of 8 September 1980,<sup>40</sup> which related to the inheritance of real estate belonging to particular law citizens but acquired under the common law regime. This decision opened the path for particular status citizens to use the techniques of common law in inheritance matters without renouncing their particular status. This option of inheritance is exercised by a simple declaration by the owner of the property, either to the mayor of the commune where he or she resides, or to the appropriate service of each province.

This declaration places real estate inheritance under the common law regime on the condition that the real estate was acquired under the common law system. Thus, according to the letter of the text, a property acquired by a statement of a palaver, or a certificate of inheritance, could not be transmitted by common law procedure.

## Conclusion

Given such a vast subject, this presentation could only be succinct, abbreviated, and perhaps even insufficient.

If we need to draw an idea from this inventory of texts which have been more or less applied, it would be that we need to redress the image of the French administration, which has too often been accused of blind colonialism and being deaf to the indigenous voice.

Can we, without being emotional, criticise the administration on the basis that the legislative or regulatory texts, which it must apply, spring more often from political aims than from research in the interest of the public or the recognition of otherness? Since locally elected representatives are now responsible for local affairs, as part of the much acclaimed decentralisation, the initiative to make the system better now belongs to them.

## Notes

- 1 For this, the following works in the Dalloz collection are well worth consulting: L. Rolland and P. Lampue, *Précis de droit des pays d'outre-mer*; P. Lampue, *Droit d'outre-mer et la coopération*.
- 2 'The existence of two particular statutes leads us to think that there are legitimate differences in civil (rights or law) linked to personal status' C.A. Noumea, Dame, Poadae, 27 August 1990 (nd). See also, J.L. Vivier: *L'émergence du statut personnel des indigènes en Nouvelle-Calédonie*, LPA, 8 September 1986:20; and 'Les limites du statut personnel des Kanak', in *Revue juridique et politique*, 1992, No. 4:473 and ss.
- 3 Confirmation of the validity of a marriage between Wallisians... *célébré conformément à la coutume wallisienne*, tribunal civil Nouméa, June 11 1990, Dame veuve Siuli Maleta, No. 930/90 (nd).
- 4 Rolland and Lampue, cited above.
- 5 Cass. Civ. February 16 1885, S. 1888 - 1 - 479.
- 6 For this, Noumea civil court, Dame Rokaud, 22 May 1989 No. 701/89.
- 7 Conference: Gérard Orfila, 'Note sur les difficultés résultant de l'existence d'un statut civil particulier en Nouvelle-Calédonie' *Revue juridique et politique*, 1990, No. 3:477 and ss.
- 8 For an excellent analysis see Gilda Nicolau, 'L'autonomie de la coutume Canaque' *Revue juridique et politique*, 1992, No. 3:219; and Gérard Orfila (1989), 'Réflexion sur la coutume mélanésienne' *Revue juridique et politique*, No. 2:129.
- 9 *JO de la Nouvelle-Calédonie*, No. 5313 of 27 April 1967:360 and ss.
- 10 For the other way see, C.A. Nouméa, 3 September 1990, Bosse Andrée and Nonmoi Marie.
- 11 C.A. Noumea, 3 November 1990 (unpublished). Confirmed by several later decrees, particularly the four decrees of 15 January 1992 (Cadin; Tillewa, Emilie; Benjia, Roseline; Goropoumaha, Olivier; also unpublished)
- 12 C.A. Noumea 3 September 1990, Nyipi-Waho (unpublished).
- 13 A child who has been legitimised by the marriage of the parents (of differing civil status) acquires a common law status. cf. C.A. Nouméa, 7 September 1990, Mr and Mrs Waho Pierre.
- 14 C.A. Nouméa, 30 March 1992, Gatefait (nd); The Noumea civil court (27 May 1991) had decided that in consideration of the current regulations the child would carry the name of the father.
- 15 But we must take note of the extraordinary ruling of the Noumea civil court on June 25 1990 when it accepted that the adoption of a common law child by people of particular status could in fact have the characteristics of a plenary

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- adoption and that ‘...in order to make it effective...the child would acquire the status of the adoptive parents, in this case particular legal status’, T.C. Nouméa, 25 June 1990.
- 16 C.A Nouméa, 21 March 1991, Enoka-Heo, (unpublished); it would have been interesting to know the position of the Cour de Cassation on the matter.
  - 17 On this subject see, Gilda Nicolau and Gérard Orfila (cf *supra*) as well as J.L. Vivier (1990), ‘Le droit Français face à la coutume Kanak’, *Revue Juridique et Politique*, No. 3:470 and ss.
  - 18 Since 1900, the role of the Syndicate of Melanesian Affairs is guaranteed by the *gendarmes* (branch of the police).
  - 19 Decree (ordinance) No. 82–877 of 15 October 1982 instigating customary assessors...*JORF*, 17 October 1982:3,016; cf. on this subject: G. Orfila, note sur Cass. Civ., 6 February 1991, D. 1992, 8ème cahier, jurisprudence, p. 93.
  - 20 Law No. 84–821 of September 6, 1984, dealing with the status of the Territory, *JORF*, 7 September 1984:2,840.
  - 21 Law No. 85–892 of 23 August 1985 on the evolution of New Caledonia, *JORF*, 24 August 1985:9,775.
  - 22 Decree No. 85–922 of 20 September 1985, dealing with the organisation and functioning of the regions in New Caledonia..., *JORF*, 21 September:10,934.
  - 23 Law No. 88–82 of 22 January 1988, dealing with the status of the Territory..., *JORF*. 25–26 January, 1988:1,231
  - 24 Law No. 88–1028 of 9 November 1988, dealing with statutory dispositions..., *JORF*, 10 November 1988:14,087.
  - 25 Administrative Court of Noumea, 19 September 1991, Moyatea, c/Etat, No. 9000104
  - 26 Ordinance No. 82–880 of 15 October 1982, related to the organisation of land tenure..., *JORF*, 17 October 1982:3,110.
  - 27 Law No. 86–844 of July 17, 1986, relating to New Caledonia, *JORF*, 19 July 1986:8,927.
  - 28 M. Leenhardt, *Do Kamo*, N.R.F., 2nd edition 1971:167.
  - 29 Delignon, *Les aliénations de terre en Nouvelle-Calédonie*, 1898:5.
  - 30 E. Agostini, notes under the civil court of Noumea 26 December 1983, D. 1983:523; the author gives a collectivist vision of clan based land ownership.
  - 31 Guillaïn founded a phalanstery in 1863 which would only last for two years.
  - 32 It is worth noting the ideas presented on this topic by the director of this establishment, Mr Vladyslaw, during the symposium organised by CORAIL, Noumea (*Annals of the symposium* 1993).
  - 33 The procedure was almost used in 1985 when the Tiendanite (Hienghene) tribe wanted to implement a case against the State. The political context of the time would stop this from happening. It is also worth noting that legal rights for the clan were recognised by the C.A of Noumea, in a decree of 9 April, 1987.
  - \* Translators note: in French the term is *petit chef*; literally: little, or small, chief.
  - 34 We can also question the origins of this body (*infra*).
  - 35 How could we therefore be offended to find F. Luchaire writing that : ‘...in New Caledonia, one finds the ‘high chiefs’, a kind of war or caste chief, at the head of the tribes, and tribal (small) chiefs (*petit chefs*), at the head of the sub-tribes?’ in *Droit Outre-mer*, Sirey 1969:398.
  - 36 Melanesians were elected to the Representative Assembly of New Caledonia from 1953 onwards; they won about one-third of the seats (9 out of 25).
  - 37 *JO Nouvelle-Calédonie*, 28 December 1981:1,728.
  - 38 *JO Nouvelle-Calédonie*, 28 December 1981:1,728.
  - 39 Decision No. 11 of 20 June 1962, regulating the establishment of certificates for inheritance matters for particular status citizens. *JO Nouvelle-Calédonie*, 23 July 1962:626.
  - 40 *JO Nouvelle-Calédonie*, 29 September 1980:1,136.

# Customary rules in New Caledonia

## The Customary Council of the Territory of New Caledonia

Customary rules, as distinct from the written rules of state law, are maintained orally. They are rules of social organisation, with mythical origins and varied uses, which are transmitted from father to son within a clan.

The Customary Council of the Territory has shown reservations about the choice of the word 'rules'. For some, the problem lies in the abstract nature of the term, which could lead to negative interpretations. Others consider it too rigid, preferring the flexibility of the term custom and/or customary usage or customary practice.

Before exploring two dimensions of the practice of custom, the first relating to traditional social organisation, and the second to its diverse uses, we need to examine the different polarities of customary organisation in order to better understand how they interact.

### Customary structures

#### The chief

There is no equivalent for the term 'chief' in Kanak vernacular. The term was inherited from the colonial administration. The corresponding notion is that of 'elder brother' or 'eldest son'—he who is above all others, and towards whom all the clans identify themselves. In a hut, the quintessential symbolic image of Kanak society, the chief is represented by the central post or the ridgepole arrow. But the chief does not have absolute power, and it is the clans who manage the tribe. Prior to colonisation, chiefs were

only responsible for their own independent tribes. After colonisation when the tribes of New Caledonia were regrouped into districts (in 1867), a distinction was made between high chiefs, at the head of the districts, and tribal chiefs who led the different tribes. Both high chiefs and tribal chiefs became extensions of the administration, their services were even rewarded with military decorations.

Although local people were free to choose their own chiefs, the French administration retained the right of approval over the nominations of persons who were to serve as intermediaries between itself and the indigenous population at large. It was the administration that set out (by a decree of 18 July 1867) the rights and obligations of high chiefs and tribal chiefs. This prerogative allowed the administration to dismiss uncooperative chiefs and replace them with more obedient individuals. The situation of course produced internal conflicts, some of which still reverberate today. Indeed people continue to pay allegiance to a high chief who was replaced by the administration, in recognition of all the existing customary and mythical ties.

### The clan

The clan is the basic entity of Kanak society.

The 'mound' (*tertre*) refers to several families who share a common ancestor who founded the clan, and who remember him and his name. The clans regulate tribal life. Each clan has a specific function, and these functions become particularly apparent at ceremonies like marriages, deaths, the yam harvest and so forth. Yet, although people (and clans) are often scattered, the clan continues to exist and claim the same place of origin, which is where the common ancestor was born or lived. Custom organises the relations among the clans, and each of them manages the politics of the tribe. It is within this framework that manifestations of custom are the strongest and most crucial.

### The tribes and the districts

Prior to colonisation, Kanaks were divided into tribes. These formed genuine towns (*cités*) that were organised according to parental ancestry. That is, the people living there spoke the same dialect and referred to a common land. Each tribe was led by a chiefly council, which served as a



decision making instrument under the authority of a chief. The tribes were completely independent of each other, with their own concerns and interests, and their own languages.

Traditionally, Kanak society was divided into classes in a strictly hierarchical order

- the chiefs
- the nobility
- the people (subjects).

In the Loyalty Islands, there were many more social divisions and these were even more marked. There was, of course, a hierarchy, but it was based on specifically human sentiments, on a kin-based conception of group adherence. In 1867, in order to facilitate administrative tasks, Governor Feuillet regrouped all the tribes of New Caledonia into districts under the authority of the high chiefs.<sup>1</sup>

### **The Council of Elders (The Council of Districts)**

This is an assembly of respected tribal elders, where each clan's representation is (in principle) assured. This system provides an efficient counter-balance to absolutism, as its powers are considerable, while its decisions are made by consensus. Decisions are often taken after a long process of debate which could, for example, involve the nomination of a chief, a land dispute and so forth.

This body continues today on a tribal scale. Since the creation of districts, councils with the same name have been set up, functioning according to the same principles as the Council of Elders. The District Council organises the life of the district and manages the most important problems (such as the nomination a high chief).

In the case of litigation, the District Council can decide on an appeal. In principle, the District Council consists of the chiefs of the tribes, the presidents of the Councils of Elders, and of high-ranking dignitaries.<sup>2</sup>

As in any human society, there are rules for living, such as those which demand tolerance, respect, and so on. On this subject, Fote Trolue's younger brother (whom we would like to thank for the help he has given us on this project), reminded us quite correctly that

[i]n Kanak society, these rules of life revolve mainly around the relations between people, the relations of people to the land, and the relations between the clans and the chiefs.

These rules, which are based in mythic origins, correspond to an emotional understanding of the universe and of the individual. This vision of the world was considerably disturbed by the contact between the two civilisations. The situation does not help a Kanak's adaptation to the new dimensions of his or her society. As an illustration of this, the Customary Council decided that it was most useful to focus its interventions on the rules concerning the status of persons, the family, and land tenure. Precisely because it is within these domains custom can, on the one hand, be applied in its fullest and on the other hand is most susceptible to transformation.

### **Particular civil status**

Particular civil status is founded in the constitution itself. Article 75 of the 1958 Constitution stipulates that 'citizens of the Republic who do not have a common law civil status, retain a personal civil status as long as they have not renounced it'. In New Caledonia, Kanaks maintain a personal status, but have the option of acquiring a common law civil status

- either by voluntary renunciation
- or by kin affiliation (children of a mixed marriage, or who were born outside of the territory).

The primacy of common law over particular law poses problems at both the level of the status of people and that of goods. Before exploring these, it is worth noting that, if the principle of irrevocability is applied to those who choose to renounce their particular status, it has no effect on the status changes undertaken by children of mixed couples or those who are born outside of the territory.

### **Marriage, divorce and inheritance settlements**

#### **Traditional marriage**

We will briefly remind ourselves of the principles of traditional marriage—it is a matter for the clan. Usually prepared for a long time prior to the event, traditional marriages were held on the initiative of the parents and the maternal relatives and followed a long series of exchanges, sometimes since the children were of very young age. Marriages were therefore arranged, and there was no freedom in choice of spouse.

Customary marriages aimed to ensure the continuity of the clan and to forge, or strengthen, links between clans. Today, this principle is losing favour. More and more young people wish to marry the partner of their choice while remaining a member of the clan. In some cases their chosen spouse is of a different civil status.

### **Mixed marriage**

Mixed marriage consists of a union between two people of different civil status.

The principle is that

- the marriage is registered according to common law and carries with it all the consequences of common law
- until a judgment passed in a legal case in 1991, the children came under common law, and were not allowed to be adopted according to custom
- a person of common law civil status does not have the option of choosing a particular civil status, and cannot therefore be married according to customary rules, even if they so desire.

### **Melanesian rights of land tenure**

As we have already seen, certain texts have attempted to give legal consistency to the tribes. This was the issue of the decree of 24 December 1867. This text conferred legal agency on the 'tribe', by giving it rights of property, and consequently of patrimony. Furthermore, it recognised the tribe's right to make use of its responsibilities to the courts for crimes and misdemeanours committed on its territory, and the tribes were assured legal representation by a chief.

The 22 January 1868 decree finalised these affirmations, mainly by giving the tribes a certain number of legal characteristics which limited rights of property. As a result, Melanesian land reservations became inalienable. From this perspective the individual became eclipsed in favour of the collectivity. That is, the tribe became the sole holder of rights and obligations and the only entity who was responsible for land. Thus, from the outset France had recognised the land rights of Melanesians based on their status as original inhabitants.

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However, the general framework of the declaration of 20 January 1855 was later considerably restricted in response to the demands of colonisation, but the principle of the recognition of land rights specifically linked to prior occupation was never put aside. The historical foundation of Melanesian land rights is therefore very solid. The law of 3 January 1969 expressly recognised a specific category of land—indigenous land reservations. To respect these properly also means confirming the rights that are attached to them.

Custom comprises a number of rules that cement the obligations of chiefs, clans, and subjects: mandatory rules and restrictions (or taboos). These rules are accompanied by punitive sanctions, which give them their obligatory nature and turn them into authentic rules of law.

To be Kanak, however, does not exclude modernity. Some have broken the links with custom (for instance, a Melanesian woman who has married a citizen of common law civil status), others try to reconcile tradition with modernity, and others choose to remain in the traditional system. In this context we can ask whether custom should disappear, remain, or renew itself.

### **Observations**

Opting for common law civil status is seen by certain tribes, particularly those of the Loyalty Islands, as a relegation of customary rights. That is why Melanesians fear the repercussions of a 'mixed marriage' for the children, who could, at the death of the parents, come into conflict over the inheritance of customary goods.

There is hardly a need to emphasise that this fear is an erroneous assessment of the consequences of belonging to the common law regime, which in no case can lessen the rights of the individual. The Melanesian family is based on patrilineal descent. This family itself rests upon a relatively large basis—the clan. It includes all the children except those that have been adopted according to custom by the mother's family, or by a clan other than that of the father. That is why Melanesians do not look favourably upon the primacy of common law civil status over particular civil status, especially when the woman is of common law status, even if she is Melanesian herself. Of course the politics of the issue, often abusively taken up by certain politicians, do not make things easier.

In terms of goods, the Melanesians do not differentiate between goods situated outside the reservation and those within it. In fact, from this perspective, goods follow the person and it is the clan that owns them. Thus, they are surprised to learn that a Council of Elders, whose members may not belong to their own clan, can at the time of death, decide on the fate of the goods situated outside the reservation. They are just as surprised to learn that, should they renounce their personal status, their children will no longer have any guarantees over the inheritance of their goods within the reservation. The status of persons and of goods opens the way to situations of conflict. Furthermore the law can only provide unsatisfactory solutions if the parties involved refuse to compromise.

All of this legislation was established without consulting the Melanesians. This is why, after a 150 year long period of colonial slumber, Melanesians today are shocked to find that so much that concerns them has been decided without their input. At times they have to accommodate, which does more to hinder than to help their adaptation to the new dimensions of their own society.

People of particular civil status can be in possession of goods outside the reservation under the auspices of common law. Likewise, people of common law civil status, either those who chose to change their civil status or those who are common law children of a mixed marriage, can retain, within the reservation, rights over goods belonging to the regime of custom. These situations do pose problems, particularly during inheritance settlements. Currently, common law goods belonging to citizens of particular civil status are passed on to the customary regime. This sometimes gives rise to feelings of injustice.

Inversely, when it comes to inheritance settlements of real estate situated within the reservation, but belonging to a common law citizen, the customary regime is applied. Whilst this follows a certain logic, it does not have any firm justification. This practice avoids conflicts but, legally speaking, inheritors of common law status, whose custom restricts their rights—women and children, for example—would be justified in receiving the shares of the inheritance which are protected for them under the civil code. It is not hard to see the kinds of embroiled situations that could result from the current inadequacies of the status of persons and of goods. Once again, satisfactory solutions do not seem apparent.

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It is worth noting the advantage of settling from the outset what happens to a possession at the death of its owner, particularly when a legal statement forms the basis of the case put forward. It is recommended that the person who is to inherit a good at the death of its owner, be named in the statement.

### **The protection of women and children**

There is the case of a wife who, through her own work, contributes to the acquisition of real estate when both spouses are wage earners. She can not be excluded, along with the children (especially the eldest son) who traditionally inherit goods and property.

Melanesians are evolving socially. It is not appropriate to fix them in a singular and static system. It is much better to give them the choice, an option to negotiate between an evolving customary system and an adaptive modern system, which should be inspired by the provisions of the civil code. The customary option would allow the Clan Council to decide on the inheritance settlement, and this body would unite only the heads of families belonging to the clan. It is not desirable for others to intervene in a matter that only concerns a limited sphere of people.

### **Goods situated within the reservation**

Judicial logic would hold that in the case of divorce, goods belonging to the community would be shared between its members. If the goods are in a reservation, then customary rules must apply and the status of the good has primacy over the results of the legal regime, because customary marriages cannot be classified as contracts. It would be beneficial in this case for the positioning of the good to determine which regime and which judicial rules it comes under in terms of inheritance, sharing and so on.

### **Custom and criminal law**

Previously, a crime of blood was punished by blood. There were ways of obtaining pardons, and means of paying compensation for the blood of the person killed. In principle, blood was paid by blood.

## Misdemeanours

As it was a matter of the life of the group, any minor attack, or any kind of theft, could undermine the solidarity of the group and was seen as a serious infraction and consequently punished. The sanctions imposed were related to group life. An example is provided by the case of a young man who raped a girl. The chief, or high chief, assembled the whole tribe. The two antagonists were summoned to present their versions of the facts, and then every person of the tribe was given the floor and gave his or her advice as to what was the appropriate path to follow. The occasion was also used to discuss all the trouble caused by boys—theft of chickens, of fruits and loud and rowdy behaviour at night among other things. Sanctions were carried out.

## The execution of punishments

Tribal police were in charge of applying the sanctions which usually consisted of beating all the offenders with a club. And this is where the group spirit manifested itself—all the people of the same generation would kneel down to receive the beatings with the offender. To avoid isolating the offender, people would submit to the beatings with him, to show their solidarity, that they had not abandoned him. Being beaten with a club may seem barbaric to Westerners, but for many it is preferable to prison or a criminal record. In custom, the punishment exorcises the error, which is no longer mentioned, and the offender is pardoned. Punishment in the Western world does not exorcise the error—one risks going to prison. A lengthy criminal record can restrict one's rights for years to come. Rights such as voting eligibility, running a business or holding public office.

As time has passed, attitudes have changed. Young people no longer accept being beaten. In certain cases, young people who have received this kind of punishment have lodged a complaint for assault. It is a paradoxical situation, because the offender from the customary perspective becomes the victim in French criminal law. Those who carried out the sanctions are charged by French justice. Young people refuse physical

punishment and ask for community work instead (for example, cleaning a cemetery or a road). This kind of punishment has been applied in Kanak circles for several years. In this respect, Kanaks were ahead of French criminal law, which only instigated community work in New Caledonia about a decade ago.

### The evolution of custom: what is its future?

Custom is becoming more and more frayed with the problems of modern life. People refer to custom and thus seek an identity that is linked to political demands. Customary chiefs are becoming less and less respected—decisions made by customary authorities are not respected, children feel further and further distanced from their decisions, and they see numerous customary values as ‘out of date’. The elders speak more and more of preserving customary values, precisely because they feel people are drifting away from them.

How will custom resist the evolution of its own people? Custom, as it is lived today, is different to that which was lived by the ancestors. The ancestors would not recognise it. Custom is flexible and it can, and must, respond to anything, evolve. Some say that for custom to be respected it must be written down (as in Fiji for example), but aren't we in danger of freezing custom, of codifying it by writing it down?

There are so many questions that the Customary Council of the Territory will have to reflect upon before coming to some of the answers. Fijians took nearly sixty years to codify their custom, and the Customary Council of the Territory has never pretended to be able to do better than the custodians of custom in Fiji.

### Notes

- 1 Note that the term district was deemed not true to tradition by the Customary Council of the Territory, which decided to replace it with the term ‘cultural territories of the chiefly councils’.
- 2 The Customary Council of the Territory chose to replace the term Council of Clans with that of Council of Elders.



## Annex

### Working Group on Customary Law (Report, 29 November 1993)

The conclusions of the fourth committee working on the Matignon Accord note that

Mr Parawi-Reybas has highlighted the persistent difficulties encountered by Melanesians of particular status under Article 75 of the Constitution, particularly as regards descent, inheritance, and the rights of women. He has decided to start a working group to explore the possibility of ratifying customary laws on the matter. The group would bring together partners of the accord, representatives of the Provincial authorities, representatives of Custom appointed by the Customary Council, and lawyers.

The group met under the presidency of the High Commissioner on 7 and 21 October, 18 and 30 November, and on 4 November 1993 under the General Secretary. It consisted of the heads of the Court of Appeal or their representatives and, as official observers, of representatives of the Customary Council of the Territory, the RPCR, the FLNKS, and various heads of departments.

On the recommendation of Mr Parawi-Reybas, the group's objective is to specify the contents of the laws of particular status, and it was pointed out that many Melanesians affected by it are not aware of these contents.

This objective led the group to examine

- the texts relating to particular status
- the changing of personal status
- the contents of particular status
- relations between persons of different status.

### The texts

(a) A reminder that the law of particular status is established by Article 75 of the Constitution of 4 October 1958 which states that 'citizens of the Republic who have no civil status in common law...retain their personal status as long as they have not forsaken it.' Consequently we can infer from this that citizens of the Republic can have and retain a personal status which is distinct from their civil status in common law. Also, we may note that it is possible to renounce a particular personal status.

Until now, the expression 'as long as' has been interpreted as meaning a change from a particular status to a status in common law, and not the other way around.

(b) The law of 9 November 1988, ratified by referendum and providing the statute of the Territory, specifies the distribution of authority and responsibility in matters of civil and particular status.

- Civil status comes under the domain of the state (Article 8-9). It therefore follows that the organisation of the civil state comes under the responsibility of the state in regards to both statuses.
- Civil law is the responsibility of the state, 'except for customary law'.

As customary law is not mentioned in the responsibilities of the Territory (Article 9), only the provinces can certify customary laws through resolutions.

Furthermore these collectivities have no greater right to govern over custom than the Territory itself. Custom, by definition, springs from customary oral traditions. The provinces can nevertheless inscribe and codify customary law. Until now they have not used this possibility, unlike the Territory, which has used its authority by adopting several important resolutions on clan organisation and property.

(c) The ordinance of 15 October 1982, which has not been repealed, creates customary assessors for the first degree courts and the court of appeal. This allows these jurisdictions to apply the principle of customary law, but not 'customary procedure', as litigation is processed directly by them, and not through the intermediary of a customary authority. This presents certain difficulties.

(d) The law of 9 July 1970, which addresses the civil status of common law in the TOM.

### **The change of personal status**

In considering the constitutional principle that a particular status can be renounced in favour of a civil status in common law, and not the other way around, several questions remain unanswered and seem to have no uncontroversial solutions to this day.

**How should a change of status be executed?** The spirit of Article 75 of the constitution implies that any renunciation of status must be made with full awareness of the reasons and according to a specific procedure in a ceremonial form. Yet no legal text specifies what these are.

These conditions would avoid any change of status without the concerned party being aware of it, or for reasons that should not, by themselves, justify it (such as the desire to divorce where custom does not allow it).

In fact, as certain operations of the civil state are erroneously recorded in a register of common law (for example, marriages or births that took place in metropolitan France), it is sometimes wrongly inferred that these matters come under the realm of the common law.

On this issue, the group came to the following conclusions

- the renunciation of personal status should proceed by judicial declaration, on a request made to the judge and based on the information and consultation of the customary people concerned
- in the case of an error, a rectification procedure should be commenced, also in front of the judicial authority
- to avoid errors due to the absence of a single control over the two registers of the civil state (*état civil*), because the legal authorities control the register of common law civil status, and the administrative authorities control the register of particular law civil status, it would be preferable for the legal authorities to control both of these
- a memorandum specifying the conditions of inscription in one or the other register, should be completed by a group of town clerks and distributed to the mayors.

More importantly, the group has ascertained that many people come under common law through kin affiliation, sometimes for several generations, but live according to customary rules. In these cases it would be necessary to seek a legal solution which would bring the law into line with practice, for example by using the legal notion of state possession.

**What is the status of minors?** This question is linked to that of the two statuses. It arises when a child is the offspring of parents of different status or when a child is adopted by parents of a different status to his or her own.

Under the primacy of civil law status, it has long been held that if one of the spouses came under the status of civil law, then the children also came under that status, regardless whether their relationship is based on descent or adoption.

A judgment of 3 September 1990 (in Annex) declared that this does not constitute a 'final decision', which means that a different judgment could be made in an analogous case, without having to go through the *Cour de Cassation* (civil branch of High Court). The Noumea Court of Appeal ruled that the recognition of a child whose mother is of particular status, by a citizen under the status of common law, 'could only entail a change of personal status if the texts allowed primacy of one status over the other, but legally neither of these statuses, in terms of maternal affiliation, has primacy over the other.'

The court specifies that the renunciation of a civil status of particular law 'has to be analysed in an act of declaration stemming from a person of legal age, who is already informed of the irreversible nature of this renunciation and of the consequences that it entails'.

The status of a minor could therefore not be changed until he or she is of legal age.

**What are the consequences of a change of status?** The rejection of particular status entails the loss of property rights linked to the clan or tribe and more generally is often considered, or felt, to be a rupture with the customary community. There is also the danger of the loss of identity that results from this.

The motivations for renunciation are often specific (divorce cases), and this kind of total rupture is not desired. It results in social situations that are rendered even more uncomfortable by the fact that victims of this action often feel that they had no choice in the matter when their status was determined in their childhood.

Thus, we need to ask whether the renunciation of particular status is necessarily total?

It was pointed out that in Wallis and Futuna, partial renunciation was frequently allowed.

For New Caledonia, a resolution of the Territorial Assembly (8 September 1980) allowed goods that were acquired outside the provisions of inheritance according to customary law, to be extracted. This can be analysed as an exception to customary status without renunciation.

The customary authorities who were members of the group insisted that it was impossible to accept a 'multiple choice' status, where everyone could choose what was most convenient in each status.

The group came to two conclusions on this point.

- The path opened by the Territorial Assembly seems interesting. Shouldn't the rules of customary inheritance be applied only to goods situated within the reservation (at least it could be an open option)?
- To avoid renunciation of particular status for specific reasons, custom could accept, without renouncing its principles (prohibition of divorce), that the inevitable consequences of a situation (such as, children or goods) could be arranged within the framework of customary procedure.

In general the group deems that a law is necessary to specify the conditions and consequences of a change of status, based on Article 75, so as to put an end to the uncertainties that stem from hitherto undetermined jurisprudence.

### The content of customary status

Customary status is oral, and changes from one custom to the other. It is therefore difficult to specify its content. The group has nevertheless recognised the need to define at least the principles of customary status. Furthermore, the chiefs have stated that custom is not opposed to this. Some of these chiefs have declared that writing is not 'taboo' in custom and that certain chiefly systems have, in modern times, amassed a kind of archive of situations or decisions.

This written text could deal with

- principles—the customary areas and then, if common principles could be ascertained, the Customary Council for the entire Territory could write down customary laws of a general nature (which the provinces could then adopt by resolution).
- individual situations—it was contemplated that customary marriage contracts could be written to specify the conditions of the uses and distribution of the goods of the couple in cases of either separation or death.
- land tenure—lands would be delineated, starting with the establishment of a public register. Leasing acts which would ensure customary guarantees (before recording the never-ending debates in legal statements) could be written down and preserved by the customary authorities (such practices already exist).

The chiefs who were present indicated that the Territorial Customary Council would discuss these questions in a subsequent meeting. The group then conceded that it would have to wait for the opinion of the Council before proceeding any further in this direction.

### Relations between people of different status

This question is particularly difficult. It arises not only in the Territory, but in any multiethnic country (such as Fiji) and even in the other Oceanic countries, as soon as it is admitted that certain rights of the person can be established by the state and not by custom.

It is subdivided into several series of problems

#### (a) According to status

- relations between a person of common law civil status and a Kanak of particular status
- relations between a Kanak of particular status and a Wallisian or Futunese of particular status
- relations between a person of common law civil status and a person of foreign customary status (or vice versa), or between two people of customary status, one of whom is foreign.

#### (b) According to rights

- rights of the person—kin affiliation, marriage
- goods—property, inheritance.

The group could not explore every situation, but chose to retain the following directions.

**Marriage between a person of common law civil status and a person under the realm of particular law.** For the moment, the act of marriage comes under common law civil status, which seems to imply a settlement system for goods according to common law. Until now the children of such unions came under common law jurisdiction, but it now seems that they have the possibility of making a choice at legal age. The group maintained its position in favour of a legal requirement for the creation of a regime of 'mixed marriages' which would allow more balanced reconciliation of the two statuses.

**Marriage of two people of different particular status.** Further research is required to establish the rules, and wherever possible those that have been written, which allow for the accommodation of two customs. In the case where one of the individuals is a foreigner, the problem lies in the realm of

international private law, as it is not appropriate to marry two people governed by customary law under French common law.

In regard to these issues, the group insists that the changing nature of morals (divorce) and of the economy (goods, especially real estate outside of the reservation), means that the uncertainties of the current situation can no longer remain without considerable risk. It will be necessary to inscribe customary rules and to govern mixed situations both by the law and by written customary rules.

**Divorce.** On the customary level, the restriction on divorce poses problems in relation to children of adultery (who have no rights, or remain in the paternal clan) and for goods (for which a settlement should be able to be foreseen).

**Adoption.** In view of the frequency of adoptions in customary society, reinforced by the rules of CAFAT which allow for state benefits to be paid to the family, it seems necessary to have a better definition of the rights of the adopted and to avoid adoptions of convenience (which are sometimes followed by an annulment of the adoption). The delegation of parental authority could provide an alternative solution.

It is worth noting that the Court of Appeal has ruled that the plenary adoption of a child of common law civil status by parents of particular status gives the child that particular civil status (which he or she can repeal at legal age in favour of a common law civil status).

The group has decided to submit the analyses and conclusions of this report to the permanent committee, the advisory committee and to the Customary Council. It intends to resume work according to the directions of these three bodies.

# 4

## Customary rules in French Polynesia

Bruno Saura

In the *Dictionnaire de l'ethnologie et de l'anthropologie*, G. Augustin draws on Max Weber to distinguish between two definitions of the term custom. In the first case, which is favoured by anthropologists and sociologists, custom stands as common practice grounded in routine, which nevertheless includes a non-compulsory dimension (such as customary food, funerals and so forth). The second type delves into the realm in which jurists understand the term custom—'when written law bases itself in the acknowledgment of traditionally common practices'.<sup>1</sup> For Weber

[t]he continually renewed devotion to certain types of behaviour sometimes instills in the minds of those who organise the public order that they are no longer a practice or convention, but a judicial obligation which must be observed: it is this kind of norm, which enjoys a simple authority of fact, that we call customary law.<sup>2</sup>

Far from being opposites, these two definitions can be seen as extensions of each other. The difference between them seems to lie in the notion of obligation, that is, in the existence or inexistence of punitive sanctions for those who do not respect custom. Yet this distinction is not satisfactory and we would be wrong, on two levels, to assume that only the disregard of legal customs entails sanctions, and ignoring 'social' or 'cultural' customs has no consequences.

First, legal customs have no intrinsic, or ontological, characteristics of obligation. They are only respected to the extent that means of coercion exist, whereby punishments demanded by the legal apparatus can be applied. It is not the custom of law, or the law itself, which constrains people in modern societies, but rather the use or threat of force, the police.



Second, the disregard of legal customs in modern societies leads to sanctions of a legal or penal nature, whereas the disregard of religious customs in traditional societies can induce divine or supernatural punishment, which can be far more serious and frightening. Legal customs, therefore, do not necessarily hold greater weight than certain 'cultural' customs.

The very idea of distinguishing between obligatory customs, because they are of a legal nature, and customs which are more or less arbitrary stems from a Western perspective in which judges—rather than priests, sorcerers, or divine forces—are in charge of issuing punishments for breaches of matters that the community deems crucial to respect. In the West the matters to which the community gives priority are inscribed within a specific framework—the law.

From this perspective it would be tempting to begin presenting 'customary rules' in French Polynesia by opposing the values underpinning traditional Tahitian customs to those on which French law, as applied in the Territory today, rest. By Tahitian customs, I refer not only to a particular culture and lifestyle, but also to those lying within that culture which Western lawyers would see as belonging to the realm of law.

One would also have to reflect on the possible existence of an autonomous legal domain in the traditional Tahitian Ma'ohi society, even if it is clear that contemporary 'custom rules' stem only partially from it. It is in the nature of custom, or customs, to evolve and transform, and rules we might identify as traditionally Polynesian have probably been modified and reinterpreted several times. Today, what we call traditional Polynesian legal customs or customary Ma'ohi law can not be presented as legal rules having come 'straight down' from time immemorial.

The specific difficulties in delineating customary rules in French Polynesia stem less from conceptual disparities between anthropologists and lawyers in regards to the meaning of custom or from the evolving and fluctuating character of what the term includes, than from the apparent absence, at first glance, of indigenous legal customs in Tahiti.

In contrast to New Caledonia, civil law in French Polynesia has no distinct status, and French law seems to have absorbed, marginalised, or annihilated many traditional customs that Westerners would classify as legal.

French civil law was applied in Tahiti as early as 1874, and penal law in 1877. In the Leeward Islands and in some of the Austral Islands, these

measures were installed later, in 1945. Thus, a Ma'ohi civil state or an indigenous court (even clandestine, not recognised by the state) does not exist, nor have they existed for some time in French Polynesia.

As far as political representation is concerned things are no different. We know that the chiefly systems and the roles of 'tribal' and 'high' chiefs in New Caledonia were created by the French colonial administration, which tells much about the supposed 'authenticity' of Kanak custom. Nevertheless, chiefly systems continue to coexist (side by side) with municipal councils, and the potential for conflict between these two institutions remains. In Tahiti and its islands, district councils, which had themselves replaced chiefly systems in the nineteenth century, were replaced by communes in 1972 without any of the institutions being split up.

The Polynesian case is therefore somewhat paradoxical in as much as there is a specific culture, and an indigenous, Ma'ohi, way of doing things, yet these have no legal extension into local institutions (such as courts and chiefly systems), as they were eradicated by the forces of colonisation. I will attempt to give an account of this violent process of legal acculturation—a process which does not prevent certain Polynesians from talking about 'Ma'ohi law' (*ture Ma'ohi*), without specific reference to either an historical period of Tahitian society or to any laws in themselves.

For the present purpose, we will consider Tahitian customary rules or laws to include all cases that come under Western categorisations of civil law (such as marriage, inheritance, property) and criminal law in which French written law and the jurisprudence of courts are either opposed to, or recognise and justify themselves in reference to, traditional practice. Obviously traditional rules are not limited to this domain, but as this symposium seeks to establish links between French law and Ma'ohi practice, it is fitting to pay special attention to the space in which these laws and practices meet, even if they may clash in doing so.

Furthermore, we will be particularly careful not to put forward the equation 'culture = custom', and risk transforming a presentation of traditional Tahitian custom into one on traditional Tahitian culture by forgetting the realm of law and the specific issue of legal customs.

Having thus defined our field of study, it is now possible to question not only the reality of customary rules in French Polynesia today, but also their representations in people's consciousness. It seems that religious

acculturation and French colonisation have drawn on, and made use of, many Ma'ohi legal and cultural practices, while simultaneously giving rise to new practices and a new conception of the law. Nevertheless, for historical as much as geographical reasons, there are relatively well-preserved sub area spaces, and in Tahiti there is widely expressed political desire to revive certain traditional institutions.

Tahiti was 'discovered' by Samuel Wallis in 1767. The first English protestant missionaries arrived in 1797, and allied themselves with the Pomare family. In 1815, Pomare II triumphed over the supporters of the traditional order, which engendered a radical religious acculturation that effectively marked the end of many Ma'ohi customs. A new conception of both law and custom was then put in place, when the French colonial administrator, who arrived in 1842, elevated changes made by the missionaries to the rank of (new) Ma'ohi custom.

Ancient Tahitian society was extremely structured and ordered. And if we define the law as all the rules that regulate relations between people in a society, or as that which is required and permitted in a collectivity (which comes to much the same thing), then the task of collecting all the obligations and practices entailed in the respect and maintenance of the social order seems immense. As royal power was grounded in the sacred, this society was characterised by the severity of *tapu* restrictions protecting people, objects, and ceremonies linked to divinity.

I will not present an inventory of usages and customs relating to persons, goods, contracts and obligations, to compare a previous way of doing things with that of the French civil code. Luckily, such an undertaking has already been attempted by R. Cochin in 1947 and it belongs outside of the realm of an anthropological reflection on the concept of legal custom.<sup>3</sup> On the other hand, it is necessary to ask how much autonomy the law could have had in such a society. Was there a specific legislative apparatus, a set of (oral) precepts and prescriptions, coupled with a legal apparatus capable of punishing those who did not meet these obligations?

In her memoirs, Queen Marau Taaroa refers in length to her ancestor Tetuna'e, whom she calls the Tahitian 'legislator'. He established austere laws, two of which (and she doesn't tell us which ones)

...were of primordial importance and personified the strong spirit of fraternity in the people; they were the basis of the hospitality that has always been, and will always be, the distinctive mark of Tahitians.<sup>4</sup>

In fact these 'laws' (that Marau Taaroa calls '*ture*', using a post-missionary neologism) revolve around two themes—respect, *te tura*, or *te faaturaa*, and honour, *te tara* or *te hanahana*. Respect was to be held for the king, the other nobles, the high priest, *Taumihau* (the government of nobles or landowners appointed by the king), warriors, *marae* (the temple), the days and places for prayer, *tapu* food restrictions, *rahui* (restriction of harvesting a particular plot of land, decided by the *aari*) and so forth. Respect, in a traditional society, means staying in one's place—that is, submitting to the social order. Honour stems from one's capacity to manifest a particular respect towards others, which in turn generates the respect of others towards oneself.

These laws were of two kinds—those which addressed the future *aari* (king), and those which applied to all of his subjects.

The first type was more like a code of honour describing principles for being respected as a governor and consummate chief. A chief was recommended to avoid lasciviousness, show dignity and restraint at all times, except when it came to hospitality where his generosity was expected to be limitless.

It was the same for the commoners, who were told

[d]o not be indifferent to the traveller who passes in front of your door. You must invite him to enter your home, kill your pig, and grease your bowl with the food you will offer him. Whoever does not obey this order will be dragged into a public place and humiliated; his error will not be hidden; the *aari* will be able to confiscate his land as punishment...<sup>5</sup>

It is easy to see how these codes contain links with penal justice, but that does not help us understand the social position (*ti'ara'a*) or rights of the individual.

Blood must pay for blood. The *aari* must assume the justified revenge that is asked of him.<sup>6</sup>

The life and death of men is under your command...May your verdicts of death not be too frequent, as your own bones could follow on the same path.<sup>7</sup>

When Tetuna'e had established his laws, it is said that he entrusted or transmitted them to the high priest of the *marae Farepua* at Vaiari-Tahiti, 'and under his authentication, they became sacred'.<sup>8</sup> This is clear testimony to the indivisibility of political and religious functions in ancient Tahiti.

How was justice actually carried out? Was there a legal apparatus which was independent from royal and priestly powers?

Despite some contradictions in the sources, the answer to this question appears to be negative.<sup>9</sup> The *tahu'a* (religious specialist) could determine if someone was guilty of theft through processes of divination and could force that person to return the stolen object.<sup>10</sup> Above all, no one would dare oppose the sentencing of the *aari*, who held the right of life and death over his subjects, without provoking the king himself. Nevertheless, the *aari* would refrain from intervening in minor affairs. On the other hand, the most serious crime was to undermine royal authority.

Ellis informs that the king, should he feel strong enough, would have banished any chief who resisted his authority, and would have sent another chief to take possession of the guilty chief's land and office...Simply speaking badly of the king or his government was considered a serious enough crime to warrant exile or death, and a human sacrifice was required to repair the offence and appease the anger of the gods towards the inhabitants of the land where the crime was committed.<sup>11</sup>

This information is significant in so far as an inventory of the causes of rebellion (*orure hau*) and trouble (*aitamai*) would form the most detailed and authentically Polynesian chapter of the future code of missionary and aristocratic laws of King Pomare II in 1819. The French colonial administrator would react in the same way at the end of the nineteenth century, when, during the annexation of the Leeward Islands, he ordered the dispossession of all land belonging to 'rebel' families or Ma'ohi patriots. Moreover, references are made to the common occurrence of banishment in pre-European Tahiti, and this was generally preferred to death as a maximum sentence in the missionary codes of the nineteenth century.

Another interesting fact is the severity of the punishments for theft in ancient Tahiti—a crime which is so ordinary in Tahiti today.

Williamson also wonders whether the Society Islands had a court of law or a consultative authority comparable to the *fono* of Samoa.

It seems to me that the administration of the law for those who were not chiefs or nobles, was in the hands of the district chief. There was a right of appeal to a higher chief but not to a collegiate court. On the other hand, that kind of legal structure did exist for the chiefs to judge each other.<sup>12</sup>

This hypothesis is highly probable and was later confirmed by the existence of class separated juries (with one for the *aari*) in the Tamatoa code of the Leeward Islands of 1820 and in the special measures of the Rurutu code of 1889 and 1900.

Who could the members of this tribunal have been? The answer surely lies in the memoirs of Arii Taimai, and those of her daughter Marau, when

they refer to the *iatoai*, or district sub-chiefs, and the *raatira*, or landowners. The definition of these two classes is crucial as they are both be found in the legal institutions of the nineteenth century codes. For Marau Taaroa

[t]he *iatoai* were a class said to descend from one of the younger branches of the *arii* families. They formed the country's nobility, and had a recognised right to a *marae*.<sup>13</sup>

We must keep in mind that being attached to a *marae*, the seat of familial, political, and religious power, allowed one to confirm one's property rights over land. As for the *raatira*, they were the landed bourgeoisie of the district.

The people qualified to act as judges were most certainly recruited from the *iatoai*. Aarii Taimai writes that

[t]he entire body of '*iatoai*' in every district was referred to as the '*hiva*'. For those who are curious about the origins of things, they are the most interesting part of our old society, because the '*hiva*' of Papara could have been the source of all modern institutions—assemblies, the administration, the army, justice, the police, the aristocracy, democracy and communes.<sup>14</sup>

It is also worth noting that the founder of the *hiva* order, was Tetuna'e, the 'legislator'. They constituted a formidable counter-power to the *aari*, whom they could depose and exile.

The omnipotence of the king at that time, did not therefore exclude the simultaneous existence of consultative or even decision making bodies. I have already mentioned the *Taumihau*, or government council. Furthermore, Marau Taaroa refers to the council of three (which might have been called *Tootoru*). This consisted of the *aari*, the high priest, and the *aari* chief of the royal guard of the *hiva* charged with enacting the decisions of the high priest over the *marae*.<sup>15</sup> She also mentions councils which took care of matters of war and sporting competitions. It is unlikely therefore that justice would have been rendered by a single individual, even if the name of the institution responsible for this seems to have been lost.

Marau Taaroa makes an anecdotal reference to a trial with judges in which the sentencing appears neither wise nor respectable.

A poor man of the '*vao*' class (the lowest) was wrongly accused of having hidden a '*urupiti*' ('*tapu*' fish) to eat with his family. When he stood in front of the judges, there were so many accusers that, despite his proclamations of innocence, he was condemned to having his stomach opened. To the subsequent confusion of the judges, no one could find a justification for his condemnation.<sup>16</sup>

Following this, the guilty party (the accusers) was killed and their land was offered to the descendants of the first victim. The necessity of repairing

a previous legal error obviously does not protect against even further misfortune, when the sentencing is either too strong or irreversible.

When all is said and done, the existence of precepts, obligations and sanctions shows that ancient Tahitian rules, or legal customs, were geared more towards a legal ideal of order than of equality.

According to our ancient laws, everyone was subjected to the laws assigned to them by right of birth. An ancient Tahitian law stipulates that 'it should be as difficult to overcome this as it is to reach the sky.'<sup>17</sup>

The rapid and definitive success of English missionaries in converting Pomare II and his people led to a code of written laws called the Pomare code. It was written in English, mainly by Pastor Nott who translated it to the king and other chiefs.<sup>18</sup> Ellis states that the chiefs

...having embraced Christianity, were unanimous in their desire to see their civil and legal institutions in perfect accord with the spirit and principles of the Christian religion.<sup>19</sup>

Rather than referring to this code and those that followed in Tahiti and the other islands as simply missionary codes, I will use 'missionary and aristocratic codes' to describe them.<sup>20</sup> They stem more specifically from a compromise between the puritanical, monarchic, and democratic values of the London pastors and the purely aristocratic values of the Tahitian chiefs, than from ill defined general Tahitian and English values.

The Pomare code was proclaimed at Papaoa-Arue on 13 May 1819, a few days before the baptism of the king. He was to be the first Tahitian to embrace the Christian religion officially.<sup>21</sup> Although the text was initiated as much by the Polynesians as by the English pastors, its content left little place for the respect of ancient Tahitian customs.

It consists of 19 laws relating to: people who kill, theft (of food), pigs (wandering animals), stolen objects, lost objects, exchange, the non-observance of the Sabbath (Sunday), troublemakers, two men with one woman, married men and women, abandoning one's spouse, men who do not feed their wives, marriage, lying, judges, the form of judgments, courts of law, and laws in general.

Only the law related to troublemakers (Law 8) is of Ma'ohi inspiration, yet it is still stated with rather frightful missionary fervour. It enumerates no less than 71 crimes and offences punishable by death, except in the cases of a royal pardon. Included are the offences of tattooing, rebelling against a chief, wearing long plaited hair, frowning (a sign of worry),

insomnia, grinding teeth (a sign of anger), having a 'sweet' voice (hypocrisy), and even making too much stomach noise.

This extremely puritanical code, which, in the case of Law 8, was impossible to apply, would be revised several times until 1842, the year the French protectorate began. It would also serve as a basis for codes elaborated in islands which were not under King Pomare's reign.

But, was it widely accepted by both the people and the leaders of Tahiti? Moerenhout suggests not.

By criminalising activities which are not crimes, and by inflicting the guilty with punishments which they do not believe they deserve, we have distanced them from the missionaries and made them forever their enemies. Furthermore, these sessions and judgments, always held publicly, are a thousand times more indecent, and immoral, than the actions they condemn.<sup>22</sup>

The reality of the situation was more subtle. The code held appeal on a formal and theoretical level, even though its application entailed injustices which replaced others that had existed in ancient times.

The chiefs who ratified the code had no reason to complain, because they maintained immense authority and control over the populations of their respective districts. The administration of justice was in their hands, whether it was in the capacity of judge or high judge in a court, or because certain legal powers were automatically conferred on them as chiefs (thereafter called *tavana*, from the English word governor). The new legal institutions established by the codes were far from democratic. I will describe them in more detail at a later stage, particularly the famous *toohitu*. They became more democratic as time passed and certain revisions were made, but in 1820 magistrates were recruited according to the same aristocratic principles that had prevailed in ancient times. Despite the fact that the criteria for passing judgments were new, the privilege of rendering justice or of pardoning a guilty person, fell into the same hands as it had before.

Another point that is worth noting is that in the years following the declaration of the Pomare code, protestant culture became more and more enmeshed with Polynesian culture. The missionaries 'litteracised' the population, fixing the Tahitian language by translating the Bible (finished in 1835). A new identity was created and Christianity became, in the words of Jean-François Baré, 'something internal' (*no roto*).<sup>23</sup> This was so much the case that the missionary laws that were modified over the years seemed



in retrospect extremely protective of the Ma'ohi when the French colonisers arrived.

In fact, according to some of the provisions, this was particularly true in relation to land. Thus, when the Huahine code was revised in 1826

[i]t is envisaged that the limitations of land litigation will be brought to the district judges and their juries. Their decisions will have to be inscribed in a specific register. Nevertheless, Colin Newbury contends that there is no proof of the development of the notion of individual property, which the English missionaries sought to instill.<sup>24</sup>

It is not so important that the concepts of land tenure held by the pastors and the Polynesians differed, what matters is that the Ma'ohi were protected from dispossession of their land. In March 1825, for example, a new law was passed in Tahiti that restricted marriages between Polynesians and foreigners (whites). This was as much to block the sale of land as it was for reasons of morality.<sup>25</sup> While the Tamatoa code of Raiatea did not go as far as that, the revised version of 1836 included an article which stated that a *popa'a* man (foreigner) who married a Polynesian woman could not inherit her land should she pass away. The land would be attributed to their children or, if that was not possible, it would go back to the wife's family.

Apart from the fact that these missionary laws protected Polynesians, they also seemed to become enmeshed with Tahitian society. They appeared as an extension of the divine laws of the Bible, providing the basis of the new Tahitian identity in the nineteenth century. This encounter between English Protestant culture and Ma'ohi culture produced a conceptualisation of the law and of rights that has survived, in part, to this day.

The neologism *Ture*, derived from the Hebrew term Torah, has been successfully incorporated into the vocabulary and consciousness of Tahitians. This is so true that the law, whether it be civil or penal, is still anchored in a religious model inherited from ancient times but also from a Protestant biblical education which emphasises knowledge of the Old Testament.

Pastor Daniel Mauer has stated quite correctly in *Tahiti: les yeux ouverts* that

[e]ven if the English missionaries had not sought to become preoccupied with legislation, the Tahitians...would have been anxious to hand them the management of their affairs...and to ask them for laws, as that was ingrained in their nature, even if they were not so concerned with respecting them...Through fear of offering their converts food that was too strong, or

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honey of which they were not worthy, they offered, through the Decalogue used as a springboard, a Jewish religion which was blocked at the doors of Grace, and which had not really known its own Bethlehem.<sup>26</sup>

Two points are worth exploring in trying to understand better not only the quibbling character of Tahitians today (the overload of the courts attests to this, and it is not only due to the confused legal system that emerged from colonisation), but also their representations of the law. These appear in claims relating to indigenous custom, presented as Ma'ohi laws, or *Ture Ma'ohi*.

First of all, Polynesians have always been admirers of principles, whether they were to be found in the ancient *Tetuna'e* codes of honour, the fables of La Fontaine today, or, of course, the biblical psalms and parables which were so popular. The *popa'a* missionaries were quick to notice how Tahitians moralised their speeches, encouraging each other to do good things, showing their knowledge of, and their interest in, good principles.<sup>27</sup> This should not suggest that they actually apply these morals in their day to day life. They often operate as an encouragement (*fa'aitoitora'a*) at the level of rhetoric and speech. These morals appear as a course to follow, rather than something that can be lived by in themselves. They fascinate people, but do not constrain them.<sup>28</sup>

On the other hand, the acceptance of Christianity, which was conceived of as a new set of laws and parables, had the overall effect of replacing one system of restrictions or taboos (*tapu*) with another.

The missionary and aristocratic codes were written according to this perspective. There was no radical transformation of Ma'ohi thought.

Hence the importance that Polynesians place on the Old Testament—it represents the alliance (*fa'aauraa faufa'a*) between the God of Israel and his people, through the person of Abraham (Genesis 17), and the gift of the Ten Commandments (*Ture ahuru*, meaning the ten laws) to Moses (Exodus 20).<sup>29</sup>

It is also a text that emphasises issues of revenge, divine anger and punishment, over grace, redemption and salvation for mankind. A relatively easy parallel is made between the history that Tahitians are living and that of the Hebrew people—a move from polytheism to monotheism, from idolatry to true religion, on the basis of disasters, diseases, and political enslavement. But the alliance that God made through the persons of the missionaries, who brought these laws, is what would allow Tahitians to be saved. One could even argue that peace on earth could happen

without Christ, but instead, through strict adherence to the Ten Commandments (meaning the laws that God desires for His Kingdom) and to the laws of the kingdom in which one lives. This is the explanation of Daniel Mauer's statement about a 'Jewish religion which was blocked at the doors of Grace, and which had not really known its own Bethlehem'. It applies perfectly to Tahitians' Old Testament conception of both Christianity and the law.

The formalism of Ma'ohi thought, which is the product of a culture based on rituals and restrictions, served not only to facilitate the acceptance of the missionary laws (apart from the *mamaia* episode, which the pastors and high chiefs managed to shake off as early as 1831, although it continued in the Leeward Islands for several years),<sup>30</sup> it also illuminates why these missionary laws, which neatly replaced the ancient prescriptions in people's minds, came to be seen as having always existed, as having already been Polynesian customs when the French colonisers came to settle in Tahiti.

The arrival of the French opened the door to a new religion, Catholicism, which the Protestants condemned with as much energy as they had spent in the struggle against the Paganism of ancient times. It posed a threat to the new Christian social order that had been in place since the 1820s. Thus, the *Tehauroa* codes of Raiatea and Tahaa underwent a final revision in 1884, four years after the annexation of Tahiti by the French and four years before these islands themselves would be annexed. There was a double edge to the changes—the sale of land, which had been controlled until that point, became illegal, even between indigenous people (Law 37, Article 10). As for Protestantism, it became the only authorised religion in these islands, because it was 'the one we are used to, and the only one that suits us' (*te haapaoraa i matarohia, o te haamoriraa la e au, hoe roa ra*) (Law 43).

Therefore, we are still left with the problem of ascertaining whether or not these codes, which were fully applied in certain islands from 1819–1945, belong to the category of the law, or to that of customary law(s). Anthropologists of law, who also have their own customs, have tended to follow E. Le Roy in distinguishing between traditional laws and customary laws.<sup>31</sup>

Traditional law refers to the laws practiced prior to colonisation, including Islamic law in Africa. Customary law, on the other hand, only

appears during the period of colonial administration. Customary law is the result of writing down customary traditions, which then become partially distorted, modified and reinterpreted.

In the case of French Polynesia, the English missionaries arrived in 1797, and the French protectorate intervened 45 years later in 1842. Yet the intensity of the acculturation shock produced by the missionaries, particularly in matters of civil law, should be considered on the same level as the enforced legal acculturation that later occurred with colonisation.

In relation to marriages and contracts, the positions of the British missionaries were not far from those of the French civil code. Even in matters of land, they advocated private property, whereas the Ma'ohi mode of appropriation was centred on the family and the collectivity.

Having said this, the missionaries never sought to force the Polynesians to abandon the indivisibility of land. Because they were not running a state, they never sought to procure goods for reasons other than the construction of parishes. On the other hand, France under Louis-Phillipe, and particularly under the Third Republic, instigated procedures for the declaration of individual land tenure as soon as 1852. This entailed the establishment of a public domain which incorporated all land that was not claimed within a specified period. This domain was intended to serve for the development of colonial agriculture.

Beyond the objectives pursued by the various parties involved, the missionary and aristocratic codes were nevertheless based mainly in Western concepts. In his research on *L'application du droit civil et du droit pénal français aux autochtones des Etablissements français de l'Océanie*, R. Cochin described these texts, which emerged from compromises between the values of the missionaries and those of the Ma'ohi chiefs, as intermediary legislation. As for the Pomare code of 1842, he states that

in no way are we confronted with a codification of Tahitian usages and customs, but rather with the revolutionary work of the English Protestant missionaries.<sup>32</sup>

Under these circumstances, we need to ask whether such an 'intermediary' legal system should be considered as part of traditional law (pre-colonial), like the Islamic law of Africa. It does seem traditional in comparison with the modernity represented by the French legal system which came to replace it—a system which was more democratic, secular,

and predisposed to the individual, but which was unfortunately stained by the colonial domination underpinned its application, or imposition.

We should therefore make a distinction between three, rather than two, types of laws

- traditional law, which existed prior to the discovery of Tahiti in 1767, or at least until the arrival of the missionaries in 1797
- neo-traditional law, which was put into place under the leadership of the missionaries before the establishment of the French protectorate of Tahiti in 1842, or before the annexation of the Leeward Islands in 1888
- customary law, which resulted from the codification of neo-traditional laws by France. This meant not only a transitory and partial integration of these laws, but a modification of them as well.

From 1842 onwards in Tahiti, we are confronted with a synthesis, or a concoction, of legal elements stemming from Tahitian aristocratic culture, English missionary puritanism, and French colonial law. These already bore little relation to the laws as they existed before the arrival of the first Europeans.

The issue here is not the making, or the remaking, of a history of the law in French Polynesia since the protectorate. For that we refer to the work of Bernard Gille and Pierre-Yves Toullelan, *Le mariage franco-tahitien*. Yet we would also like state that from our point of view the whole affair resembled a rape more than a marriage, a rape to which the victim consented only after the act.<sup>33</sup> But that is a different issue altogether.

What is at stake here is an understanding of the ways in which France came to see the laws and institutions instituted by the missionaries and the Polynesian aristocrats as indigenous, particularly those relating to land tenure. The Ma'ohi 'authenticity' of the court of the *Toohitu* is due as much to the Polynesian desire to maintain control over land as to a colonial practice which gradually came to focus exclusively on matters of land tenure.

Article 3 of the Treaty of the Protectorate of 9 September 1842 established that

[t]he possession of the land of the queen and of the people will be guaranteed to them. This land will remain theirs. All disputes relating to property law or to the ownership of land will come under the special jurisdiction of local courts.<sup>34</sup>

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In practice, a whole set of texts relating to land tenure were assumed/read, in violation of the treaty of 1842, to allow the agricultural development of the Kingdom and the installation of colonial settlers.<sup>35</sup>

The restriction on marriages between foreigners and Tahitians inscribed in the Pomare Code of 1842 was reversed in 1845. In the same year the conditions relating to the sale, the lease, or the donation of land were slackened.

The civil code was making its entry into the Marquesas Islands as early as 1843 and, in the States of Pomare IV, by 1845, but with some reservations. The Royal Ordinance of 1845 included the provision that

[t]he Court of first instance, and the Appeals Council will apply French civil law modified either by royal ordinance, by local decree, or by the customs of the place.<sup>36</sup>

While this was a recognition of local customs, it seems minor compared to the measures taken at the same time to deprive the Tahitian courts of their competence and extend the sphere of the French civil and criminal legal system. A few of these should suffice to make the point.

On the first of December 1843, a decree by Governor Bruat limited the jurisdiction of indigenous courts to civil cases between the Queen's subjects and to criminal cases between Tahitians, on the condition that they did not concern the safety of the Colony. A decree of 13 April 1845, signed by the commissioner and the regent...withdrew the Tahitian courts right to judge over real estate litigation between Tahitians and foreigners, etc.<sup>37</sup>

As for Cochin, he states that

[t]he Pomare Code of 1842 was applied until March 13, 1869, when French laws became effective (in the States of the Protectorate) in accordance with the decree of August 18, 1868.<sup>38</sup>

Through this decree, French law became applicable in the Etablissements Française de l'Océanie (EFO), except for matters of land tenure where disputes property between Ma'ohi continued to come under Tahitian jurisdiction. This effectively marked the end of the Pomare code in Tahiti, except for matters of land, despite the fact that the statutory move from subject to that of French citizen would only come about at the time of the annexation treaty of 28 June 1880.

In those islands which had not yet come under French care, however, the missionary and aristocratic codes continued to be applied until 1945, even if they were substantially modified by France.

Rurutu in the Austral Islands, which was annexed in 1900, had evolved until then under the rules of a missionary and aristocratic code, which was only slightly modified during annexation.<sup>39</sup> A decree of 5 May 1916 confirmed the validity of indigenous jurisdictions and codified laws in correctional and criminal matters, except in cases of legitimate suspicion. Another decree, that of 25 August 1917, specified that

Nothing changes for the special tribunal mentioned in title 69 of the codified laws, which made provisions for cases where an offence is committed by the king, the chiefs or judges and other public servants. The offence would be judged, in conformity with the law, by a court consisting of island judges or high judges, who are free to choose those assessors they wish, to join in the task.

By 1880, in the eyes of the colonisers, Tahiti no longer had any traditional legal customs or even neo-traditional customs or rules forged by the missionaries between 1818–42, except for those relating to disputes of land tenure. Yet if the forces of religious acculturation or colonisation had gained the upper hand over traditional law, they had not necessarily done so in relation to all the practices.

The vastness of the Territory, coupled with the varying durations of the missionary and aristocratic codes and the differing degrees of acculturation in the islands, meant that certain practices continued to resist French law, or had difficulty accommodating it.

We will leave aside those practices relating to names and especially to adoption, instead referring briefly to Marie-Noëlle Charles' solid analysis of traditional concepts of the family and the legal implications they entail.<sup>40</sup>

What we will explore here is the issue of land, which is so important to Ma'ohi identity and so prominent in the discourse of contemporary cultural and political reclamations. It appears that while traditional or customary concepts of land tenure (ownership, management and transmission) persist in some of the more distant islands, this is not the case in Tahiti. In Tahiti, where customary practice is regressing, a discourse of identity is nevertheless developing around Ma'ohi culture and custom. It has led to some concrete developments such as the recreation of the *toohitu*, which is conceived of today as a council of elders on issues concerning land.

Until now we have made much of the collective mode of land appropriation for the Ma'ohi, without specifying what it entails. First of all, it is important not to confuse family ownership with a pseudo-system

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of primitive communism, in which everything would belong to everybody. Individual exploitation of land does exist, even if ownership is collective or family based (in the widest sense of the term). François Ravault was correct in stating

Polynesians make a fundamental (cultural) distinction, which constitutes an exceptional provision in (French) law, between the ownership of land (*fenua*) and that of plantations (*faapu*). Plantations belong to the planters or their inheritors, but are always harvested individually (as in the case of the copra rounds).<sup>41</sup>

Traditionally land can not be separated from, and indeed is a part of, a system of kinship.<sup>42</sup> People are kin because they live together on the same land, whether they are actually kin by blood—from the same *ôpu fetii* (large kin group) and members of the same *ôpu ho'e* (consisting of brothers and sisters and their descendants over two generations)—or whether they are kin by adoption. Furthermore, residence validates the rights over land that one inherits from one's family origins. In the range of land over which an individual may have joint rights, he cannot claim ownership of land which he has never exploited, developed, utilised, or lived on. As Paul Ottino has clearly demonstrated for the island of Rangiroa, absence for more than three generations annuls potential rights over land. A person originating from two different islands, and marrying someone from a third, therefore has to make a crucial choice as to where to reside. His or her grandchildren will, when they become adults, have definitely lost all rights to land on the other two islands.

Such an enmeshment of land and family leads to the idea that to sell land, or even to share it, is to sell or divide one's family, which is completely opposite to Ma'ohi values. Land is inalienable in the sense that it cannot be given to a stranger, but that does not mean that one's rights over it are eternal. Yet, that is what a number of claimants believe today. They are proclaiming their attachment to the land of their ancestors through the device of French laws, but they would have lost their claim over that land anyway in Ma'ohi tradition because of lack of residence and usage.

The custom which leads to an individual losing their rights over certain land is therefore not in total contradiction with the effects of the thirtieth prescription of extinction contained in the civil code, even if the motivations for these two types of loss of rights are very different. Tahitian legal custom or rather traditional arrangements, in matters of land tenure, provides for



a possible renunciation of rights. The big difference lies in the fact that this 'stripping' of an individual is voluntary and constitutes a fair counterbalance to the 'stripping' of the other family members in relation to the land that they no longer live on, but on which the person involved still resides.

The other main difference is that Tahitian custom does not allow for prescriptive acquisition, or usurpation. A foreigner can never become the owner of land, under any circumstances, even though he may have lived on it for more than thirty years, or his family lived on it for more than three generations. If he resides on this land it is because he has family based rights to do so, either through his lineage or through adoption. Polynesians had never considered that a man could be without family or land, let alone want to become the owner of another family's land.

So where does this traditional conceptualisation stand today? Is land tenure, meaning 'the system of obtaining, dividing and imparting rights of usage of land', the same for contemporary Polynesians as it was for their ancestors?<sup>43</sup>

The installation of property title deeds in the Society Islands in the nineteenth century had the initial effect of giving weight to the claims, or potential rights, of certain individuals over land that they or their ancestors had claimed. This land was called *tomite* land. Whilst the concept was foreign to Polynesian culture, or to Ma'ohi ideas of land tenure, the declaration of ownership became a powerful protective tool for people whose ancestors had thought to *tomite* their land.

Jean-François Baré described the evolution of the situation very well. From now on

[t]he *mana* over land could appear to have been replaced by a *tomite* over land. As the most important ancestors, those from whom one gained one's identity, were those who had transmitted the rights of land tenure, the *tomite* came to serve in some ways as ancestors; there was the impression of a new era being born with them... In the same way that the residence of an ancestor and his or her children had induced a process of successive residential choices, of evictions and aggregations, so did the initial act of the *tomite* set in motion a series of movements which resulted in groups of people who, several generations later, had a common *tomite*. Whatever decisions were taken within these family and territorial groups, which the anthropological notion of 'residential lineage' describes relatively well, or the justice or injustice of the various cultural codes, the *tomite* came to be a founding element in island life.<sup>44</sup>

Hence the fanciful nature of a project that sought to re-establish the land rights of people on the basis of ancient genealogies and of the *marae*. With the *tomite* a new era had begun and a new concept of the transmission and tenure of land was born, one which strayed from the customary designs of ancient times.

So what happened to the notion of indivisibility? An expert on land tenure in Tahiti, Gabriel Tetiarahi writes that '90 per cent of Territory's land is undivided', seeing in this the proof of a resistance to acculturation and especially of the desire to continue living together. Unfortunately, this perspective seems overly optimistic, as many of the abolitions of indivisible land have not yet been finalised.<sup>45</sup> Apart from certain islands which we will discuss, the sharing of land is both desired and practiced by the majority of Polynesians today.

The abolition of indivisibility is not an obligation in Polynesia, even if an entire legal arsenal has been put into place to facilitate individual ownership. In sum, the spirit of the civil code is unfavourable to the indivisibility of land, whereas Polynesian custom sees it as the norm. The fact remains that today it is most often the complexity, length and cost of a court case that discourages people from attempting to procure a release of indivisible land, rather than the cultural motivation pushing them to maintain the indivisibility of their land.

The abolition of indivisible land is difficult to procure, because it presupposes the existence of written property titles, which is not always the case. Much land was not *tomite* (*aita i Tomitehia*), having not been declared to the *tomite* registration committees of the nineteenth century (created by the Tahitian Law of 24 March 1852), and is thus considered to belong to the public domain. It is also restrained by the surveying and registering of land, as one cannot divide what is not delineated. The Territory administration is far from completing this task, which depends on very expensive private surveyors. The lack of surveyed land helps the persistence of indivisible land, but that is not the result of people's desires. Finally, in the case of land that has been both surveyed and registered, a sharing system can be put into place, but it must take into account the large number of title holders based on the rights of indivisibility.

Amicable sharing, which needs the agreement of all the indivisible holders and concerns small undivided plots of a few people, is the exception, whereas legal sharing has become the norm.<sup>46</sup>

The unification of these two elements, ownership titles and survey plans, means that there will not be an abolition of indivisibility in all the cases brought forward. There are outlying islands in French Polynesia where these two conditions are met, but where nobody has access to a judge (French, of course, because they are the only ones recognised, or who recognise themselves, as competent) necessary to share land officially. It is difficult in these rare cases to talk of legal custom in so far as no appropriate jurisdiction exists. Indigenous courts have either all disappeared or been suppressed. Nevertheless, occasional marginal subspaces of traditional practice do appear, in which Ma'ohi realities are in total contradiction with French law.

How are we to draw a table of the various cultural and legal situations for the five archipelagoes of the Territory?

On Tahiti island, which has not yet been entirely surveyed, half of the land between Papeete and Mataiea to the south, and Papeete and Paenoo to the east

...has been the focus of a sharing arrangement or is in the process of becoming so. In the other communes, the percentage is less. At Moorea, an essentially touristy island, there have been many releases from the indivisibility of land.

This was the 1990 estimate produced by Denise Girard-Goupil and Teriivaea Neuffer in their outstanding report on indivisibility.<sup>47</sup> They specify that sharing seems to work in layers, that is, by large branches of the descendants of a common ancestor, who then either make arrangements between themselves or can once again go to the courts to make use of their rights.

In the Leeward Islands, an initial survey of the land was established in the 1950s but proved unreliable. New surveying operations are currently being carried out. The push for the abolition of indivisibility comes less from the Polynesians who have remained on the land, than from their *fetii* (kin) who grew up in Papeete and who wish to return to their family land, but in clearly defined individual plots. Despite the surveying

...much of the land is still undivided, although the 'Services des terres' (Land Service) has established 400 subdivisions since the creation of its branch in Uturoa.<sup>48</sup>

In the Marquesas Islands, the situation varies according to the island. For historical and demographic reasons, much of the land was never

declared and remains in the public domain (the law on the declaration of property was only applied in 1902, at a time of depopulation). Other land belongs to people who had no descendants. On the other hand, and particularly in the north of the archipelago, mixed Marquesan and European families (*demis*) own enormous areas of land. Much of the land remains in the category of 'uncontrolled indivision', particularly on Tahuata and Fatu Hiva, meaning that the legitimate landowners are not known.

The authors of the report state that the situation is such that everybody wants to share...but, we are confronted with a lack of structures (courts, judges, solicitors, etc.).<sup>49</sup>

In the Austral Islands, Raivavae and Tubuai, which were already integrated into the Pomare Kingdom in 1842, evolved along the same legal lines as Tahiti. While Tubuai underwent the *tomite* procedures

...in Raivavae, much of the land was not claimed. Such is the case of the fenua piipii for which a magistrate had to visit in 1976, and spend three weeks recording the declarations of the claimants...When he returned to Papeete he passed judgments against the Territory for each of the declarations of property, by means of the thirtieth prescription.<sup>50</sup>

The distant Rapa Island was annexed in 1881 and attached to Raivavae and Tubuai, from an administrative and legal point of view, from 1887 onwards.<sup>51</sup> Finally, Rurutu and Rimatara were annexed in 1900 under a *régime d'indigénat*, like the one in the Leeward Islands, until 1945. There were no *tomite* either at Rapa, Rurutu, or Rimatara.

Four of these five islands have been surveyed and registered, with Rapa being the exception. Yet in order to abolish the indivisibility of land, the existence of an airstrip and regular flights to Tahiti carries more weight than the official surveys. Whereas a turbulent geographical configuration restricts the construction of an airport in Rapa, in the cases of Rimatara, and especially Raivavae, the population has always been opposed to greater interaction with the outside world, so as to maintain their traditions. Thus, for the three islands that are only serviced by boat (which pass around once a month), the problems relating to land tenure are settled between family members, virtually without any reliance on the courts of Papeete. Only on very rare occasions does the *Service des Terres de Papeete* deal with requests for the release from undivided land.

In Tubuai, supposedly the most 'modern' island and definitely the island with the most individualistic attitude of the archipelago, there is an

abundance of land disputes in the courts. Although undivided land remains the norm, multiple subdivisions of land are being negotiated. Only the existence of vast areas of fertile land has restrained extreme partitioning of the area into small plots.

In Rurutu, which holds a reputation of authenticity in the eyes of the Tahitians, the desire to subdivide land is getting stronger. Rurutu had not installed the *tomite*, and people did not always see eye-to-eye on issues of land tenure in earlier times, but nevertheless operated with a *modus vivendi* which was crucial in such a small island environment. People who lived next to each other and worked together in parish or village groups on agriculture or craft could sometimes hate each other and occasionally fight, as Alain Babadzan says, 'with strikes of *puta tupuna* (family textbooks containing genealogies and traditions)'.<sup>52</sup> On this island, the installation of an aerodrome in the 1970s further enhanced the transformation of customary land tenure. It certainly changed day to day lifestyles, but more significantly it instigated the first reliance on property title deeds, following the thirtieth prescription. This was a consequence of the expropriations caused by the construction of the airstrip, and of the necessary compensation payments that followed. Once again, the decisive factor came from the outside.

Finally, in the Tuamotus atolls the same remark can be made on the subject of air strips and their impact on economic and land related matters. Due to the isolation of these atolls, for a long time the only people to show any economic interest in them were those who lived there. By leaving one's island, and by not coming back, one relinquished one's rights to land according to Ma'ohi tradition. Consequently, there were almost no demands for the abolition of indivisibility. Furthermore

[t]he situation is particularly complicated in this archipelago, and more entangled than elsewhere, as indivisibility originally existed, since the claims were made by several individuals jointly. Often they were brothers and sisters, cousins, or even a whole family. Ninety per cent of land in the areas used for coconut plantations is in indivisibility. It usually consists of small plots, or else sometimes people argue over the ownership of a specific tree.<sup>53</sup>

The opening up of some of the atolls went hand in hand with the development of commercial fishing to supply Papeete, tourism (Rangiroa, Tikehau) and especially black pearl cultivation in atolls like Manihi, Ahe, Takaroa, Takapoto, Arutua, and Apataki.<sup>54</sup> As the industry can be highly

profitable, it has stirred jealousies and conflicts that have often turned violent in relation to the maritime tenure of the lagoon. Although lagoons are said to belong to the public domain, the section of a lagoon that faces land belongs to the owner of that land according to Polynesian tradition. The pearl cultivation boom brought people who were not originally from the island, or at least who had never lived on it. They came to claim a plot of land, so that they could then ask for a maritime concession and start cultivating pearls. It is a far cry from the Ma'ohi land tenure system described by Ottino in Rangiroa in the mid-1960s.

Despite this, there are still some isolated atolls where traditional modes of appropriation and exploitation of the land persist, even when there is an airstrip present, and even though these lands are supposed to belong to the public domain. Such cases, which used to be the rule, have now become the exception in French Polynesia as a whole. Even in the Taumotu Islands where 90 per cent of the land is undivided, the situation is only partially due to respect for traditional values and ways of life. The legal complexity of each situation is also responsible.

As modernisation has become more and more dominant, a traditionalist discourse of return to Ma'ohi sources has developed in certain sections of the population, particularly amongst intellectuals. The Polynesian situation is very close to that in New Caledonia, even if people in Papeete don't speak of custom by saying the foreign term. In Tahiti, Punaauia or Rurutu, people don't do custom the way they do in Noumea, Canala or Lifou, but they speak about it just as much, and ever more so. Put simply, the words used in the Ma'ohi language render the phenomena invisible to those who do not listen to the Tahitians or who do not understand their language.

The generalised use of the term Ma'ohi to replace 'Polynesian' is itself quite recent, reflecting the appropriation of the term Kanak by Melanesians, except for the fact that Ma'ohi, meaning 'aboriginal' or 'indigenous', was never a pejorative term amongst Europeans. It was simply absent from the Europeans' vocabulary.

The discourse of *Hiro'a tumu Ma'ohi* (original Polynesian culture) started amongst a handful of intellectuals of the Tahitian Evangelical (Protestant) Church. Whilst it used to be a marginal factor in this church, which has the highest number of followers in the Territory, it has today become dominant and spread throughout the whole of society. It is no longer a matter of 'consoling incantations', as Jean-Claude Guillebaud described

the cultural assertions of the 1980s.<sup>55</sup> It has real consequences in terms of land tenure and people's relations with French law and justice. It has led to concrete initiatives aiming to restore the *toohitu*—customary courts of the nineteenth century which were in charge of settling disputes over land. This comes at the price of reinterpreting the original nature of the *toohitu*.

As far as the contemporary conceptualisation of Tahitian culture as custom is concerned (Hiro's *Tumu, Iho Tumu or Peu Tumu* in Tahitian), we can approach the issue in parallel with the situation in New Caledonia. The two countries present unexpected similarities which have been appropriately analysed in Frédéric Rognon's thesis, *Conversion, syncretisme et nationalisme: analyse du changement religieux chez les Mélanésien de Nouvelle-Calédonie*.<sup>56</sup> Rognan highlights how much of Kanak culture has been influenced by the nineteenth century missionary heritage, even if the concepts and reclamations presented today are done so in terms of ancestral values, tradition and authenticity.<sup>57</sup> In returning to Alain Babadzan's analysis of cultural and religious syncretism in Rurutu, we are actually confronted with a new tradition. Rather than merely being made of elements borrowed from pre-European culture and the missionary contribution, it results from the fusion and synthesis of these elements, forming an original syncretism.<sup>58</sup>

As the issue at stake is the reclamation of Ma'ohi identity, the discourse neglects the weight of the missionary heritage. It does this by relativising the wide gap between ancestral customs and values and those that were introduced by the Bible in religious matters, and by the missionary and aristocratic codes in terms of society. Even though it is directed against the French colonisers, it neglects the unconscious impact of a century and a half of French legal acculturation. This includes one hundred years of the exercise of democratic laws (rather than aristocratic) in Tahiti, and fifty in certain other islands, which, although they may sometimes have been ridiculed, are held as valuable principles.

The two main apostles of the Ma'ohi cultural revival are Henri Diro and Duro Raapoto, both of whom were ex-students of Protestant theology. A man of the theatre, a poet, and a militant for independence, Henri Hiro came to a premature death in 1990. His lifelong friend, Duro Raapoto, is the son of Samuel Raapoto, who was the first president of the Evangelical Church of French Polynesia (EPPF) when it gained its autonomy in 1963. Duro Raapoto is a professor of *reo Ma'ohi* (Tahitian language) and is also in

charge of the Committee of Theological Debate of the EEPF as well as having undertaken, since 1988, a theological study comparing certain elements of Christianity with Ma'ohi culture. He was at the origin of the concept, and subsequent general use, of the terms *Hiro'a Tumu*, *Iho Tumu*, and *Peu Ma'ohi*, which can all be translated as Ma'ohi culture, identity and custom. But we will let him define these words himself, and their relation to land, in an unedited letter, written in French, that he sent to us in 1986.<sup>59</sup>

*Hiro'a* translates as the idea of someone who is in full possession of his mental and physical capacities, who can see and understand what is happening around him...

*Tumu* refers to that which is fundamental

*Hiro'a tumu* therefore refers to this fundamental knowledge. But in order to better grasp the term, one needs to know that *tumu* originally applied to plants.

*Tumu* is a plant with a trunk, which is therefore at full force. It gets this force from the land, a notion to which it is inextricably linked. There are no trunks without the land to nourish them. Similarly there is no culture without land...The land is called mother by Polynesians. Just as a cord attaches a child to its mother, so tradition demands that the child's umbilical cord be buried in the ground...To take away the land of a Polynesian is to take away his culture, his sensitivity /awareness, or to condemn him to live his culture artificially. As long as we have not resolved the problems of land, the problems of culture will remain murky.

Finally, the term *Iho Tumu* is no different from *Hiro'a tumu*, as the notion of identity is expressed by the idea of essence (*Iho*). The land is life, it is alive, and from this life the Polynesian *Iho tumu* is born, feeds itself, and grows...To take away land is to condemn a Polynesian to being a kind of wandering soul, with a vaporising identity, in the image of the spirits who failed their passage to the other world and are eternally condemned to wander dangerously between two universes....

There is a lot to discuss on the subject of Dor Raapoto's passage, in the late 1980s, from a simple poetic discourse of cultural revival to an ambitious theological synthesis of Christianity and Ma'ohi culture. While this new theology does not have unanimous support within the Evangelical church, it has been important for the young generation of Ma'ohi pastors. The most spectacular innovation it has produced is the replacement of the term Jehovah, the name of the god of Israel and of the Christians, with Taaroa or Te Tumu Nui (the Big Origin), the creator god of Polynesia.

This theology is interesting because it is situated in the extension of the concept of culture as traditional customs (*Hiro'a Tumu*), since the Ma'ohi term *Peu* refers more to the totality of customs, habits, and ways of life. It



touches on matters of land tenure, as land and culture are seen as the gifts of God to the Ma'ohi people, to whom He pays specific attention. *Message au peuple élu de Dieu (Poro'i i te nuna'a ma'itihia e te Atua)* ['A Message to God's Chosen People'] is the title of one of Duro Raapoto's works, published in over ten thousand copies by the Evangelical Church in 1989.<sup>60</sup>

In the 1980s, a working committee on land tenure, led by Gabriel Tetiarahi, was created within the EEPF. It contributed considerably to the renaissance of the *toohitu* in the strongly Protestant island of Tahaa. These were the Ma'ohi customary jurisdictions which had appeared in the nineteenth century codes and had been suppressed in the Leeward Islands in 1945.

But before exploring this renaissance of *toohitu* in Rapa, Tahiti, Rurutu and Tahaa, we must return to the original missionary and aristocratic codes. It is important to see whether the conceptualisation of the 'customary', or indigenous (Ma'ohi), courts today has changed in comparison to the realities of the *toohitu* of the nineteenth century.<sup>61</sup>

*Toohitu* can be broken down to *too*, which is a prefix for any number between two and nine, and *hitu*, which means seven.

Although most Polynesians are convinced that the institution pre-dates the arrival of Europeans, it undoubtedly due to the fact that it deals specifically with matters of land, as a result of colonisation (and not prior to it). This, coupled with the inseparability of land and Ma'ohi identity, gives it a reputation of authenticity or antiquity.

There are no indigenous or ethnographic texts which mention the existence of the *toohitu* in ancient times. The term does not figure in the Pomare Code of 1819, and, if we are to believe William Tagupa, it originally appeared as a court of appeal in 1824, when the code was first revised.<sup>62</sup>

William Ellis calls the institution

[a] supreme court...consisting of seven judges, of which two are residents of the island of Eimeo (Moorea). The judges are also high level public servants (governors or Tavana) and nearly all of them are chiefs. This double function gives them considerable influence and sufficient powers...it even serves as a barrier to any intrusions on the sovereign power. The powers of the court can even block royal authority. The mode of judgment consists of a jury of six people (plus a president)...Everybody has the right to be judged by their peers.<sup>63</sup>

In fact, the first *toohitu* played the roles of both a *cours d' assise* (highest level criminal court) and of a jurisdiction of appeal. Its creation can be

explained by the desire of chiefs of noble rank not to be judged by inferior people. Hence the existence of a royal court which could also be appealed to by people of the lower class who were contesting ordinary judgments. The power of making final decisions in matters of justice was given to chiefs who were not part of the Pomare family (who from then on were the only ones to reign on the throne of Tahiti), even in serious cases, which gave them regal functions in matters of justice, much like those they had each held in their own district in ancient times. Having said this, the *toohitu* of the time did not have wide ranging powers over matters of land, despite the fact that, by virtue of their nobility, they were considered to be wisemen or elders with substantial knowledge of tradition.

In practice, the *toohitu* would become the missionaries' main political tool from 1824–31—effectively for the entire duration of the politico-religious insurrection of the *Mamaia*. It was the members of the *toohitu*, the chiefs of Tahiti (including Tati of Papara, and Paofai, spokesman of the *toohitu*), who triumphed militarily over the millenarian *Mamaia* movement, which the young Queen Pomare IV had joined.

Nevertheless, the power of the *toohitu* was not due, at that stage, to the strength of the legal institutions it represented, but to the political weight of the chiefs it was composed of. It went hand in hand with the weakening of the power of Pomare III and his sister Pomare IV who, at the time of her enthronement, was still young and carefree of her responsibilities.

Despite the move to the status of French protectorate in 1842, the jurisdiction of appeal (*tiripuna hororaa*) which was formed by the *toohitu*, and was unique to Tahiti and Moorea, was not affected to the same extent as the first degree courts by the processes of democratisation instigated by France. Although the *toohitu* was still appointed by the Queen, the district judges (*thaavamataeinaa*) and the district chiefs (*avana mataeinaa*) were elected by the landowners from 1852 (Tahitian electoral law of 22 March) onwards.

In other words, the authority and responsibilities of the *toohitu* changed so that they were eventually transformed into specialists of land tenure. This happened in two stages. First, the Tahitian law of 30 November 1855 installed a court of appeal between the normal district tribunals and the *toohitu*, which was unique to Tahiti and Moorea. At the same time, the *toohitu* ceased to fulfil this function, becoming instead a kind of supreme court, the third instance of indigenous jurisdiction, called the Tahitian High

Court. It was not really a *Cour de Cassation* (highest court of civil law), but more a second jurisdiction of appeal which would either guarantee (by confirming) or invalidate the sanctions of the Court of Appeal. On the other hand, appeals for cases concerning the death penalty would be brought directly to the *toohitu*. They were therefore cloaked in a reputation of wisdom, of being the men to whom one turns in serious cases or when all else has failed, much like the *aari* of ancient times. Yet we have also seen that the Tahitian law of 28 March 1866 gave the monopoly over matters of Tahitian jurisdiction to the French legal powers, except for land disputes between Polynesians. These disputes were the responsibility of the district councils, with appeals being sent directly to the *toohitu*, who were also responsible for ratifying the decisions of the council which were not questioned in an appeal. With the law of 1866, the *toohitu* ceased to rule on appeals of death penalties, because all crimes and misdemeanours relating to problems other than those of land were to be brought to the French courts. From this point on, the competence of the *toohitu* was restricted to matters of land. They no longer constituted either a political counterbalance to the powers of the Pomare family, which had been severely curtailed by France, nor the pillar of social and moral order intended by the English missionaries, who started leaving Tahiti from 1852 onwards.

The *toohitu* continued to exist until the beginning of the twentieth century. The treaty of annexation of 29 June 1880, contained the following clauses.

Our States, wrote Pomare V, are thus reunited under France, but we ask this big country to continue to govern our people with Tahitian laws and customs in mind...We also ask that all minor matters be judged by our district councils, so as to avoid large costs and long voyages for the inhabitants. We also wish that affairs relating to land be left in the hands of the indigenous courts.<sup>64</sup>

Yet, through a convention dated 29 December 1887 (and ratified by a law of March 10, 1891), Pomare V decided that these courts would be suppressed when

...the operations relating to the delineation of ownership are finalised and when the disputes that they have given rise to are settled.<sup>65</sup>

In practice the Tahitian High Court sat until 1934, and then extinguished itself.

In the Leeward Islands, and in Rurutu and Rimatara, which were not part of the states of Pomare V and were annexed between 1888 and 1900,

the Ma'ohi courts of first instance and of appeal (the *toohitu*) continued to function regularly until 1945. Their authority was not limited to land tenure, even though it had been reduced over time by the decisions of the governor, who had the right to modify the indigenous codes applied in these islands. The consequence of extending French nationality to all of the old subjects of the EFO, brought about by the decree 45/482 of 24 March 1945, was the ratification of the decree of 5 April 1945, which repealed the indigenous jurisdictions of the Leeward Islands, Rurutu, and Rimatarara. It seemed that the *toohitu* had lived out their lives.

Yet in the 1980s and 1990s the *toohitu* were reintroduced in certain islands, whether or not they were recognised by French law.

The first initiative came from a woman of Rurutu, Martha Pascault. On 6 August 1977 she created an association called Teva Nui, 'Polynesian movement for the information and defence of the owners of undivided land', which sought to encourage owners to settle through amicable sharing.<sup>66</sup> Teva Nui, which had 370 members at the end of 1979, would soon set up a committee of genealogists and land tenure specialists in Tahiti, Rurutu and the Leeward Islands. These structures, although they only worked with a section of the population, nevertheless brought concrete help to some of them. Martha Pascault would soon christen them 'committees of elders' or the *toohitu of Teva Nui*.

Her association was reborn in 1988 under the name of 'Association O Teva Nui, Pu ma'ithia e to tatou Fatu e Iesu' (*Teva Nui*, group chosen by our Lord Jesus), now presenting an explicitly recognised political and prophetic character. Ironically, its statute appears in the *Journal Officiel* of the Territory (14 July 1988), but the Administrative Court of Papeete declared it illegal on 4 January 1989. We will only quote short extracts of its statutes, which have been reproduced elsewhere.<sup>67</sup>

(the members of Teva Nui) choose...to participate in political life by presenting candidature lists to the municipal and territorial elections. This is to maintain the sacred union which should allow for the reinstallation of the three Tahitian jurisdictions: the jurisdiction of the district council, the jurisdiction of the Tahitian High Court, and the jurisdiction of the Tahitian Court of Cassation...

(They wish for) the fulfilment of the power of God, on this day, April 16 1988, and according to the prophecy of the Prophet Isaiah, Chapter 1, verses 26 to 28: 'I will restore your judges as in days of old, your counsellors as at the beginning, afterwards you will be called the City of Righteousness, the Faithful City...and those who forsake the Lord will perish.'

Finally, *Teva Nui* declared that all judgments made by the French courts and judges would be nullified

...because France owes an enormous debt to the Tahitian people. All acts relating to land tenure will now have to be established by the committee of elders known as *tomite toohitu de O Teva Nui* of the commune in which the land is situated, and written in Tahitian....

That the work of the *toohitu* is inscribed in such a prophetic perspective would not surprise anyone who is familiar with the inextricable links between the political and the religious in Polynesia. The aims of the association follow those of the Protestant missionaries, who protected the land and solidified the language by writing it down. The trust in a God who is both a saviour and vengeful, opposition to the French profanitisng of Ma'ohi land, as well as the elected nature of the group, echoes the theological discourse that was being elaborated at the same time by Duro Raapoto. The group can be situated in a cultural pattern of prophetic, millenarian, and messianic movements in Oceania, which are usually the product of Christian acculturation and colonisation. Yet Martha Pascault's association is not a religious movement, even if it is occasionally supported by certain specific 'elders' called the *tahu'a*. Her discourse is borrowed from the prophetic complex of liberation, but her actions are situated in this world and in front of the French courts, which she assiduously attends while still contesting their fundamental legitimacy. In certain elections, she has also presented candidate lists composed entirely of women, without much success.

The work of Martha Pascault and the undertakings of Gabriel Tetiarahi in the Evangelical Church have contributed to a political awareness among the inhabitants of the Leeward Islands and influenced the restoration of the *toohitu* on the island of Tahaa (4,005 inhabitants in 1988) which was initiated by the mayor of the commune, Monil Tetuanui. In 1990, with the help of designated parish members, he installed *toohitu*, or councils of elders, in each of the eight commune sections (or associated communes) of the island of Tahaa. Twelve members, five of whom are deputies, are elected by the populations of each neighbourhood.<sup>68</sup>

Their sphere of authority is mainly concerned with the allocation of maritime concessions in the lagoon for the establishment of pearl farming and breeding activities, which at that time was just starting in the Leeward Islands. Nevertheless, the *toohitu* are infringing upon the authority of the

Territory, even though the nature of the public area of the lagoon is currently in dispute. Not recognised by the state, or the Territory, the *toohitu* of Tahaa in fact work with the municipality as a council of elders anxious to prevent the serious deterioration of human relationships that occurred in the Taumotu islands with the advent of pearl cultivation.

Finally, there is an island, Rapa, where the *toohitu* were officially reinstalled by the state. Although their powers no longer reflect those of the original nineteenth century *toohitu*, the initiative proves that the name and memories of them are still being perpetuated.

Rapa (514 inhabitants in 1988), the most southern and inaccessible of the islands of French Polynesia, was never surveyed, nor has it ever seen a declaration of property lodged with a *tomite*. It belongs to the administrative subdivision of the State of the Austral Islands, which was lead by a Tahitian, Jacques-Denis Drollet, for the first time in the mid 1980s.

This refined and cultured man had to implement mayor Lionel Watanabe's idea of giving legal form to a practice that was still alive—the meetings of the Council of Elders to resolve problems of land. Thus, on 7 July 1984, the municipal council of Rapa agreed 'to the creation of a council of elders called *Too Hitu* in Rapa and to the proposed methods of choosing its members'. Article 1 of this text, written in French, specifies that

[t]his council will gather the most respected people who live in Rapa, choosing them amongst those who are the oldest and most informed as to 'questions of land'. It will effectively contribute to the Continuity of a Link that has always been upheld on the Island, that between Polynesian cultural Life and Ancestral Land. And this, so as not to disturb this Customary Land Tenure which remains a model of Tradition harmoniously embedded within Families, and throughout Time. Due to the absence of registered surveys and hence of official demarcations on Rapa, it will be invested with a Guarantee, given by the consensus of the entire Population, over the Descendence and Hereditary Links which regulate and determine the places of each of the island's inhabitants, as either Ancestral or Adopted Land. Following this, an adviser will be attached to the council of elders which it will send as an emissary to the mayor of Rapa, accomplishing a kind of expression of Certification on behalf of the Loyal Memory of the Truth of the Acts which consist of construction permits, and of the subsequent implantation and modification of the environment.

The designation of the seven members of the *toohitu* is intended to be by secret ballot vote of and by all the residents 'who make up the population of people over the age of forty years'.

Finally, mention is made about the land management systems carried out by the *Tiaau* (steward). The *toohitu* are responsible for appointing *Tiaau*,

who are supposed to be 'trustworthy individuals, representative of the patrimonial and usufructuary interests of the inhabitants and the families of Rapa' (Article 3).

This resolution, which had been approved for the High Commissioner by the State Administrator on 31 August 1984, evolved with the adoption of a new resolution on 25 July 1986 that would ultimately lead to the creation of a council of elders under the guise of a municipal commission. That same day, the mayor, who was the honorary president of the *toohitu*, issued a decree naming the seven members, 'each representing one of the large families of Rapanese origin', and 'among those residents of Rapa who are knowledgeable about matters of land'. They were inevitably chosen from the Municipal Council and were responsible, for example, for authorising the distribution of building permits but also, on a more general level, for managing land disputes on the island. The *toohitu*

...deals with contemporary actions without exceeding its legal authority: this means giving advice which satisfies the general Consensus or accrediting well known facts (Article 3 of the resolution of 09/86).<sup>69</sup>

The transformation of the 1984 *toohitu* into a municipal commission two years later, testifies to a certain political realism—the advice of councillors who are part of the mayor's majority can be easier to obtain than that of a *toohitu*, which would be opposed to him. The people of this municipal commission, however, are not necessarily the island's most respected and knowledgeable men in matters of land tenure, and in practice they often work informally with other 'elders' who are members of the big families. Nevertheless, it is encouraging to see that an institution which was originally legal, Tahitian, and aristocratic, and appeared at the time of the missionaries, continues today to exist and evolve—that is, continues to live—in the entirely Protestant island of Rapa.

A final word needs to be said in relation to the Polynesian government's management of the land problem. If the idea of reviving indigenous courts usually emanates from opponents of the pro-French, liberal, and pro-development politics of the people in power in Tahiti since 1982, it has nevertheless had the effect of bringing to their attention the necessity of maintaining a reserved and balanced approach to the subject and conforming at least to the spirit, if not the word, of the *toohitu*.

In 1987 Ministry of Land, the Public Domain and the Development of the Archipelagos, was created within the government of Alexandre

Léontieff. To date, however, it has not instigated any fundamental reforms because of the political risk involved.

The review of the statute of the Territory in 1990 resulted in the entry of Article 90bis within the chapter on cultural identity in French Polynesia, which states that

[a] body of experts, composed of people who have acquired notable competence in matters of land tenure, has been installed. Its composition, organisation and functions are set by the resolutions of the Territorial Assembly which also appoints its members. This body can be consulted by the president of the government, the president of the Territorial Assembly or the high commissioner, on any questions relating to land tenure in French Polynesia. It presents the assembly of court of appeal magistrates with qualified people...to be registered as legal experts.

For the moment, this dispensation has not been applied, and in 1994 there were only two land tenure experts working with the court of Papeete.

Finally, Article 3, Paragraph 7 of the law for the direction of economic, social, and cultural development in the Territory, which was passed in February 1994, made provisions for the installation of a 'commission of obligatory reconciliation and arbitration in Land matters', whose composition and work methods have yet to be defined.

These measures, which are still only theoretical, testify to the growing awareness of the seriousness of the question of land tenure in Polynesia. The problem is linked to economic stakes as much as it is shaped by the emotional forces that it engenders.

Furthermore, it is necessary that they actually have an effect, because the discontent and resentment of many Polynesians is growing, even though one would wager that any decisions made by a court would only satisfy a small number of people. Two days prior to the beginning of this symposium, a general assembly of the latest of the Polynesian landowners associations was held at the Papeete town hall in the presence of several hundred participants. It is called *Mata ara* (open eyes, or vigilance), and also presents itself as a committee for the defence and protection of indigenous land rights. Its president is none other than Joinville Pomare, the driving force of the royalist and pro-independence Pomare party, who has long struggled against exploitation of land in violation of the treaties signed by his ancestors in 1842 and 1880. This has been his political warhorse for more than twenty years. *Mata ara's* program encompasses updating Polynesian genealogies, condemnation of registered surveys



carried out by French surveyors for private companies, the demand for Ma'ohi surveyors to replace them, categorical rejection of the civil code and especially the thirtieth prescription of acquisition, and, finally, the reinstallation of Ma'ohi land courts. This association is far from being composed only of pro-independence militants or sympathisers. Having said this, it is true that in Polynesia, resentment towards France is usually fuelled by private land litigation which is very costly for both the French laws and for the courts of the Republic, which hold very few people—Polynesian or French—knowledgeable in questions of local land tenure.

In this study we have measured the legal and cultural changes that have come about in Polynesia since it was opened to the West.

In pre-European times there was a whole set of restrictions, rights, and obligations, of which only some are to be found within the realm of French law. Disrespect for the golden rules of hospitality, place, and even sacred words, could lead to serious human or supernatural punishments. These rules have lost their effect, or even their meaning, today.

There were also practices, some of which are maintained today, of adoption or of collective (family based) appropriation of land. Yet, in many other cases, traditional rules have been substantially remodelled by two hundred years of Christian acculturation and one hundred and fifty years of colonial occupation.

What popular discourse these days calls *Ture Ma'ohi* (the law, or Polynesian law) generally refers to two things—the aristocratic and missionary laws of the nineteenth century and the jurisdictions to which they were linked. These have become indigenous or aboriginal in so far as they have protected Ma'ohi from land dispossession and have given them the possibility of settling their own land disputes—the so called '*Affaires Polynésiennes*'.

On a more subjective level, the Ma'ohi expression *Ture* refers to an order, a vision of the world, and the way Ma'ohi people organise their lives, invoking a cultural and often religious meaning which goes far beyond the strict confines of law. To speak of *Ma'ohi Ture* (in the sense of *Ma'ohi Ture no te orara'a*, Ma'ohi rules of life), is to refer to that which is good (*au*), but also suitable (*Tano*) and just or worthy (*ti'a*) for Polynesians, in opposition to French values and criteria. We are therefore dealing less with a conflict of legal systems (because the Tahitian legal system had to

incorporate the outlines of the colonising one, and there are now no Ma'ohi jurisdictions outside the French system) than with a conflict of values and legitimacies.

The Polynesian example therefore demonstrates the advantages for the anthropology of law to explore not only the legal practices of indigenous people, but also the circumstances of acculturation and contemporary representations of the law. By accounting for all of these preoccupations, we can overcome the barrier that exists between comparative law and legal anthropology, two disciplines which are as distinct from each other as are theology and religious anthropology.

An anthropology of the law built on this basis would be close to inscribing itself into a vast political science which could claim to be an anthropology of power. The prospects for research are enormous, without taking into account the fact that current social and cultural processes of change—in the case of Polynesia, for example—will probably lead to new political and legal orders and disorders.

## Notes

- 1 *Dictionnaire de l'ethnologie et de l'anthropologie*, published under the direction of Pierre Bonte and Michel Izard, 1991, PUF, Paris:182.
- 2 Max Weber, 1991. *Economie et société*, PUF, Paris:182 [translated from French].
- 3 Cochin, R., 1947. *L'application du droit civil et du droit pénal français aux autochtones des Etablissements Français de l'Océanie*, Archives Territoriales de la Polynésie française (ATPF), Paris, 1775, L/4/45/96. See also Brochet, R. *L'introduction du droit civil et du droit pénal aux îles Sous-le-vent*, nd, 174 P., ATPF, 1776, L/4/45/97.
- 4 Princess Takau Pomare, 1971. *Mémoires de Marau Taaroa, dernière reine de Tahiti, traduits par sa fille la Princesse Ariimanihinihi Takau Pomare*, publication de la Société des Océanistes, Musée de l'homme, Paris:98.
- 5 *Ibid.*:99.
- 6 *Ibid.*:99.
- 7 *Ibid.*:66–7.
- 8 *Ibid.*:98.
- 9 The best synthesis is that of Robert W. Williamson (1924), in *The Social and Political Systems of Central Polynesia*, Cambridge University Press, Vol. III, pp16–26. See also Douglas Oliver (1974), *Ancient Tahitian Society*, Vol. II, pp. 1,053–73. Both of them make reference to the numerous accounts of early discoverers, and of nineteenth-century ethnographers and missionaries, particularly W. Ellis.
- 10 Cf. William Ellis. *Polynesian Researches*, 1853:378.
- 11 Williamson, *op.cit.*, p.20.
- 12 Williamson, *op.cit.*, p.18.
- 13 *Mémoires de Marau Taaroa...*, *op.cit.*, p.87.
- 14 Adams, Henry. *Mémoires d'Arii Taimai*, Paris, Société des Océanistes, p.7.
- 15 *Mémoires de Marau Taaroa*, *op.cit.*, p.82.

- 16 *Ibid.*:101.
- 17 *Ibid.*:86.
- 18 'On the real origin of the authors of the code' see Appendix II of Colin Newbury (1961) in John Davies (edited by Colin Newbury), *The History of the Tahitian Mission (1797–1830)*, The Hakluy Society, Cambridge:366.
- 19 Ellis (1972), *op. cit.*, *French Edition*, Musée de l'Homme, Paris, T. 2:249.
- 20 Only those codes found in the Service territorial des archives de Tīpaerui-Papeete (ATPF) have been consulted. The references are:  
 For the Leeward Islands: Tamatoa code (1820) 3543 B/4/44/341 and Tamatoa and Teariimaevurua code (1836) 3544 B/4/44/341; Code of Huahine and Maiao (E ture no te Basileia o Teururai i Huahine e no te Basileia o Nanua i te Maiaoiti ra) (1853 ed.), B/8/294; Code Tehauroa (1884), B/8/43/287 and Tahitoe of Raiatea and Tahaa (1877), B/8/294; Codified Laws of the Leeward Islands archipelago (1893), B/8/43/1185; (1894) (E ture no te Hau Raiatea e Tahaa), B/8/43/286; (1895), B/8/43/287; Indigenous laws of the government of the Leeward islands (1898) (puta ture no te mau fenua i raro) B/4/44/441; (1911 ed.), B/8/253; (revised in 1917), B/8/270.  
 For the Austral Islands: E apoapo Rurutu o tei faati'a faahou hia i roto i te Hau o Teuruarii IV (1889), B/4/369; Codified laws of Rimatara and Rurutu (1890, approved in 1900), B/8/43/319 and B/8/279; (1891), B/8/43/1186; (1892), B/8/43/278 No. 492 and 493.  
 All further references to these codes in the text relate to the above mentioned archival codes.
- 21 Cf. Bouge, L.J., 1952. 'Première législation tahitienne, le code Pomare de 1819', historique et traduction, in JSO, Paris, T.VIII, Dec.:5–26.
- 22 Moerenhout, Jacques-Antoine. *Voyages aux îles du grand océan*, original ed. 1837, re-edited in 1959, T.I, p. 378.
- 23 Baré, Jean-François, 1985. *Le malentendu Pacifique*, Hachette, Paris:77.
- 24 Appendix of Colin Newbury in John Davies, *The History...*, *op. cit.*:370.
- 25 Cf. Adams. *Mémoires d'Ariitaimai*, *op. cit.*:138.
- 26 Mauer, Daniel, 1972. *Aimer Tahiti. Tahiti les yeux ouverts*, Nouvelles Editions Latines, Paris:97.
- 27 One could make the same remark in 1994, in regards to the public gatherings of the pro-independence party of Oscar Temaru. Their emblem is a Christian cross and their motto is 'God is my master'.
- 28 This is one of the roots of the prophetic millenarian movement called *Mamaia* in Tahiti and the Leeward Islands between 1826 and 1841. It was a reaction to the rigours of the missionary and aristocratic codes which had only seduced people on a formal level. With the *Mamaia* movement the millennium had already started and there were no more restrictions or laws. For more on this episode see Gunson, Neil, 1963. 'Histoire de la *Mamaia*, hérésie visionnaire de Tahiti (1826–1841),' BSEO., No. 143–4 (June–September), Papeete:233–94.
- 29 The Ten Commandments are also called the ten restrictions in Tahitian (*eiaha*): for more on this see Robert Levy (1973), *Tahitians: mind and experience in the Society Islands*, Chicago University Press:183.
- 30 On the formalism of Ma'ohi thought through the example of a Polynesian church see Saura, Bruno, 1994, *Te mau Sanito. Histoire de l'Eglise Réorganisée des Saints des Derniers Jours en Polynésie Française*, Herald Publishing House, Independence, Missouri:161–3.
- 31 Cf. E. Le Roy-M. Wan, 1982. 'La formation des droits 'non étatique', in *Encyclopédie juridiques de l'Afrique*, vol. *L'Etat et le Droit*, Dakar, Nouvelles éditions africaines, pp 366–70; and Norbert Rouland, 1988, *Anthropologie juridique*, PUF, Paris:364–6.
- 32 Cochin, *op. cit.*:37.

- 33 Bernard Gille and Pierre-Yves, 1992. Toullelan *Le mariage franco-tahitien*, Polymages-Scoop, Papeete, 174pp.
- 34 Cf. *Annuaire de Tahiti*, March 1892:99–100.
- 35 Cf. Panoff, Michel, 1965. 'Un demi-siècle de contorsions juridiques: le système foncier en Polynésie française de 1842 à 1892', *The Journal of Pacific History*, Vol. 1:115–28.
- 36 Cf. Hangen, Christine, 1989. 'La propriété déclarée: le *Tomite*', *BSEO*, Papeete, T. XX, No. 247, June:22–8 (p. 23).  
We would like to thank Judge Calinaud for the following information relating to the full application of the civil code in Tahiti. It happened in three steps, first with a vote by the Tahitian legislative assembly of the law of 28 March 1866 on the organisation of justice. Then by the decree of 18 August 1868 which was promulgated by an order of 16 March 1869, and finally by another decree on 27 March 1874 which promoted the civil code as well as a hundred or so other codes or texts of law. The period of introducing the civil code thus spanned from 1866 to 1874.
- 37 Gille and Toullelan, *op. cit.*:52.
- 38 Cochin, *op. cit.*:36; in fact the correct date is 16 March, not 13.
- 39 Cf. Caillot, Eugène. *Histoire de la Polynésie orientale*, Paris, ed., 1910. pp. 438–49.  
Vérin, Pierre. 'Notes socio-économiques sur l'île de Rurutu', in *Cahiers de l'ISEA*, January 1964:99–131. 'Les Etats de Rurutu et de Rimatarara, étranges petits protectorats océaniques de droit interne', in *Revue Française d'Histoire d'Outre-Mer*, T. LII, No. 186:225–31.
- 40 Cf. Charles, Marie-Noëlle, 1992. 'L'enfant *fa'a'amu* vu par le droit', in *Regards sur l'enfant 'fa'a'amu*', Papeete, premières journées de recherches de l'APRIF, 28–29 April:86–91.
- 41 Ravault, François, 1978. 'Problèmes fonciers en Polynésie', in *Tauhiti*, publication de la Maison des Jeunes et de la Culture de Polynésie française, No. 24:10–15 (p.14).
- 42 On this subject see P. Ottino, 1972. *Rangiroa. Parenté étendue, résidence et terres dans un atoll polynésien*, Cujus, Paris; and Panoff, Michel, 1970. *La terre et l'organisation sociale en Polynésie*, Payot, Paris.
- 43 Ravault, *op.cit.*, p. 13. All of the work of this ORSTOM researcher could be referenced in relation to the confrontation of the traditional system with contemporary practice in the Territory. An abstract of it can be found in *L'Encyclopédie de la Polynésie*, Christian Gleizal (ed.) 1988, Papeete, Vol. 9, pp 89–93, 128–9.
- 44 Jean-François Baré, 1985. *Le malentendu Pacifique*, Hachette:70–1.
- 45 Interview with Gabriel Tetiarahi mentioned in volume 9 of *L'Encyclopédie de la Polynésie*, p. 129.
- 46 Girard-Goupil, Denise and Neuffer, Teriivaea, 1990. *L'indivision en Polynésie française*, report No. 80, of the Conseil économique, social et culturel de Polynésie française, October:24.
- 47 *Id.*:30.
- 48 *Id.*:30.
- 49 *Id.*:32.
- 50 *Id.*:34. Furthermore, according to information gathered in 1994 by the Ministère de la mer, des affaires foncières et du développement du territoire (Ministry of the Sea, Land Tenure, and the Development of the Territory), the Territory of French Polynesia owns 11 per cent of the land in the five archipelagoes. Within this percentage we must also take into account that some of the land is susceptible to reclamations of ownership on the basis of the thirtieth prescription, such as occurred in Raivavae.

- 51 See Decree 220 of the governor, dated 28 June 1887, *Bulletin Officiel de EFO*, 1887, pp 208–9.
- 52 Babadzan, Alain, 1979. 'De l'oral à l'écrit: les *puta tupuna* de Rurutu', *JSO*, Musée de l'homme, Paris, No. 65.
- 53 Girard and Neuffer, *op. cit.*:33.
- 54 The case of Mataiva lagoon which contains phosphate worth 1 billion Pacific francs is a special one in which there have been numerous attempts to identify ownership and subdivision.
- 55 Jean-Claude Guillebaud, 1980. *Un voyage en Océanie*, Points Sueil, Paris, 196pp.
- 56 Anthropology thesis of the University of Paris X, 1991, 890pp. + bibliography.
- 57 Ragnon writes that custom, as it is lived socially (and not religiously), is 'a set of laws and obligations which are more or less constraining, and are adapted to a relative poverty and to communal life. They prevailed in the era of missionary control...On a general level, custom often conflicts with the new aspirations of the young' (pp. 189–90). He quotes Jean-Marie Kohler for whom custom, like nationalism, 'seems to be an ideological cement (more than a social cement) which obscures the emergence of socio-economic disparity more than it restrains it' (p. 190) (Cf. Jean-Marie Kohler, Patrick Pillon and Loïc J.D Wacquant, 1986. *Jeunesse canaque et coutume.*, Institut culturel mélanésien, Gaphoprint, Noumea, 64pp).
- 58 See Babadzan, Alain, 1982. *Naissance d'une tradition. Changement culturel et syncrétisme religieux aux îles Australes*, ORSTOM, série travaux et documents, No. 154, Paris, 313pp.
- 59 This letter is annexed in my DEA (masters degree) of political studies at the University of Aix-Marseille III : Saura, Bruno, 1986. *L'identité polynésienne. Facteurs de revendication et discours identitaires à Tahiti*, 257pp + annexes.
- 60 Duro Raapoto, *Message au peuple élu de Dieu (Poro'i i te nuna'a ma'itihia e te Atua)*, 57pp. His three major works, by order of apparition, are *Te rautiraa i te parau a te Atua e te iho tumu ma'ohi* (The Exaltation of the Divine Word and of Traditional Polynesian Identity), 1988, 59pp.; *Te pure a te Fatu* (The Prayer to God), 1992, 99pp.; and *Te Atua e te natura, te natura e te taata* (God and Nature, Nature and Man), 1993, 124pp. They are all published by the EEPF. For commentary see Saura, Bruno, 1989. 'Théologie de la libération et théorie de la culture chez Duro Raapoto', *BSEO*, Papeete, No. 246, March:1–15.
- 61 For more details see Bruno Saura, (nd.). *Naissance et disparition d'une juridiction coutumière ma'ohi: les toohitu de Tahiti et des archipels avoisinants*.
- 62 'La crise des concepts légaux à Tahiti, 1819–1838', *BSEO*, Papeete, No. 261–2, March-June 1994, pp82–94 (p.87). The article is a French translation of an article appearing in the *Hawaiian Journal of History*, Vol.8, 1974.
- 63 W. Ellis, quoted by Tagupa, *op. cit.*:87.
- 64 *Annuaire de Tahiti* for 1892, ATPF:104.
- 65 It is precisely on the basis of the argument that these disputes are still ongoing that the Montpellier lawyer François Roux, assisted by Bengt Danielsson, established a consultation for the Pomare family in 1987, contesting the suppression of indigenous jurisdiction over land (personal document, supplied by Bengt Danielsson).
- 66 Cf. *Tauhiti*, *op. cit.*, 1978:16.
- 67 Cf. Saura, Bruno, 1993. *Politique et religion à Tahiti*, *op. cit.*:338–40.
- 68 The Biblical symbolism of these two numbers, 7 and 12, is obvious, whether it is conscious or not. On the other hand, the number of judges which was set at seven at the time of the first *toohitu* in Tahiti, could also be explained by the number of territorial subdivisions in Tahiti and Moorea at that period.
- 69 This resolution was approved on 12 September 1988.

# Customary rules in Wallis and Futuna

Antonia Trouilhet-Tamole and Emeli Simete

This chapter unfolds in three parts. The first is a brief reminder of customary institutions and we outline certain particularities of the territory of Wallis and Futuna which differentiate us from our Caledonian and Tahitian neighbours. The second part is devoted to what we could call external influences on customary rules. In Wallis and Futuna, as in Tahiti, there are two essential external influences—the arrival of the early missionaries and the adoption of the status of overseas territory (TOM) in 1961. In the third part we ask questions about, and provide answers to, the future of this custom and raise the issue of a certain adaptation of customary rules in Wallis and Futuna to the transformations we are currently experiencing.

## Customary institutions

We can not begin to understand customary rules without having an understanding of what the customary institution is in itself. To do this, we will outline the specificities of the Territory in relation to New Caledonia and French Polynesia, but first we will begin by exploring the customary institutions themselves.

These customary institutions were not created by the law which made the islands of Wallis and Futuna into French Overseas Territories. The law of 29 July 1961 allowed all traditional organisations to continue side by side with the authorities of the Republic, and these two authorities coexist perfectly. It is a peaceful coexistence which, despite certain small clashes from time to time, has lasted for 33 years.

Despite the small size of the two islands (Wallis has a surface area of 96 km<sup>2</sup> for 8,973 inhabitants, and Futuna has a surface area of 115 km<sup>2</sup> for roughly 5,000 inhabitants) there are three kingdoms, one in Wallis and two in Futuna. These kingdoms are organised identically into two levels—the upper level consisting of the king and his ministers and the lower level of the district and village chiefs.

In the kingdom of Uvea, the king who currently holds the title of *Lavelua* is the highest authority and the supreme judge. He is aided by a council of five customary ministers, led by the prime minister who holds the title of *Kalae-Kivalu*. In Futuna you find exactly the same traditional organisation: the king of Alo carries the customary title of *Tui Aigaifo*, and the king of Sigave currently holds the title *Tui Sigave*. Thus, the king in Wallis and each of the kings on Futuna is the highest authority and, of course, the supreme judge.

As regards as the chiefs, the district chiefs are appointed by the king on proposal from the people. They are the representatives of the Lavelua in a particular district. These district chiefs also have authority over the village chiefs, who constitute the lower level of customary traditional organisation, which is in no way pejorative. The village chiefs are elected by the population of the village, except in the period from 1964–78, when a decree from the High Administration provided for elections based on universal suffrage (or franchise). In the old days these village chiefs had a relatively limited role, being responsible only for organising work to be done within the respective villages. Today, however, they have gained importance, because they organise the work to be done with the credits allocated in the budgets of every constituency. Let us not forget that, if there is a relaxation and rejuvenation of custom, it is because the chiefs themselves are younger, speak French, and have stronger relations with the administrative authorities.

There are 20 village chiefs in Wallis and 15 in Futuna, and today the role of the administration, as in New Caledonia, is simply to ratify those who are designated by the population.

## Particularities

A particularity that requires mention is Article 2 of the statutory law, relating to the status of particular law, which stipulates that the indigenous

population of the island who do not have a common law status maintain their personal status as long as they have not specifically rejected it, as is the case in New Caledonia. What is worth noting, in comparison with the situation in New Caledonia, is that 'the quasi-totality of the Wallisian and Futunese population has maintained a personal legal status', with the exception of a handful of Wallisian and Futunese, numbering about 60–65, and some expatriates who have lived in New Caledonia or in Metropolitan France.

The second point which also constitutes a particularity of the territory is that in Wallis and Futuna 'there has been no massive influx of an external population to the territory'. Actually, the 1990 census for Wallis and Futuna counted a total population of 13,705 inhabitants, of which 98 per cent were Polynesian and only 2 per cent of European origin. For the moment, this European population is marginal in the Territory and is mainly composed of civil servants and their children.

The third point is the 'absence of a communal regime'. In fact the Territory is divided into three districts each corresponding to a kingdom—the district of Uvea, the district of Alo and the district of Sigave. Each district has a council, which could be regarded as a municipal council. This council of members is elected according to customary provisions and is presided over by the king. Village chiefs, who resemble mayors in their administration of their respective communities, do not belong to this District Council, but can nevertheless work in collaboration with the head of the district. In Wallis this head is, according to the law, the superior administrator, but in practice he delegates his powers to a civil servant. In Futuna, on the other hand, the superior administrator has the two titles—head of the district of Alo and head of the district of Sigave.

Finally, the last of these points relates to the land tenure system which exists in Wallis and Futuna, to which we wish only to draw your attention. Paragraph 4 of Article 4 of the statutory law used to stipulate that the real estate and land tenure regime to be applied to the territories of Wallis and Futuna would have to be determined by decree. This article could in fact never be applied and Paragraph 4 of Article 4 was finally repealed. Today, it is essentially the customary authorities who manage the land tenure system. The situation is of course motivated by the customary authorities' long held mistrust of any approaches on the land tenure system. This is reinforced by the fact that most Wallisians and Futunese belong to a



particular law status and especially by the lack of any registered surveys. Yet it can also be explained by a desire not to upset things as they are, which is endorsed by the customary authorities today. It seems, however, that customary rules, far from being fixed, have been subjected to many influences.

## External influences

### The Catholic missionaries

We will try to present you with these external influences which remind us of those encountered in French Polynesia. First, there was the role of the Catholic missionaries, who arrived around the 1830s, and converted the entire population within about 30 years. The man in charge of this mission, Mgr Bataillon, quickly became an adviser to the then queen, Queen Amole, to whom he proposed the Code of Law of the island of Uvea in 1870. This document, which contained the rules of conduct and organisation of the kingdom, remains the only written reference for which certain principles continue to be applied in the kingdom of Wallis.

The code outlines the rules of organisation of the kingdom, the designation of customary authorities and especially of their respective powers, the rules of the district assemblies of the kingdom and of the villages, which are the instruments for decisions by the customary authorities. The code also makes provision for customary courts, which I believe to be an idea of the missionaries as these courts did not exist traditionally, and which continue to rule over litigation between specific citizens today.

Next to these rules, which we can call the rules of organisation of the kingdom, stands the second part of the code, which we could call the rules of good conduct. In fact, these annihilated many of the principles of traditional customary law. Any traditional principle which contradicted Catholic morality was simply put aside so as to give the principles of evangelism full reign. The code also had various provisions to protect the island at a time when there were many merchants, sailors and adventurers who came by sea and represented a certain threat to the integrity of the Territory.

The first point, as in French Polynesia, was a restriction on selling land to any foreigner who had come by sea. This principle still applies because,

except for a few very exceptional cases, it is extremely difficult to acquire land in Wallis without the backing of the customary owners.

Another principle which was written in the code is that there would be only one religion in Wallis and Futuna. Neither the king nor the chiefs were allowed to set up another kind of worship, which would bring despondency to the country. Furthermore the legislator of 1961, when the status of TOM was adopted, wrote, 'the Republic guarantees the population that it will respect their religion', while making sure to put the term religion in the singular. We can reasonably assume that, at the time of the writing of this text, the missionaries had a certain amount of influence over this legal project.

Another point is that the customary authority is responsible for maintaining the clergy. This principle is still applied as villagers continue to participate in both the maintenance of the mission plantations and the annual retreats of the mission representatives.

It is forbidden for any married person to separate from their partner and there are no provisions in the code for people married in custom to divorce.

As regards customary marriage, it simply consists of a church marriage followed by a customary ceremony which confirms it. There are no ministers of customary worship to sanctify the customary marriage, it is purely a matter of confirming the ceremony.

In regard to customary festivals, which are casually called either customary or religious in Wallis and Futuna, each district and each village has its own festival which inevitably commences with a mass, followed by a customary ceremony. The invitations to the festival are sent out by the customary authorities, and the invitation is made for the recipient to participate in both the mass and the customary festivities which follow.

This selection of examples should illustrate the prevalence of the role of the Catholic mission in the customary system, which was to play another role in 1961 when the territory was declared a TOM. The legislator in the law of 1961 established a framework which was quite flexible, if not vague, because nothing precise was said on the role of the customary authorities. It must be said, however, that it was not easy to set a solid framework from the outset with an exact definition of the role of the customary authorities in relation to the new principles of the Republic.

## The adoption of the status of an Overseas Territory in 1961

In thinking about this subject we could say that the customary authorities have at times been implicated or associated with the status of TOM, as well as being set apart from, or concurrent with, or even overtaken by, the arrival of new institutions.

**Implicated or associated custom.** The first point is to retain the particular law status. Currently, 98–99 per cent of Wallisians and Futunese belong to this status.

Second, the statutory law has set up a court of local law which presides over litigation between citizens of local legal status in disputes relating to goods held according to custom and especially for the application of local law status.

Third, in terms of implicated or associated custom, is the participation of the three kings in the Territorial Council as vice-presidents, and as members by law.

The fourth point is the role of customary authorities in the territorial circumscriptions.

The final point concerns the settling of land disputes because, as long as there are no applicable texts, it must be said that all litigation is judged by customary authorities; yet it is nevertheless necessary to think about another way of settling them.

**Custom that has been put aside.** This occurs mainly through the exclusive authority of common law in matters of criminal law. This is something that the customary authorities find hard to accept because the settling of litigation automatically means settling all litigation whether it be civil or criminal. There is an ongoing debate between the customary authorities and the magistrates of the common law jurisdiction about these spheres of authority.

Putting custom aside is also possible for citizens of particular status who wish to claim an agreement under the auspices of a common law jurisdiction.

These are the two areas where custom seems to have been put aside, but if customs has lost authority in these areas, there are still many areas where it affirms itself and, especially, organises a future for itself.

**Concurrent, or overtaken, custom.** This stems from the development of new institutions which emerged from the law of 1961, such as the creation

of the Territorial Assembly, the Council of the Territory, and the respective attachments which were assigned to these new institutions. Prior to this, there was no other power, or counter-power, in relation to customary authority.

It is also a consequence of the emergence of elected national representatives who have an important role to play and who sometimes get into disputes with the customary authorities because important decisions are increasingly being made by the territorial and national elected representatives in partnership with the state. Consultations with customary authorities are becoming less and less frequent.

### Thoughts on the future of custom

It seems useful to think about the subject as a Wallisian of particular status. We believe that the statutory laws have made provisions, in terms of this, for custom to blossom. This 30-year period of stability should have allowed Wallisians and Futunese to think about what they really want to do with custom. It is not a question of completely writing down custom, but it seems necessary, on certain specific points, especially where they are concerned with litigation, to renounce the primacy of oral law and write down what we might call the general principles of custom. This would serve to clarify the issues and extract the main principles for each kingdom, so that we can then think about the details.

We should take advantage of this period of stability. Just as in the laboratory represented by New Caledonia we have had the luck—and we insist on the term luck—to have several possibilities tested in succession, so our richness and luck in Wallis and Futuna might have been to have only known statute which has been flexible enough to allow for several possibilities in which custom can express itself. We need to think about this unique experience and develop it by creating texts, especially land registers. Citizens of particular status who are concerned about the settling of litigation by customary authorities need to be given answers. For example, in relation to divorce, particular status citizens who have lived in New Caledonia are aware that there are solutions for settling a divorce, whereas custom in Wallis and Futuna has not made any provisions for this matter in terms of any particular law. Furthermore, in New Caledonia

the Territorial Assembly has ratified texts brought forward by the customary authorities.

The other point on the future of custom is to try and revive the role of the Council of the Territory in the current institutions. The council includes the three kings and certain ministers who are members by law. It must be revived because, it is currently only consulted two or three times a year (and even then, as if by chance), whereas it is supposed to assist the higher administration and especially to give its opinions on any deliberations before the Territorial Assembly. We would also need to reconsider the District Council, which should be reconfigured to give a prominent role to the village chiefs, in consideration of their current responsibilities. It is through such measures that, in our opinion, our society can go forward whilst still maintaining the rules of custom.

In concluding, we would like to evoke an image. Polynesians have always been a travelling people, people who went from island to island and who would leave an island if it no longer suited their needs. Today we are condemned to remain physically in a territory which assimilates external contributions. It is essential, therefore, to adapt our situation and our style of life to what really exists and especially to the framework that certain followers of custom sometimes call the rigid framework of the rules of the Republic.





# 6

## Custom and the magistrate

approach and practice in New Caledonia

Fote Trolue

### Historical overview

When the French administration arrived in New Caledonia towards the second half of the nineteenth century, it discovered a population scattered among different indigenous kingdoms, within each of which custom was practiced to varying degrees. It seems important to me to highlight this unifying aspect of custom to guard against the temptation of stressing the existence of several customs and forgetting the common base by dwelling on differences of degree.

At that time, France wished to establish a colonial settlement in New Caledonia and nothing was to impede this ambition. As the Kanak population threatened this goal, if only by its very presence, the French administration decided to take charge of the matter. It started by excluding Kanaks from the political and administrative systems by making them French subjects and then by quartering them off into restricted areas called reservations, which they could only leave if they had official permission.

Although these reservations were an affront to human rights, they nevertheless allowed the Kanak population to continue living according to custom and hence preserve a cultural identity.

It was not until 1946–47 that the indigenous population—subjects of France—became citizens and could participate in the political life of the



Territory. The French administration not only exiled the Kanak people to the reservations, but also actively encouraged colonial settlement and organised customary society according to its own criteria. And so the districts were born (restoring the pre-existing 'kingdoms' either partially or totally), led by the high chiefs, as were the tribes, led by the tribal chiefs with the Districts Councils and the Councils of Elders.

In terms of common law, the administrative organisation of customary society turned the 'tribes' into moral persons, making them responsible for offences committed by their members. The high chiefs and the tribal chiefs were responsible for the maintenance of public order within the geographical perimeters of their authority.

## A partial consideration of custom

The acquisition of French citizenship by Kanaks did not mean a disavowal of their customary values. Both the constitution of 1946, and that of 1958, expressly recognised these values in the following terms.

All citizens of the Republic who do not have a common law status maintain their personal status as long as they do not reject it.

But this recognition of personal status would be limited to '*L'État civil des personnes*' (marriage, divorce, adoption, inheritance) and had no effect in other areas of the law. For example, the criminal or social laws of the Republic would be uniformly applied in New Caledonia, regardless of cultural origin.

Under the constitution, both the organisation and the application of particular civil status would come under the jurisdiction of the Territory until 1988, when it passed into the hands of the districts.

Until quite recently, litigation over matters governed by particular status was virtually never brought before the common law courts. They were settled directly by the customary authorities. The end of the *régime de l'indigénat* (which coincided with the Kanak acquisition of French citizenship) and the exit of Kanaks from the reservations posed new problems whose solutions could not be found in custom alone. As a result, the common law model was increasingly used by Kanaks seeking to settle litigation.

## Kanak cultural revival and the growing recognition given to custom

Custom is one of the pillars, if not the main one, of Kanak political claims and independence. In order to appease this political claim, the French administration started organising a better and more real recognition of Kanak cultural identity. The customary authorities, the clan, the palaver, and other institutions, was no longer confined solely to the districts and tribes, but came into the common law courts to assist the professional magistrate in his or her encounters with custom. In this regard, an ordinance of 1982 established customary assessors who are put forward by the customary authorities of the various customary areas to join the common law court when it encounters litigation over matters governed by particular civil law. Moreover, the legal decentralisation that occurred with the creation of sections of the *tribunal de premiere instance* in Noumea, Koné and Lifou, will further aid in taking custom into account.

## Custom calling on the magistrate

With the coexistence, in civil matters, of two categories of persons—those under the regime of common law and those of particular legal status—New Caledonia presents a novel dimension to the magistrate who comes here to take up his or her functions. Furthermore, the principal of legislative specificity means that the laws applied in metropolitan France are not automatically applicable in the Territory. This is the case for the Territory's and the Provinces' own legislative and regulatory authorities, which also call on magistrates, particularly to confirm the legal foundations of their decisions.

It is important to highlight the fact that Kanak political and cultural claims will also have certain consequences for a magistrate's approach to custom. Until recently, when a common law judge was called to deliberate on a matter pertaining to particular law by a citizen of particular status, he or she would immediately declare him or herself incompetent, based on Decree 424 of 3 April 1967, on the application of particular status, making it applicable to all to custom. While declaring himself incompetent, however, the judge would mention that the only way for the matter to be brought into his or her sphere of competence would be for the claimant to

renounce their particular status. Often enough, Kanak claimants who were unhappy with the customary process, especially a perceived laxity, would end up changing status, against their desire so that a problem could be settled by a magistrate in a common law court. In fact, neither the claimant, nor the magistrate, was satisfied with this way of settling litigation. Moreover, as soon as a solution to the litigation was found the claimant would hastily ask how to get their old status back, only to be bewildered that the change of status is irrevocable. Another worry is likely to plague them: will the renunciation of personal status undermine their social situation in the reservation?

As for the magistrate, the situation may be satisfactory on a human level, but is dubious on a legal level—how can a magistrate dissolve a marriage that was celebrated under a particular status regime for a citizen whose only justification for this is an earlier renunciation of his or her particular civil status?

Is this a way of skirting proper procedure by allowing a particular status citizen to escape custom for a case that should come under that statute?

Should the magistrate apply customary notions of time for customary settlement procedures between particular status citizens?

For example, in a decision in 1989, the magistrate ruled, based on a legal fiction—that common law prevails over particular law—that it was legally impossible for a common law child to be adopted by a particular law citizen. This position was reinforced by the idea that a renunciation of status could only be made by particular status citizens. Moreover, a magistrate is called upon to rule not only on civil matters but on criminal law as well, although particular status has no effect in that domain. To understand this situation we can use the example of a particular status citizen who occupied land on a reservation without appropriate customary title. The concerned individual ignored several notices to leave by the proper owner, who was supported by the council of elders of the tribe involved, until the day he was chased from the land and his crops were destroyed. When the case was brought to the customary authorities they ordered the man to return to his own clan land, but told the true landowner and the Council of Elders to rectify the material damage done (supply yams, potatoes and vegetables and rebuild the hut). Unhappy with the customary decision, the man lodged a complaint to the highest-ranking

judge, and criminal law procedures were set in motion. From this point on, the guilty party from the customary perspective became the victim in front of the magistrate, and the victims according to custom became the alleged perpetrators of a crime in the common law courts. In terms of the criminal law procedure, the true customary landowner and certain members of the Council of Elders were charged with destruction of property belonging to someone else, and on a civil level they were ordered to pay compensation to the claimant. The criminal law magistrate limited himself to the criminal implications of the case and declared himself incompetent to resolve the real cause of the lawsuit, which was the issue of land tenure. In custom, the litigation forms a whole, from the violation of customary rights through to the destruction of the crops and the harvest, but, in written law, litigation is dissected into different customary (land tenure) and penal (destruction of goods) aspects. While the magistrate thought that this was proper legal procedure, the accused saw themselves as victims of an injustice, because, on the customary level, they were the ones who had sought justice. I mention this case in order to highlight the fact that contradictions can exist between customary and written law. The magistrate must take this into consideration in the interests of those going to court and especially of justice itself.

Kanak cultural revival, combined with the rise in the number of particular status citizens seeking to settle litigation in common law courts (which can partially be explained by a certain laxity of the customary authorities), will lead to certain innovations by the legislative powers. The creation of customary assessors to assist the civil courts with matters pertaining to particular civil law is a case in point. The magistrates are showing a different attitude towards the adoption of a common law child by particular law citizens when they abandon the primacy of common law over particular law to work towards the interests of the child and the family, and when they explain clearly to the particular status citizen the irrevocable nature of a change of status.

This evolution of practice and of the texts does not, however, mark the end of customary recourse to the magistrate. He or she could be called upon at any time to rule on a case coming under particular legal status; for instance, between a Wallisian wife and Kanak husband. Which status would prevail; the Kanak or the Wallisian status? And with the rise in

conflicts over land tenure, will the magistrate continue to consider only the penal aspects of the cases, and turn a blind eye to the customary dimensions? In light of the diversity of customary practices, one can wonder whether the customary assessors will provide sufficient aid to the magistrate in the search for legal solutions that help to harmonise human relations in society.

## Conclusion

The transformation of attitudes and morals means that the solutions to the new problems confronting custom today are not necessarily found in custom alone but also in common law. One of the major difficulties confronting a magistrate dealing with a case pertaining to particular status law is the diversity of customary practices which, because of their oral nature, produce uncertainty. To facilitate the work of magistrates, it would be worth considering writing custom down, with all the advantages and inconveniences that includes. It is up to the people who can claim customary status to make the choice themselves.

In the beginning of this chapter I spoke of the duality of status. Beyond the issue of the relationship between custom and the magistrate, lies a more profound and general question, which concerns all the citizens of this country—will the co-existence of two statuses undermine the emergence of a Caledonian nationalism?

# 7

## The magistrature and custom

questions and answers on approach and  
practice in New Caledonia

Bernard de Gouttes

A plaque in the house of the Claudels in the île Saint-Louis displays a sentence that Camille Claudel sent Rodin, 'Whenever I think I have understood the world, there is always something missing to torment me.'

This volume, which is about understanding the world, also holds something obscure for us judges of the law, when we think about how we exercise our legal functions in Kanak circles.

An inherent lack of understanding of the Kanak world leads us to an uncertain approach towards the subjects or objects of law that we act on in our legal interventions. We can see this as an outcome of the process that Carbonnier called 'the institution of doubt which leads to decisions'.

There is also an absence of the parameters of time in its acceptable duration and progressive evolution. A court judge has to make a decision at a given time for a specific act, and the decision is contingent on the case at hand. To highlight the relationship of the justice system with custom in 1994 without considering the persistence of Judeo-Christian concepts of man which inspire common law, European conventions, and *Onusian* law would lead to unlikely certitudes.

So, as judges of the French legal system, we are called on to make a decisive choice—either we apply French law by marginalising particular local law, or we apply French law by maximising its capability to take Kanak customs into account.

The legal history of New Caledonia shows the oscillations of the judges and of jurisprudence on this dilemma, which arises whenever a legal decision has to be made in Kanak circles.

What I show here are the heavy considerations that weigh on a judge who has to rule on a case that involves Kanak customs.

The first question is based on the fundamental issue of the compatibility between the task of the judge, as defined by Article 66 of the Constitution of the Fifth Republic, to guarantee individual liberty, and the fact that Kanak culture blends the notion of individual responsibility with that of the collective responsibility of the tribe.

Moreover, the question of written law and oral tradition can not be avoided. The radically different approaches between a written positive law and an oral tradition, which is more flexible and contingent on the inclinations of the authorities, give rise to severe complications. These complications relate as much to the issue of securing the permanence of a legal or customary norm as to the validation of these laws.

In the same vein, there is an opposition between the transparency of written law, which only has legal validity once an act has been publicised, and the relative confidentiality of custom, where knowledge is subordinate to the elders (and what they say) and where confidentiality can be total to ensure the secret and sacred nature of a particular tradition.

These contradictions, although not exhaustive, were encountered in two long periods in the history of New Caledonia. The first of these can be summed up as a kind of negative conflict over legal competence. A parallel trajectory between the customary Kanak world and the legal world was created. The state left all customary litigation in the hands of the customary authorities, and essentially intervened only in conflicts that it considered a threat to the public order.

The common law justice system was invoked basically only for conflicts in which the litigants were governed by civil law or had a criminal record. This kind of application of the proverbial 'rendering unto Caesar what belongs to Caesar and to custom what belongs to custom' was transformed as a concept of the individual's relation to the tribe developed, to which the customary approach did not always respond.

The emergence of the concept of the individual was largely triggered by growing awareness of the individual as a subject and actor of individual

and economic rights. The starting point of this second period seems to me to lie in the first confrontation between Western and tribal worlds—evangelisation.

This was based on the concept of the sacred nature of the human person made in the image of God and emphasised the individuality of the human person and the sacred nature of his or her dignity. Therefore, it does not seem coincidental that the rise in cases brought to the common law court by particular law citizens stems from the actions of particular status citizens acting as victims.

The victims of infractions increasingly feel that the customary settlements do not provide just compensation for the damage or aggressions they claim to have endured. This slippage between customary compensation and what the victim considers to be proper compensation stems from several causes: an uneven distribution of authority in each of the regions, customary institutions, an evaluation by the customary authorities which does not reflect the current attitudes of particular status citizens, and, finally, customary sanctions which are no longer accepted, particularly corporal punishment. Hence, the usual area for the collision of particular law and common law justice has often been criminal law.

The most characteristic illustration of the development of these ideas are the victims of sexual aggression who no longer consider the customary sanctions—compensation from clan to clan—to be an adequate coercive measure for the offence that was endured. It is significant that the psychological or psychiatric reports established for the hearings show analogous reactions between women who were raped in the bush and those who were raped in large metropolitan cities.

Beyond the divergence of cultures, the denial of one's own dignity provokes the victims to an irreducible reaction of revolt and an appeal to common law justice, which seems to them to be better geared towards the protection of victims than the customary settlements.

It is also important to note that the Kanak associative or political milieu brings its own concerns to this change of attitudes and contributes to the reliance on common law, because it considers that customary reparation does not exclude criminal law.

Parallel to the rising awareness of the rights of the human person in his or her physical and moral integrity, the economic, social and cultural evolution of New Caledonia has also brought particular law parties to the



common law courts for litigation on patrimonial, economic and social issues. The consecration of this approach towards common law was realised in 1982 when a decree created customary assessors for particular law litigation.

This decree mentions the conciliatory role played by the customary authorities in Melanesian communities under local law, but also makes provisions for cases where litigation is brought to a common law court by a particular status party. In such cases the court is supplied with an even number of particular law assessors who have a deliberative voice. If the judgment is appealed, the Court of Appeal is also supplied with customary assessors.

The decree attempts to strike a balance between the maintenance of customary settlement, by stressing the customary authorities' preliminary role of conciliation, and the requirement for a judge to render justice, a constitutional obligation without which any use of the justice system would be a denial of justice itself.

Experience shows that the call on customary assessors to complement the courts in particular law litigation is limited. Yet there has been a slight progression, particularly since the creation of sections separate from the Noumea Court in the Northern and Island provinces.

It is true that there is at least an apparent contradiction in having professional judges, bound by common law, ruling on cases pertaining to particular law, even if they are aided by customary assessors. Furthermore, these kinds of cases have been of limited scope, dealing mainly with the separation of spouses (as divorce is not recognised in Kanak society), child maintenance, division of property and goods, or child care. More often than not, when a case has not been settled by customary avenues, the claimant tends to opt for a common law solution, renouncing his or her particular status.

On the other hand, the customary authorities are seeking more formal and concrete recognition of their role, because they fear seeing custom reduced to 'a culture' when it is politically responsible for social organisation. This was expressed in the Matignon Accords, which set up a working group to reflect on the future of particular law and its adaptation to the modern world.

Although I do not wish to pass premature judgment on the tangible developments that will emerge out of the conclusions of the working group,

several variables need to be taken into consideration. First, general principles of particular law must be elaborated in a written form. Then, a procedure must be devised for settling conflicts between particular law and common law, and particular law conflicts between different customary areas. Finally, customary law must adapt to new social situations like divorce, family breakup, or the creation of private enterprises.

The Territorial Assembly of New Caledonia has already supported a kind of external organisation of customary law in the 1967 ruling on the civil status of particular law citizens. In 1962 and 1965, it passed a resolution on the establishment of certificates of inheritance and, in 1958, it passed a decree on the attribution of land in the spirit of land tenure reforms.

The Noumea Court of Appeal has also taken particular law into consideration within its jurisprudence. It has done so in diverse areas of the civil code, like divorce, personal status or child care.

Throughout these regulatory and jurisprudential progressions, two fundamental, but veiled, questions remain unanswered. Does common law have primacy over particular law, and is there any possibility of divisibility for these statutes?

The State Council was asked to explore the problem of irreversibility for a particular law citizen who opts for common law.

The High Assembly considered that common law status was an achievement of the Republic in terms of individual liberty, the legal consequences of the Declaration of Human Rights, and the rights of the citizen. It did not consider this to be irreversible, because Article 75 of the Constitution was, in a way, only a conservatorial law. In other words, the State Council touched on a legal incertitude which would jump at the opportunity of putting forward the possibility of a change of status, as well as the impossibility of setting objective criteria to determine who would in fact be eligible to change status—how many generations would we need to go back for this?

On the other hand, the Noumea Court of Appeal has denied the primacy of one status over the other in several decisions. Furthermore, as protector of the rights of the individual, it puts forward the principle that opting for common law status is not irreversible for children of a mixed marriage or of particular status parents. The decisive factor for the judge is the legal capacity for choice—the coming of legal age, when the child can choose his or her status in a way that guarantees their ‘free choice’.

On top of this first attack on the irreversibility of a change in status, the fact of the divisibility of status is being progressively recognised, although not fully established. According to the activities a particular status citizen is engaged in, he or she can come under either common law or particular law.

That is what the debates of the Territorial Assembly, which I mentioned earlier, brought about. This was done by allowing particular status citizens, for example, to partially renounce their status when acquiring real estate so as to give them the benefits of common law status.

We can see the vague outline emerging of a person being of particular status in the 'tribe' and common law status 'in town'.

Is this the beginning of an answer to the contradictions of particular law and common law that might allow for a particular status citizen to maintain customary identity, whilst still participating in the human and economic activities of a Westernised society? It is difficult to tell. This approach, however, has not yet been critically examined either by the Council of State or the Cour de Cassation, the two supreme bodies of public and private law.

Court judges, who are under the obligation to apply justice to whoever asks for it and act as guarantors of individual freedoms, can only apply the laws over which they have the authority to do so. Of course with the combined effects of Articles 74 and 75 of the Constitution, the law of the Republic in New Caledonia has developed a unique 'expression'.

Article 74 gives the Territorial Congress a large part of the responsibilities that come from the Parliament of the Republic, and this is growing in scope. This allows a specific legal situation for the Territory. Article 75 establishes the recognition of particular local legal status, providing much more autonomy to the customary authorities.

Nevertheless, the fact remains that the legal state in New Caledonia draws on a Western legal model, which is that of the main industrialised societies of the world, and which is based on a different conception of the world than the traditional approach of Kanak culture.

But the Kanak approach is not fixed either. It is under siege from the modern world—namely, the rise of the notion of the individual within the tribe, and the requirement of legal security, which is a necessary condition for development.

It is said that 'facts are stubborn', and it is up to us—judges of the law and the customary authorities—to acknowledge this. It is up to us to be

## Custom and the law

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attentive to the evolution of society and to be determined that there can be no true state of law without cohesiveness.

Only through an empirical, flexible, and forward looking approach will judges find an ongoing balance in conflicts between particular and common law. This will have to be on a case by case basis and will have to take into account the evolving nature of custom, which is itself influenced by the evolution of society.

# 8

## Customary law and custom in Polynesian jurisprudence

René L. Calinaud and Camelia Domingo-Neti

To discuss land tenure and custom in jurisprudence, it seems necessary to begin with some definitions. Jurisprudence is the result of the pragmatic application, interpretation and comparison of legislative texts by judges. It is the resolution of multiple concrete cases which gradually produces a whole legal system which is more or less coherent.

Land tenure, *stricto sensu*, concerns human relations with land, or to be more precise, the relations between humans with regard to the subject of land. Yet it goes beyond this. When legal reforms for land tenure were undertaken in Polynesia, there was an attempt to define what a *chambre foncier*<sup>1</sup> could be, but nobody could pin it down with any real precision. In the greater sense, land tenure encompasses questions of property, inheritance, sale, gifts, sharing and dividing, delineation, leases and possession. Furthermore, the problems of urbanisation cannot be separated from those of kinship relations.

Custom, in a legal rather than ethnological sense, is also a set of norms with communal values. Its particularity is its traditional foundation and essentially oral nature, occasionally marked with concrete objects. The delineation of property in Polynesia was marked by a tree or stone which, by virtue of this, became sacred or *tapu*. In the beginning, custom created the law, which then either became fixed through codification or evolved along its own lines.

In expressing these ideas it should be pointed out that according to French concepts, the law, by its very nature, is written. French law is thus opposed, in principle, to custom and tends to leave little or no room for it.

Yet for those of us in French Polynesia, the problem of the law/custom relationship is more apparent, more urgent, and larger in terms of land tenure. This is because problems and questions over land tenure generally tend to last a long time. For example, when one is confronted with a problem of child care, or a work contract, the current laws suffice, but when a judge is presented with an inheritance settlement based on a deed of 1852, he or she has to consider the legal situation at the time, which was not homogenous, as well as issues of kinship and filiation. This is why genealogists sometimes appear as miracle makers, because, while property titles are limited to certain documents, the frequent changes of civil status pose enormous difficulties for claimants trying to establish their part of an inheritance.

It is interesting to note that Polynesia, unlike several other French territories, does not have two coexisting types of jurisdiction. Custom and laws are subject to a single more or less homogenous system.

It is worth sketching an outline of the evolution of the legal state in French Polynesia here. In doing so, we can distinguish three main periods. The first was the era prior to European implementation of written law. Culture was not written, but that obviously does not mean that there were no social rules. On the contrary, the rules regulated behaviour in relation to universal issues such as the relationships of couples, descent (kinship), and land appropriation, which are all categorised as 'legal' issues. We can therefore legitimately speak of customary law (or more precisely of 'traditional law').

The following period, which we call the 'transitory law' period, started with the first local codification—the Pomare Code of 1819—and continued until the promulgation of the Civil Code in 1874 for most of the Territory, and 1945 for the Leeward Islands and part of the Austral Islands. Initially, the written laws did not cover land tenure. The issue of land, however, became more and more developed in the codes, although custom retained an important place.

Finally, the contemporary era is that of a Western-type written law. Internal evolution is characterised by a considerable increase in regulations

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and an increasing alignment with the metropolitan system. Custom is only a residual survivor.

A certain amount of leeway is left to the judges to either elucidate custom or absorb it into their legal determinations. As early as 1896, the Cour de Cassation advanced the principle by which the Papeete jurisdiction of appeal

...has the sovereign power to determine the essence of the law, the competence and form of jurisdiction for all that concerns local customs prior to French annexation.<sup>2</sup>

This generally concerns the first two periods that we outlined, but since our legal system considers anything not drawn from French law<sup>3</sup> to be a matter of pure fact, we might think that this position would still be valid for contemporary customs in as much as the interstices of written law can allow them some space.

This creates two problems. The first is to determine which custom is at issue, because, as long as custom is alive, it will change. It changed before with the development of new technologies and morals—access to land was not practiced in the same way in pre-European times, with cultivation of taro and other staple crops, then on the large coconut plantations, and it is different again today. Undoubtedly, the possibilities for construction on undivided land were not the same during the era of bamboo huts as during the time of cement buildings. Custom varied (and is still changing today) between archipelagos. Property titles in the Society Islands were established by a genealogical link to the ancestral *marae* and, in the Taumotu Islands, by belonging to a clan-like organisation called the *ati*. Today, the legal situation and the problems encountered in urban areas are not identical to those in the rural sectors. Custom also varied according to social class—while ‘small’ landowners were limited to the family land of their place of birth, the Tahitian aristocrats could claim several distinct *marae* as their own. This is just an outline to give an idea of the complexity of the phenomenon.

Once the sphere of custom has been defined, the second problem remains—determining what it comprises. In practice, the methods and answers change according to whether one is trying to specify and apply customary law as it was at the time when it had a legal existence, or whether one is trying to do so in terms of the contemporary continuation of customary practice.

In the first case, the work of the judge involves the interpretation of the few texts that were written during the ‘transition period’ (mainly the Pomare Code with its successive revisions, the Tahitian law of 1852 on the registration of land, and the codified laws of several other islands). The judge must interpret these in terms of what we know of the social conditions of the time, and for this we have several ethnographic documents of the eighteenth and nineteenth century. There are about 20 or 30 decisions of this type from 1886 to 1994 classified relating to capacity—entitlement, parental authority, the effects of gifts, descent, adoption, property, marriage system, inheritance and usufructure. Furthermore, one of us was commissioned to go to Rapa to specify the rules of inheritance that applied prior to 1945 and to verify that, in accordance with the Polynesian customary system, children were treated equally, whether they were born in or out of wedlock.<sup>4</sup> This could lead to a more detailed study of customary law, but we will not go into specifics here.

In the second case, which contemporary land tenure customs can we recognise as carrying legal efficacy? The first notion that comes to mind is that of uncertainty. In our system (which we call an *Etat de Droit* [‘legal state’]), non-codified custom is a question of fact. Consequently, it is up to the party claiming custom to put forward the proof of its existence and substance. It is quite rare for this to be done with any real relevance, however, as confusion reigns in the minds of people. The population is committed to its traditions, but more often this takes the form of a ‘spirit of tradition’ and a cultural community rather than precise, clear, and uncontested practices. Today, custom is a kind of mythical nebula. It is often referred to because it is vaguely associated with ancestry, but without really knowing what it is and mixing it with biblical citations and in relation to immediate personal interests. The same claimant, in the same case, may call on custom to block a sale or a testament which bothers him, and then invoke the civil code to eliminate his cousin under the quite anti-traditional pretext that there is no formal recognition of that cousin. Legal stability and equity both lose out in this game.

Yet the judges, at their own discretion, can draw on local custom when it seems to serve a useful purpose for the case at hand. We will explore some practical applications of this, but first we should come back to what we have just said, highlighting two essential characteristics of the French Polynesian situation compared to that of New Caledonia.



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The first one, and this is what differentiates French Polynesia from New Caledonia, is the unity of legal status. This unity stems, in most of the Territory (the ex-Pomare kingdom and its dependencies), from the implementation of the civil code in the period 1866–74, as well as the annexation documents of 1880 and the joint declaration of 1887. Later, the ordinance of 24 March 1945, which extended full citizenship to ex-‘subjects’, and its complementary decree of 5 April 1945, suppressed the last of the indigenous jurisdictions. Although there is an *état du droit local* (state of local law) which is hardly different to the metropolitan state (*état métropolitain*), it applies to all residents of the Territory, regardless of origin or ethnic group.

The other characteristic, which makes us similar to New Caledonia, is that here as well, land—the relationship of people to land—is an important element of identity. We would like to quote *feue* Aurora Natua, a Tahitian personality who was knowledgeable, but discreet, about her traditions. When somebody from her island approached her to say ‘we are *Fetii*’ (cousins), she would answer by asking ‘oh yes, on which *Fenua?*’ (which land?). From her perspective, that was everything.<sup>5</sup>

So, in turning to some of the findings drawn from actual jurisprudence, we will not speak of the many cases where custom seems to more or less correspond to French law. For example, adoption existed in traditional society—the problem today is whether or not the legal formalities are followed.

The civil code allows for subsidiary recourse to local usage in a limited number of situations, for example, for the distance required between plantations and the boundaries of properties; for the delays awarded to the taker, when the lease is not under some special rule or convention; or for the division of produce between the landowner and the tenant. In the latter case, the courts have determined—based on known contractual examples, reports from agronomists and geographers, and statements collected during legal enquiries—that the division of the produce of a coconut plantation is usually one-half for those who work the land, one-quarter for those who own it, and one-quarter for those who planted the trees.<sup>6</sup>

Since the 1960s, the courts have had to deal with a new kind of lease which relates to the suburban zones—when a small plot of land is rented for construction by a tenant of a temporary dwelling. This is what sustains

the shanty towns, where this type of convention escapes the regulations for residential leases and rural leases. There was a need to set commencement and completion dates and determine how long it would last for. The judge confirmed that the usual practice was to allow 3–12 months for notification, according to the particular circumstances. In fact, however, he invented this—a praetorian creation which is now set in writing.

These two examples may show a positive approach to custom by jurisprudence, sometimes studying custom objectively and sometimes seeking to contribute to its production, through analogy and a desire for equity. They are nevertheless somewhat marginal, and it is more interesting to see how fundamental characteristics of traditional land ownership survive in contemporary legal practice.

One of these characteristics was that property, which was transmitted through a line of inheritance going back to a founding ancestor, was inalienable. The sale of land, however, was legalised in Tahiti by the texts of 1844–47. The concept of prescriptive acquisition was introduced at the same time, when the term *aitau* ('eaten by time') appeared, and was legalised as a consequence of the implementation of the civil code. Today, claimants who seek to sidestep these modes of acquisition in the name of a tradition that has been abolished for 120 years are tackling a legal condition which cannot be avoided. On this point, the conflict between custom and written law is insurmountable.

Another essential characteristic is that property was family owned. Land belonged to a family, not an individual, and this notion has persisted to the present<sup>7</sup>—it explains the undivided nature of most land today. Different regulations have tried to suppress it, all unsuccessfully. In legal practice, none of the co-holders are forbidden from making a claim to and obtaining, a division of the land. Yet the idea of the family entity still maintains efficacy, particularly in relation to the notion of *souches* (ancestry, origin, lineage, 'stock') and hence the problems of prescription.

In legal terms, the *souches* correspond roughly to Tahitian term *opu* and are the sub-groupings which delineate the inheritors. They have a recognised role in both the provisional management of co-ownership (the heads of lineage are responsible for the allotment of rent and for organising the harvesting rosters<sup>8</sup>) and at the level of distribution (most of this is done by the lineages, not the 'heads'<sup>9</sup>).

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These incidents are also seen in the realm of prescriptive acquisition, and the law has changed on this matter. Originally stemming from a political and colonial administration which was hostile to co-ownership, there was a tendency to systematically favour 'usucapion'. In the mid-1990s a Land Commission incorporating members of the Territorial Assembly and a magistrate, did research in all the districts of Polynesia and found that the population held strong reservations about the institution of usucapion. As a result, jurisprudence changed several years later and became hostile to prescription, perhaps overly so, as a reaction to the previous position. Today, the position of the courts is more subtle and pragmatic. In terms of the family ideology in question, the principles that have been extracted are, on the one hand, a strong insistence on the actual nature of possession when a case involves an co-owner who is said to have 'usucap'e' against the rights of other co-owners;<sup>10</sup> and, on the other hand, the possibility of acquiring land by prescription, not of a delineated plot but of an undivided area,<sup>11</sup> or of acquiring land on behalf of the family branch rather than on one's own.<sup>12</sup>

A third fundamental characteristic is the clear distinction traditionally made between rights of ownership of the land and the right to exploit the land.

Following the research mentioned above, the Commission developed rules to specify and protect the 'rights of the plantation owners', but these never actually came into existence. The effects of this custom are quite clearly manifested in the law.

The law has recognised, under certain conditions, a specific right called 'rights of *superficie*'. This is analogous to French metropolitan customary land tenure—and allows the developer to be the sole owner and have free use of the plantations and constructions he or she has created, regardless of whether he or she is the actual owner of the land.<sup>13</sup>

Furthermore, the rules of the civil code, which are supposed to restore the produce of individual plantations on undivided land to all of the inheritors, are never invoked in court, or only in cases of clear abuse.<sup>14</sup> For the same reason, they are often followed by a preferential attribution of the shared plots which operates outside the strict conditions set by the law.<sup>15</sup>

The last of the characteristics is the importance of the marine environment. This mainly means the coast and the lagoons, which are a

source of food and a means of communication. Here are two examples of how they have been taken into account by the law.

First is the recognition, in specific cases, of the private appropriation of parts of a lagoon. The law in this regard became widely-known through two cases in 1979–80 and 1991, but actually draws on several judgments between 1864–1953 and is based both on metropolitan models and on the study of the Pomare Code and ancient customs.

Second is the fact that in dividing marine tenure, access to the riverbank is often granted to co-owners whose lots do not touch it. There is no article of law to enforce this—the parties ask for it, the experts make provisions for it in their reports, and the courts ratify it. We could say that a textual vacuum is filled here by the imposition of custom.

This quick overview shows how local jurisprudence can adapt to the land tenure situation of the Territory by giving the texts a meaning that flows from custom, and by inserting custom into them, even if it sometimes means overlooking an article of the Code.

All this, however, depends, in part, on the judge making a decision. This is because there are two schools of thought among the magistrates. Some apply the law in Papeete as they would in Dunkerque, without having to worry about particularities and consequences. Others believe that their role is to adjust the law to the needs of the people. Some manage records, and others deal with concrete situations. It does seem that there may be a problem of equity for claimants, depend on which school of thought they encounter in the court.

On the other hand, it is clear that abandoning customary information produces harmful social and economic effects, and the development of a mentality of individual ownership feeds into the destabilisation of the population. This set of phenomena is irreversible, and it is no longer possible to simply let people go back to disintegrated or altered ancestral practices. We need to make do with modern technical and legal constraints.

Polynesians are aware of the advantages of a legal decision which solidifies co-ownership over custom, where all is oral. So, in order to solve the problem of land tenure in Polynesia we need to research the past.

The answer involves a number of reforms that should encompass the entire land tenure system, but what we are interested in here are the procedures. By that we mean the proposals of the *College d'experts fonciers*

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(College of Land Tenure Experts) and of the Territorial Commission for Reconciliation. These projects have passed into the institutional texts but have not been applied effectively. They should recall one of their inspirations—to help the law in its treatment of land tenure by using those who know what survives of custom. Let's hope that the way they are implemented lives up to these expectations.

### Notes

- 1 Translators note: I have left this technical term in French: it translates roughly as an 'area of tenured land'.
- 2 Cass. Req. 20.1.1896; *Revue Penant* 1896, 291.
- 3 'Law' refers here to the larger sense of 'laws and regulations'.
- 4 *Rapport du juge forain sur l'application du code civil à Rapa*, R. Calinaud, 16 September 1981.
- 5 *Bull. Soc. Etudes Océaniques*, 1991, No. 5:254–5.
- 6 *Bull. d'information du Tri. Sup. Appel*, Papeete, 1980, No. 2:16–18.
- 7 It was maintained in practice by the users when land titles were created.
- 8 For example T.S.A 59 of 24 September 1953.
- 9 T.S.A 122 of 28 July 1955; 93 of 17 May 1956; 2 of 27 January 1966.
- 10 T.S.A 3 of 6 January 1977; and Cass. 29 October 1979; Cour d'appel 116 of 9 August 1984; 39 of 10 February 1994.
- 11 T.S.A 244 of 8 January 1962 and Cass. 30 January 1967; Cour d'appel 142 of 4 June 1987.
- 12 T.S.A 122 of 28 July 1955; Trib. Papeete 364 of 9 May 1975.
- 13 *Encycl. Dalloz V. Superficie*; T.S.A 42 of 6 March 1958; T. Papeete 854 of 14 January 1975, 170 of 11. February 1976, 506 of 22 June 1977, 763 of 8 August 1979.
- 14 C.A. 116 of 4 April 1991
- 15 T.S.A 20 of 17 April 1969; C.A. 171 of 1 December 1983; several decisions by the Court of Papeete.

## Annex I

### The opinion of the Tahitian legislator of 1852 on the need to reform customs

Extract from the proceedings of the Tahitian Legislative Assembly's session of 5 March 1852. The debates preceded the vote on the Tahitian law on '*L'État civil*' of 5 March 1852.

The order of the day calls for the discussion of the proposed law on the acts of the civil state (*état civil*)

*The president:* The spokesperson, Ote, has the floor.

*Ote asks for the Assembly's tolerance:* He feels somewhat underqualified, but is anxious to fulfil his obligations, and does not want to miss out on the discussion of a law which will fill a large gap in the Tahitian Code. For a long time now, he says, we have been dissatisfied with the uncertainty, or rather the obscurity, of family genealogies. They are an ongoing source of litigation over land tenure. The absence of titles and the impossibility of establishing the exact links between the various parties, always leaves some uncertainty in property law. Land is passed on from hand to hand. As soon as a case is closed, others step forward to make claims. Despite all our efforts, our judgments are precarious; we lack any solid foundation on which to base our decisions. And this state of affairs has unfortunate consequences: apart from the confusion, and the enmities sparked by the litigation fever that has grasped the country, agricultural activity is languishing. A landowner today is never sure that his rights will not be contested tomorrow. And this causes a pernicious disincentive: people do not want to work land that is under continual dispute. So despite all the ongoing efforts of the Governor, his planning and urging, his encouragement and freedoms, he cannot make agriculture flourish. Our lands remain fallow. It is security that is missing. A father of a family would work hard if he could be assured that the fruits of his labour would not go to someone else who, through litigation, would take them from him and his family just when they were about to reap the benefits. But that is not all: not only are people not working, but when a foreigner wishes to rent land in order to render it productive, they are refused access because of the uncertainties that hang over land tenure. No one knows whom they should be dealing with, or the land remains undivided between several

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people...some desire to rent it out, and others do not; or the conditions acceptable to some are unacceptable to others. This is the lamentable chaos we have been struggling with for so long. We must get out of it (*entirely: hear, hear!*).

‘Well! The law that is put forward offers you this. Under this law, it is true that our old customs will be violated, but the flames of litigation will die down, and security will breed work. Once the law comes into effect, nobody will be hindered and confused by trying to trace our ancestors; this epidemic of discord, of court cases, of laziness and misery, will cease to inflict our country. Every session of the *toohitu* leads to a multiplicity of litigation where the judges are forced to make decisions based on the uncertain memories of elderly people who are questioned on the ancestry of the parties involved. Once this information is set into public registers it will be an enormous advantage! The memories of men weaken, even if their declarations are guided by the best of intentions; but that which has been put down in books remains always clear...In short, the new law will replace obscurity with light...

*The speaker, who spoke with vigour, appears tired. ‘There is much more to say, he adds, and I have only partially demonstrated the advantages of our law: but the audience is perceptive enough to realise that fatigue, and my relative lack of qualification, do not allow me to fully develop the issue.’ Ote returns to his place.*

## Annex II

The law of 10 March 1891, ratifying the statements signed by King Pomare V and the Governor of the French Establishments of Oceania

Article 1. The statements signed on 29 December 1887, by King Pomare V and the Governor of the French Establishments of Oceania have been ratified. They suppress the articles of indigenous jurisdiction (whose maintenance is) stipulated in the act of annexation of Tahiti by France.

### Annex to the law of 10 March 1891

Declarations signed on 29 December 1887 by the Governor of the French Establishments of Oceania and King Pomare V

His Majesty, King Pomare V and M. Lacascade, Governor of the French Establishments of Oceania, representing as such the President of the French Republic, and acting in accordance with the powers conferred on him,

Consider that the reservations contained in this Royal declaration of June 19, 1880, giving full and entire cession to France of the sovereignty of His Majesty Pomare V over the Society Islands and its dependencies, provide an obstacle to the harmonious union of Tahitians with their new co-citizens;

His Majesty Pomare V would like to give his ex-subjects a renewed proof of his affection, and to the French Government a renewed expression of his confidence,

The (high) contracting parties have agreed upon and declared the following, subject to ratification by the French government:

The indigenous jurisdictions which are maintained by a stipulation in the act of annexation of Tahiti by France, will be suppressed as soon as the processes relating to the delineation of property have been accomplished and the disputes arising from them have been settled. The acts of *l'état civil indigène* (indigenous civil state) will be regularised free of charge, as the ex-subjects of his Majesty request it.

From now on, the translation of the acts into Tahitian and vice-versa in the courts, will be done free of charge.

Done in Papeete on the twenty-ninth of December, eighteen hundred and eighty seven, in the presence of all the chiefs of Tahiti and Moorea.

signed: Lacascade

signed: Pomare V



### Annex III

#### The opinion of the commission for the improvement of the land tenure system on prescriptive acquisition

(extract from the minutes of the meeting of 7 December 1956)

*The president:* (...) This is an important question as nearly all litigation revolves around prescriptive acquisition.

*A member:* Do we find a notion of prescription in Tahitian customary law?

*The president:* I have found the expression *Aitau* in the Tahitian law of November 30, 1855. The term *Aitau* means 'eaten by time'.

I will read Article 70 of this law for you

When the dispute to be settled is based on *tapuna* descent on both sides, then the judges will carefully seek the true genealogies of the parties, and allot the land to the most direct inheritor. If one side claims rights of descent, and the other bases their claim on the rights of *aitau* possession, the judges will follow the decree of Governor Bruat, made on May 3, 1847, on the request of the *toohitu* (high judges). At least three witnesses, who must be *ex-huiraatira* (land owners) of the same district, are required to prove this kind of agreed possession of land.

This decree of May 3, 1847, is written as follows

We, President and *Toohitu*, after considering the difficulties and uncertainties which exist in disputes over land possessed in ancient times during the pagan era.

And also in light of the decision taken by the assembly of *iriti ture* (legislators), according to which anyone who owns a plot of land is the true title holder of it, if he has benefited from it since the abolition of the pagan government;

Consequently, we appeal to our Queen to order that disputes dating back to that time, before the establishment of the laws and the gospel, no longer be brought for judgment before the *toohitu*, nor the district judges and the *hui raatira*.

We also appeal to the *Gouverneur Commissaire* of the King of France to acknowledge our request.

Court of the *Toohitu*, May 3, 1847.

signed: Taama-Tairapa-Nuutere-Ote-Fareahu-Utami, President

(The commission then goes on to the perusal of the surveys addressed to all the District Councils of the Territory.)

*The President:* These answers all demonstrate the quasi-unanimous opposition to prescription; the districts may agree to a thirty year prescription, but the generalisation of a 10 year prescription, which Councillor C... and I recommended at our last meeting, seems to be impossible; it would create too large a gap between the law and usual practice, which would only be a source of violent conflict.

I think that, in light of the answers we received, we must therefore come back to the thirty year prescription, for important reasons of social stability. (...) This is a matter for the courts, which must show prudence in applying prescription; moreover, prescription cannot be automatically applied, it must be requested by one of the parties.

Is the commission, in brief, being asked to recommend a 30 year prescription while the provisions of the Civil Code concerning the shortened prescription after 10 years of alienation of land remains in force?

## Annex IV

### Notes on the issue of Moruroa

The precise name for this atoll is Moruroa and apparently means 'large hoop net', it is shaped like a fish-trap.

In *Tahiti aux temps anciens*, Teuira Henry does not even mention it, writing only that 'the uninhabited islands (of the Taumotu Islands), scattered to the East and the South had no importance and, being rarely visited, did not belong to the domain of the chiefs.'

### Chronology

- 1767—discovery attributed to Carteret who called it Osnabruck
- 1792—wreck of the whaling ship *Matilda*
- 1723—Duperrey's passage, mapping of the atoll
- 1825—Beechey's passage: no trace of inhabitants or cultures, but leftovers of shipwreck(s)
- 1832—passage of a ship that sees some huts, but no dwellings
- 1834—passage of another ship and a conflict with the eight inhabitants
- 1834 or soon after—Moerenhout's passage, no human traces  
(After 1852) apparently—considered vacant by the Tahitian Administration
- 1878—concession given by the Administration to the *Société Océanienne*.
- 1910, concession to the *Société Française de Cocotiers des Taumotu*.
- 1918–19—at least five or six persons
- 1928—lease to the *Cie. Immobilière et Agricole d'Océanie*
- 1931–32—at least 4 people and 2 children
- 1930, 1934–36, passage of K. Emory of the Bishop Museum, and Mgr. Mazé, nobody on the island
- 1936—Transfer of the concession to the Ste. Tahitia
- 1939—passage of Noel Ilari, 3 adults and some children
- 1950–52—2 couples
- 1964—transfer by the State territory, responsible for indemnities towards the tenant Sté Tahitia.

**Sources:** *Bull. Soc. Etudes. Océaniques*, n. 162, 1968, and n.232, 1985.

# 9

## Customary legal proceedings in Wallis and Futuna

Olivier Aimot

On 19 November 1986, Queen Amelia of Wallis submitted a treaty for ratification by the French authorities. The treaty for the protectorate was founded on the following principles. The Queen of Wallis wishes to strengthen the links that have, for many years already, united her with France, and thus accepts to place herself under the protectorate of France.

As a sign of this mutual engagement she will remove her flag from the French flag.

A resident commissioner will be responsible for foreign affairs and for all affairs concerning Europeans.

The Queen wishes to maintain her independence and also to retain her authority over the indigenous inhabitants.

This text was inspired by the request for a free and independent state under French protection (4 November 1842), which was ratified on 5 April 1887.

On 15 May 1910, a new text, which reinforced the powers of the resident commissioners was nevertheless accepted by the King of Wallis and was valid in Wallis, but not Futuna, until the change of statute of 1961.

The kingdoms of Uvea, Alo and Sigave, which on 29 September 1887, submitted a request to enjoy the benefits of the treaty of 1886, were still applying the provisions set out in the Bataillon code established by Mgr Bataillon in 1870. He was the first missionary in Wallis and his influence was particularly strong in restricting 'the sale of land in Uvea to whites'.

## Customary legal proceedings in Wallis and Futuna

While this text is primarily a collection of restrictions, it does include the following 'rules for the law'.

If a chief establishes a law in his village, that law is not valid. If he first asks the government, and it accepts, then that law is valid.

It is forbidden for a judge to make a ruling concerning his son, daughter, wife, brother or sister-in-law or any of his parents. If one of them does this, they will be punished by the law of the government.

And the law of the Uvean government is that it applies to all the people who live in Uvea: the whites, the Chinese, and all the residents of Uvea regardless of nationality. They are all equally subject to Uvean law.

This sketch of a code of procedure made all residents subject to the laws of Uvea, regardless of origin. And contemporary settlements of customary litigation have a certain regard for this rule, which is explored in more detail below.

On 8 August 1933, a decree on the organisation of French justice in the islands of Wallis and Futuna created a Court of First Instance with extensive jurisdiction. For the first time, Wallisians and Futunese were subjected, in certain cases, to the French legal system.

Article 4—The Court of First Instance of the islands of Wallis and Futuna is responsible for civil and commercial matters concerning French citizens, French subjects, French subjects and *protégés* of other countries and foreigners of all nationalities and their co-authors or accomplices.

The same applies, even if the parties are indigenous, when one of the persons concerned belongs to one of the categories of the previous paragraph.

Article 5—In matters of simple policing and correctional justice, the Court of First Instance has jurisdiction over French citizens, French subjects, French subjects and *protégés* of other countries and foreigners of all nationalities and their co-authors or accomplices.

The Court of First Instance is equally entitled to know about offences committed by indigenous people against French citizens, French subjects, non-indigenous French *protégés* or foreigners of all nationalities, and even for indigenous people if one of the above persons is concerned.

Article 6—Crimes committed by French citizens and subjects, by non-indigenous French subjects and *protégés*, by foreigners of all nationalities or by indigenous persons, even against indigenous persons, will be judged by the Noumea Court if a person belonging to any of the categories enumerated prior to the present article is concerned, either as accused or plaintiff.

Article 7—Disputes between indigenous persons, as well as offences and crimes committed exclusively by indigenous people towards indigenous people remain subject to indigenous jurisdictions, apart from the exceptions mentioned in Articles 4, 5, and 6, above.

## Custom and the law

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In other words, offenders of the rules set out by orders of the police of the *commissaire générale* are to be judged by the court of first instance.

Article 8—In any case where one of the parties is an indigenous person, the judge will be assisted by an indigenous assessor who serves in a consulting capacity. This assessor is appointed by the King of the island where the court is seated. He must be accepted by the French resident commissioner or his usual substitute.

This system, which was largely dominated by local law because of the small number of French and foreign persons residing in Wallis and Futuna, was to continue in a strict legal sense until the law of 29 July 1961. It continued as a non-written law well beyond that date. This fundamental law of 1961, specified that

People who originate from Wallis and Futuna have French nationality. They enjoy the rights, prerogatives, and freedoms, attached to the designation of French citizen, and they are also under all of the obligations it entails. Those who do not have a common law status retain their personal status unless they explicitly renounce it (Article 2).

The Republic guarantees the populations of Wallis and Futuna the right of freedom of religious worship, and the respect of their beliefs and their customs as long as they are not in contradiction with the general principles of law, and the provisions of the present law... (Article 3).

And, in particular

[a] jurisdiction of common law attached to the Noumea court of appeal, as well as a jurisdiction of local law, have been instigated in the islands of Wallis and Futuna.

The common law jurisdiction is the only one responsible for, and competent in, criminal matters. It enforces the current communal criminal laws without discrimination. It is equally responsible for commercial and civil matters, subject to the authority devolved to the jurisdiction of local law.

In all matters, appeals against judgments passed by the jurisdiction of common law are to be brought to the Noumea court of appeal. Crimes are judged by the *cours d'assise* of Noumea [today of Mata-Utu].

For all appeals, the local law jurisdiction is competent in the first degree

- 1) For disputes between citizens governed by local law status, and for matters having to do with the application of this status.
- 2) For disputes about goods held according to customary practice.

In any case, parties who come under local law jurisdiction can, based on mutual agreement, claim to benefit from the common law jurisdiction; in that case, the customs and practices governing them will be applied.

Judgments rendered as a final resort by the local law jurisdiction can be challenged before a *chambre d'annulation* attached to the Noumea court of appeal, for incompetence, abuse of power, or violation of the law.

## Customary legal proceedings in Wallis and Futuna

A decree in the *Conseil d'État* regulates the organisation of the common law jurisdiction. Dating from the implementation of this decree in the Territory; the provisions of articles 1 to 16 of the decree of August 8, 1933, are repealed.

A decree from the High-Commissioner of the Republic in the Pacific Ocean organises the jurisdiction of local law (Article 5).

A decree of 19 February 1962, modified by the decree of 26 December 1983, concerned the organisation of the common law jurisdiction which managed the entire criminal domain. This made it theoretically possible—for the first time ever since the arrival of Europeans in Uvea—for the common law of the Republic to have influence over local civil law in matters where both parties were of local origin.

Finally, a decree of the High-Commissioner of the Republic in the Pacific Ocean organised a jurisdiction of local law in the Territory of the islands of Wallis and Futuna.

To sum up, customary authority was almost in the legal domain until 1933, then it was separated but remained largely dominant from 1933–61, when it became limited, at least in the texts if not in fact, to a section of the civil domain. Since then, the ways it is implemented have been contested increasingly often by those to whom it applies.

This long confrontation between slowly weakening customary authority and the authority of the Republic, would lead us to conclude that common law is gradually replacing local law. Paradoxically, this is taking place at a time when the rights of peoples to their own cultural identity is increasingly being recognised.

This rapid overview of the textual evolution of legal organisation obviously can not account for the much more complex reality, in which Wallisians and Futunese have demonstrated, until very recently, their extraordinary capacity to adapt.

I am therefore compelled to set out my examination of the customary institutions which are still used and to comment on the jurisdiction which was created, but never enforced, in 1978, based on the search for solutions to the difficulties and questions we face today.

### **Conflict settlements in particular law**

As demonstrated by the texts on the legal organisation of the islands of Wallis and Futuna, customary legal proceedings should not only concern

the civil domain in the broad sense. If this seems to be the case, we must note the frequent exceptions of fact in many criminal cases and the problems for the Noumea Court of Appeal caused by the difficult relations between customary authorities—in a situation where their power is largely contested—and the legal institutions of the common law.

The administration of Wallis is based on the notion of villages belonging to one of the three districts—Mua, Hahake and Hihifo of the Kingdom of Uvea. In Futuna, villages are grouped together within the two kingdoms of Alo and Sigave.

The customary legal procedures I will present to you are those of Uvea, which are identical to those of Futuna with the exception that no intermediary structure exists between the village and the King's Council.

### The procedures in theory

The entire procedure of first instance is based on the search for a settlement, whether the litigation was instigated between inhabitants of the same village or not. This requirement sometimes necessitates many meetings and long delays, but it is still widely used because it is discrete and costs little.

**The procedure within a village.** The customary authority responsible for litigation originating within the same village is the *pule kolo*, village chief, who may or may not be surrounded by assistants called the *lagiaki*. Sometimes the presence of a customary minister or district chief may automatically confer responsibility on that person because of his rank in the customary hierarchy.

When two persons have a dispute to settle, one or both of them will first go to the village chief. The village chief tries to get the parties to agree, calling on the elders of both families if it is a land dispute, and attempts to settle the problem without calling on any other intervention than that, perhaps, of the *lagiaki*. The settlement is usually held in the village chief's home and at night so as to avoid unnecessary publicity.

The meetings end either with agreement, which may include acceptance of a punishment by one of the parties for their attitude, or without any agreement, in which case an appeal is set in motion.

The first option is an appeal before one of the King's ministers unless a King's minister has been summoned already. The King's minister would then attempt again to get an agreement by eliciting further information.



## Customary legal proceedings in Wallis and Futuna

The second option, specific to land disputes, is to bring the conflict before the district *fono*, which is held every Sunday after mass. The *fono* is attended by the district chief, the two *Lavelua* ministers who come from that district, and the village chiefs of the district.

Although theoretically not compulsory, it is strongly recommended that the parties prepare an *umu* (traditional meal, consisting of taro or yam, *kape*, and cooked pork), accompanied either by a *kava* root or a wrapped bottle. To present the gifts, they are expected to wear traditional attire. The members of the *fono* hear the parties and, if it is likely to facilitate a solution, they will go to the places concerned. They can reconvene a later meeting if the various materials they have at their disposal are insufficient for a quick settlement of the problem.

If an agreement is not reached, or if one or both of the parties are not satisfied, then the high chiefs are summoned. In principle, this is meant to be the last resort for a settlement.

The Council meets under the presidency of the *Lavelua*, even though his presence is neither systematic nor compulsory. It thus consists of the King, the six ministers and the *Puluiuvea* as well as the three district chiefs, *faipule*, and the chief of the village in question. The parties are then expected to make the same presentations as for the district *fono*.

At hearings, the verdict is finalised when the parties have been heard under the direction of one of the ministers, usually the *Kulitea*, and the ministers and district chiefs have intervened to elicit more information, make a comment, or if they asked for their opinion. The King then settles the matter and the hearing is closed once his decision has been made. This decision is not meant to be reversible or debated, although this principle has occasionally been contravened in the last few years when the *Lavelua* has used his sovereign powers to re-open the debates.

**The procedure between two villages or two districts.** The procedure for litigation between two inhabitants of different villages is identical to that followed for parties of the same village. On the other hand, when the case concerns residents of different districts, it is brought to the *Puluiuvea* with the usual aim of reaching an agreement. Otherwise, it is brought directly to the King's Council, which would be summoned in any case were the initial attempt to secure an agreement to fail.

### Contemporary practice

While the general outline of legal procedure I have described remains valid today, we do need to add certain details and corrections which are important for the questions now being asked about the juxtaposition of the common law justice system and that of local law.

First, we must not lose sight of the fact that people usually choose the customary legal process whether it be for civil suits or criminal offences, despite the fact that common law judges are the only ones with the authority to settle criminal matters since the law of 29 July 1961.

I have personally noticed on many occasions, however, that, while Wallisians continue to accept the settlement of certain criminal transgressions by the traditional customary authorities, they were quick to realise that the common law judge could, in such matters, become a supreme authority and an ultimate venue in such matters, when they found the decisions rendered by the customary justice system unsatisfactory. As a result, the magistrate needs to listen carefully to the parties and take equally into account the legal rules imposed on him and the customary punishments which may have, as is often the case, already been enforced prior to the matter being brought to the court.

It also means that continual explanation is required so as to clarify the situation and avoid an open conflict with the customary authorities.

In terms of civil issues, the recent increase in meetings held by chiefs whose authority is often contested entails an increase in the cost of investigations. This is even more so for issues of land tenure, as no decision is ever definitive. The King and his Council can always go back on a settlement, particularly if it was not recent or if it was made under chiefs who no longer hold their official positions.

This is how the emergence of the notion of 'land to be built on', with a much higher monetary value than land for agriculture, has led to several conflicts over land which had been legally settled a long time ago (for example, Matalaa point, the Sia land).

This uncertainty and the costs of litigation mean that there is a need for reforms. Without these the common law will quickly impose itself on the local court which, by being the guardian of ancient traditions and of a strong cultural identity, will not have adapted to ensure its own continuation.

Finally, the old rule that ‘the law of the Uvean government is that all the people residing in Uvea are subject to it...’ continues to prevail, because as it still applies to litigation, in a local law context, between a Wallisian and a Futunese if they both live in Uvea.

In Futuna, on the other hand, a case between a person from Alo and another from Sigave has its own unique procedure, which is linked to the specific history of these two kingdoms.

As there is no supreme authority, an agreement is sought between the representatives of the two kingdoms. There is an understanding, however, that, in terms of protocol, the kingdom of Alo, which won the last war in the middle of the nineteenth century, has precedence over that of Sigave.

I will now turn to the organisation of the jurisdiction of local law which is outlined in the statutory law and was implemented by the decree of 20 September 1978.

### Customary courts of law (established under the law of 29 July 1961)

In the Territory of Wallis and Futuna, local law is administered by three first degree courts, a second degree court, and the *chambre d’annulation* of the Noumea Court of Appeal.

Customary law has validity and responsibility in the first degree courts and can be appealed against in the second degree courts for

- disputes between citizens governed by a local law status, and for issues bearing on the application of that status
- disputes having to do with goods possessed according to custom.

Any judgments made by the customary law jurisdiction can be attacked in the *chambre d’annulation* on the grounds of incompetence, abuse of power, and violation of the law, as set out in the conditions under part IV of the decree.

For all decisions made in customary matters, Article 49 of the decree establishes that

... judgments and statements made in customary law matters will include the names of the members of the court and the court clerk, an indication of the custom invoked by each of the parties, the name and position of the interpreter, the name, sex, age, occupation, residence of each of the parties, a summary of the claim and possibly the observations made by the court; the

name, sex, age, occupation and residence of each witness, as well their kinship relation with the parties, the oath they took, and their statements; finally, a complete elucidation of the custom applied.

### **The first degree courts**

The first degree courts cited in Article 1 of the decree are located in Wea (Wallis), Alo and Sigave (Futuna). There are plans to set up a first degree court in each circumscription.

Each tribunal consists of a president, six assessors for the first degree court of Uvea, and four assessors for each of the first degree courts of Alo and Sigave. These assessors have a deliberative role and are designated for a year by decree of the chief of the Territory on a joint submission from the president of the section of the common law court at Mata-Utu and the customary chief of the circumscription in question.

The president and the assessors are chosen amongst the traditional authorities who are recognised as such according to customary rules, as well as other respected members of the community. Their mandate is renewable. They take an oath before the president of the section of the common law court at Mata-Utu, or, according to the magistrates' formula, a local hearing.

The president and the assessors work for free, but the state allots some funding to them. The head of the Territory sets the amount monthly on an inclusive basis.

The court responsible for settlement is the one which sits where the claimant resides. In real estate matters, however, the case is brought to the court which sits in the area of the real estate, and, for inheritance matters, to the court of the place where the deceased person last lived.

The clerk's office is held by a French citizen who is designated in a statement from the head of the Territory and on the submission of the president of the section of the common law court. The clerk receives a salary from the state which is set on an inclusive basis by the head of the Territory. On the proposal of the president of the section of the common law court, the organisation and functions of the clerk's office are set out in a statement written by the head of the Territory. The claimant either submits a written request or formulates his or her demands orally to the clerk. He or she must unambiguously indicate their identity, the identity of the defendant, the object of litigation and the witnesses they wish to call.

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The hearing is free, but certain costs, particularly the salaries of the technicians, are billed to the losing party. The court, however, can decide, on well-founded grounds, to impose a fraction or the totality of the costs on another party.

The clerk writes the request in a special register and convenes—usually, but not always by official letter—the parties to obtain an agreement. Prior to the hearings, an attempt to get an agreement must be made in front of the president of the first degree jurisdiction or an assessor designated by him. In either case, they will be assisted by the chiefs of the villages of both the claimant and the defendant as well as the court clerk. If an agreement is reached, an official statement is written up, which is equal to a judgment. If no agreement can be reached, then the court clerk convenes the parties for a legal hearing, and the hearing must mention the attempt at agreement.

An interrogation takes place during the debates and the procedure is oral. The clerk records the debates and incidents during the hearing. The notes are then certified by the president. The president can order any measures he deems useful to be carried out, including visits to the site, expert advice, and investigations. The hearings are open to the public. If the final judgment is not given immediately, the president informs the parties of the date on which it will be made. The final judgment is announced publicly and immediately inscribed in a special register, and copies are sent to the parties who request them.

An appeal can be launched against any decision made by a first degree court. It is made by letter to the clerk of the court that passed the initial judgment. The clerk records it in a special register and notifies the opposing party in accordance with Article 16. Within eight days of the appeal declaration, the clerk passes a copy of the judgment and all relevant material to the clerk of the second degree court.

The appeal can be made, under the same conditions, directly to the clerk of the second degree court. In that case, the clerk of this jurisdiction immediately informs the clerk of first degree court, who then passes a copy of the judgment made, and all relevant material, to him within eight days.

The appeal can be lodged by the parties or their representatives. The head of the Territory also has the option of lodging an appeal. To do this, he has exactly 15 days, starting from the day when he was notified of the

decision by the clerk, to get the approval, as is outlined in Article 51 of the decree.

Judgments are not carried out automatically, and a plaintiff judged by default has the right to appeal. The first degree court is summoned again by the plaintiff. The parties are assembled and the affair is brought to an ordinary hearing.

### The second degree jurisdiction

The second degree court is situated in the Territory's administrative centre. It can nevertheless sit before a local hearing at the administrative centre of each circumscription in Futuna. It has its own office clerk who is a French citizen under the same conditions as those set out for the first degree courts. Provisions have been made for this clerk to be replaced in the case of a local hearing, by the clerk of the first degree court sitting in the jurisdiction of the appeal.

The second degree court consists of two sections—the Wallis section and the Futuna section. It is composed of a president and eight assessors. The presidency is assumed by the president of the common law jurisdiction.

The Wallis section includes the president and four assessors chosen from the circumscription of Uvea.

The Futuna section includes the president and four assessors, two of whom are chosen from the circumscription of Alo, and two from that of Sigave. If one of them is absent, the youngest member of the circumscription that is over-represented stands down.

The assessors should not belong to any of the first degree jurisdictions. They are designated for a year by decree of the head of the Territory on the joint submission of the president of the section of the common law court and the customary chief of the circumscription in question. They are chosen amongst the traditional authorities who are recognised as such according to customary rules, as well as other respected members of the community.

The assessors take the oath prescribed by Article 6 before the president of the common law court. Each section can legitimately sit with two assessors. If the Wallis section only consists of three assessors, then the president prevails in the case of a split vote.

Each section of the second degree court is a jurisdiction of appeal for decisions made by the first degree courts under its responsibility. For cases involving a party from Wallis and another from Futuna, however, decisions

are made by the joint sections. This also happens if the president chooses to convene the case in that way.

The joint sections of the second degree court sit once a year in the administrative centre of the Territory. The Wallis section sits in the administrative centre of the Uvea circumscription. The Futuna section sits in the administrative centre of the circumscription of the claimant, or, for real estate matters, in the circumscription where the real estate is situated, or else, in inheritance matters, of the last place of residence of the deceased person. The clerk draws up the brief and convenes the parties.

The procedure to be followed in the second degree courts is identical to that of the first degree courts.

Within eight days of the final judgment, the clerk sends a copy of it to the head of the Territory and to the attorney general of the Noumea Court of Appeal.

If judgment is by default, an appeal can be lodged under the same conditions as those set out for the first degree courts.

### The chambre d'annulation (Chamber of Annulment)

The chambre d'annulation sits in Noumea. It is made up of

- the first president of the Noumea Court of Appeal, or the magistrate responsible for replacing him
- two magistrates designated by the first president of the Court of Appeal
- in a consulting capacity, the heads of the offices of the islands of Wallis and Futuna to the high-commission in Noumea, and two assessors who are particular status citizens from Wallis and Futuna and speak French. They are appointed by the High Commissioner of the Republic to the Pacific Ocean from a list of 12 respected members of the community.

The functions of the public ministry are exercised in this court by the Attorney-General of the Noumea Court of Appeal or by the court magistrate acting as his substitute. The functions of the clerk are carried out by the court clerk himself or his substitute.

An appeal against the annulment of judgments made as a last resort in matters of customary law, can be made to the *chambre d'annulation*. The appeal can be made directly by the concerned parties, by the head of Territory, or the Attorney-General to the Noumea Court of Appeal. It is

made by verbal or written declaration to the clerk's office of the court which made the decision being questioned. This is subject to the conditions set out in Article 15 of the decree. The clerk then sends the appeal to the clerk of the *chambre d'annulation*. The appeal is also made to the clerk's office of the *chambre d'annulation* in Noumea, under the same conditions.

These are the compulsory provisions of this institution, which was approved in 1978, after many meetings held by two successive magistrates. Although approval was given by the three Kings and their councils, the elected representatives of the Territory, and the administrative and legal authorities, the institution has in fact never been set up.

So what can we learn from this situation in which local law litigation, and specifically that relating to land tenure, is being governed by a chiefly system which is finding it increasingly difficult, and whose authority is being questioned? Furthermore, local law litigation is carried out under unreliable conditions which are seen as an obstacle to the economic development of the Territory, whose size and small population already make such development an uncertainty.

But isn't this just an excuse, when an, albeit imperfect, instrument for basic understanding of customary rules, with all their contradictions and debates, actually exists? It is perhaps true that the islands of Wallis and Futuna, like New Caledonia, are, as Jean-Claude Boulard described in '*Au pays des trois royaumes*'<sup>1</sup>, confronted with the introduction of a monetary economy which the fragile equilibrium of social structures, based on a mix of customary rules and religious precepts, may not resist for long. Such is the power of money, and the difficulties of controlling it.

Yet it seems to me that Wallisians and Futunese, whose remarkable powers of adaptation I have already mentioned, possess all the qualities needed to take up the challenge. This is at a time when metropolitan France is going through its own evolution. There seems to be a growing desire, even if it is timid, to recognise the rights of those regions that wish to see their own cultural identities concretely incorporated into the institutions they live with.

The islands of Wallis and Futuna still hold a valuable trump card—their small size, relative isolation, and strong traditions up until recently, have sheltered them from the imperialism of powerful external economic interests, such that the Territory's land has remained in the hands of its inhabitants.



## Customary legal proceedings in Wallis and Futuna

Do we need to oppose custom to the law, making the latter synonymous with progress, when, as Professor Rouland explained, business law and industrial law are heavily governed by custom ‘in the sense that the rules applied, and the models of conflict management are largely produced by the social groups concerned’?

The revival of customary legal proceedings would reassure the customary authorities in their traditional roles, and would serve to clarify the essentials of customary rules progressively through a process of decisions which would come to form a jurisprudence. This can be done by implementing the institution created in 1978, even if it needs to be improved by taking into account the evolution of the Territory and the behaviour of its inhabitants since then, or by establishing it immediately, before instigating reforms that experience itself would dictate.

Was it not the court of Tananarive which reminded us on 8 August 1929, that

[a] custom is not inert matter; it automatically evolves over time and can transform itself according to the needs of the day or even disappear when the circumstances that made it necessary no longer exist.

This procedure seems to be the one that the customary authorities of the Territory are following.

Emeli Simete invoked a similar idea

if we had to forgo the notion of customary power, we would need to hang on to custom as a collection of positive traditions, I am persuaded we would not regret it.

Being in full agreement with her perspective—which is also that of many Wallisians and Futunese who wish to engage with the modern world without losing their cultural identity—I am convinced that the customary authorities would be able to give a balanced, controlled, and progressive answer to this request. This will happen if they remain attentive to the changes in their environment, and will be carried out by decisions stemming from the essential principles of a particular local law which is concerned not to sacrifice the collectivity to the individual.

### Note

- 1 Collective work: *Au pays des trois royaumes*, Paris, ed. Pacifique (Ministère des DOM-TOM), p. 14.

# **Appendices**



# First debate

Prof. Jean-Yves Faberon, Chair

*A question has come from the audience concerning the status of Wallisians and Futunese in the territory of New Caledonia. Do they come under particular law status and how are they managed on this territory? Which authorities manage their problems in New Caledonia?*

Judge Emili Simete answered that we first need to take into account Mr Agniel's statement about the confusion that currently pervades the territory of New Caledonia regarding Wallisians and their status. Why? Because any Wallisian who arrives in New Caledonia seems to be considered a common law citizen since they are inscribed in the common law register as soon as they arrive. Yet, each commune should have its own separate register like those that belong to particular status in the Melanesian community. But in practice, this right seems so unknown to Wallisians that in New Caledonia they are confronted with the general principles of the rules of the Civil Code. Judge Simete believes that in all the rulings that have been rendered, there have only been a few cases where Wallisians came under a particular status.

Olivier Aimot would like comment on two issues. The first concerns citizens of particular status, specifically the Wallisians to whom we have just referred. The fact that their life acts are inscribed in a determined register does not, legally speaking, modify their personal status. Both the Constitution and the fundamental rules of the Statute of 1961 formally specify that a Wallisian of particular status retains that status as long as he or she has not explicitly rejected it. Therefore this first point must be mentioned today because we have based ourselves on the notion that a citizen, whether he or she be Wallisian or Kanak, was inscribed in a common



law register so as to make he or she come under common law status. This is an error that we must take note of, discuss, and highlight.

The second point relates to the problem of a particular law citizen. Contrary to certain provisions which exist in New Caledonia, there are no provisions which govern particular status in Wallis and Futuna. There is the exception of the jurisdiction of local law of 1978, which is discussed in Part Two, but which has no practical existence and is an issue currently being debated. This state of affairs complicates things considerably since, in the eyes of the legislator, a citizen of particular status is one who continues to live a traditional lifestyle, as mentioned by Guy Agniel (Chapter 2). But when this citizen has a good knowledge of French and lives like Europeans do, then for all purposes he or she eventually loses his or her particular status. That is why, as in Chapter 5 (Trouilhet-Tamole and Simete), a Wallisian or Futunese in New Caledonia is not considered to belong to a distinct status as he or she appears to live as a Westerner. This issue has raised tough questions which have been brought to the attention of the working groups that were installed following the Matignon Accord, especially the working group on particular status. These questions have been asked in view of the presence of Wallisians within this context.

*Another person in the audience is interested to know why there is no particular status in French Polynesia given that the Constitution seems to allow for this possibility for all inhabitants of every TOM? What does the Constitution stipulate on this point and why are there no particular status citizens in French Polynesia?*

René Calinaud answered that the situation stems essentially from the particular history of the territory of French Polynesia. One can say that in general there is no longer any particular status in the Kingdom of Pomare V that Bruno Saura told us about. This includes the island of Tahiti and its dependencies since 1869–80, the beginning of the implementation of the Civil Code and the Law of Annexation. Particular civil status disappeared in the Kingdom of Tahiti at that time. It continued until 1945 in those islands which were not dependent on the Kingdom of Tahiti, the Leeward Islands and part of the Austral Islands. At that point, the decree of 1945 extended citizenship to all the inhabitants of what was the French Union, and after that there was a special decree for the entirety of what was known as the French Establishments of Oceania, the old name for French Polynesia. This decree suppressed the indigenous jurisdictions which had survived until

then in the Leeward Islands and parts of the Austral Islands. Both the indigenous jurisdictions and the codified laws that supported them were suppressed at that time and particular status ceased to exist. The entire population of French Polynesia came under common law status.

*Jean-Yves Faberon is wondering whether customary law in New Caledonia, which is recognised by statutory law—as opposed to the situation in French Polynesia—really stems from the provinces as seems to be the claim in the contemporary statute of New Caledonia. As far as he knows there are no texts about customary law existing in the South Province. Yet there have been problems in Lifou which could have been managed by customary norms that the South Province should have established, which would have been an astonishing situation! He is also wondering whether the provincial Assemblies of the other provinces, which have legal authority, could elaborate rules relating to customary law if the statutory texts were to allow it. He asked Guy Agniel if he could provide some comments.*

Guy Agniel indicated that to the best of his knowledge no text has been ratified by the Provinces.

Jean-Yves Faberon stated that traditional customary rules and modern rules could be joined at any time but that this has not happened.

Olivier Aimot mentioned that, within the framework of the working group on particular status, this is an issue currently being explored by the customary authorities themselves—which is essential to the process—as well as by the representatives of the political parties who are associated with it. They are the ones who, either directly or by mandate in the provincial assemblies, have the possibility of enacting it. This would happen if a consensus or a strong idea could be extracted from the discussions, even if it is premature to guess what will emerge from these debates. From what one reads in the minutes of the meetings of the Customary Council of the Territory, it does seem that much thought and work is going into what would be needed to integrate the various provincial provisions.

Jean-Luc Delahaye, the President of the Chamber, states that while he has no particular authority to speak on behalf of the Northern Province or the Islands Province, he nevertheless believes that work has commenced in the Islands Province on creating reports of palavers. He cannot confirm whether or not any decisions or implementations have been reached, but in any case the provincial assemblies have started working in that direction.

## Custom and the law

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The case is not simply one of a total void, although he cannot say if an agreement or resolution has been passed on the palaver reports.

*A member of the assembly has put forward another question which addresses the general themes of this symposium, bringing up the notion of respect for Kanak and Oceanic customs and law.*

Paul de Deckker indicated earlier that certain French people who go and stay with a tribe try to respect their custom, meaning that they go to a Kanak place respecting the Kanak people and their right to their land, and this is a notion that seems to be missing from the generalities of this symposium. And if the dominant society is trying to pay attention to Kanak society and its laws and customs, isn't it also respectful of the Kanak representatives to create the necessary space to offer a customary welcoming to John Ah Kit, who is present with us today, and who is the representative of the Nitmiluk nation, an Australian Aboriginal people, one of the oldest existing cultures today. Yet this indigenous population is one of the youngest since it is less than 100 years old, having only been legally recognised in 1967 by the dominant Australian society. We must ask whether land rights is not a crucial notion for this symposium.

The president of the session answered that the symposium's brief is not to take decisions, nor to write declarations (or resolutions), but to ask questions, as has just been done. They will remain unanswered.

*A town clerk asked the panel if children of mixed marriage between a particular law husband and a common law wife can claim to the rights of their father or not?*

Guy Agniel stated that this is what he meant by saying that the current regulations make provisions for the child to be a common law citizen, and that this is inadequate. It would be better for a child to be a particular status citizen, and then to be given the right to choose a status when he or she obtains legal age.

*Someone else asked about the renunciation of particular law. For example, the case of particular law parents who lived in the New Hebrides (not yet the independent Republic of Vanuatu), and who were indigenous New Caledonians working in Vanuatu who had registered their child under common law. On their return to New Caledonia the child is a common law citizen whereas the parents come under a particular legal status. Is there any possibility for these people to*



*renounce their common law status so that they can reintegrate into particular law and be like the Caledonians from here.*

Guy Agniel stated that the issue was a material concern that could easily enough be rectified by a court hearing

*The next question was about the renunciation of adoption and whether it allowed Melanesians of particular status to adopt children of a de facto union who come under common law. These children carry the patronymic name of the adoptive father, who is a particular status citizen, but retain common law status. Are there any answers to these questions?*

The First President stated that as far as the registers are concerned, he thought he had expressed himself clearly, because what is indicated on a register does not lead to a change of status. Therefore, and undeniably so, if there are particular status citizens who are inscribed in common law registers and for whom this has consequences both in daily life and on a legal level, then clearly a request of rectification should be made by demonstrating their right to belong to particular civil status. He thinks that the conditions are that there be no difficulties in establishing their belonging to particular legal status, and that there is sovereign recognition to that effect.

The court has relatively recently answered the second part of the question, which is that of a common law child who, because he was born of a mixed union, is then adopted on a customary level. While the texts relating to this are much more difficult to master, the court has been clear on two points—first, there is no dominance of one status over the other. A recent decision by the Noumea Court of Appeal confirmed this decidedly. Second, a common law child who is likely to be adopted according to the terms of plenary adoption by two people of particular status, in the sense that the common law understands it—and that is the essential point—can change status if the customary rules and the different parties, meaning the clan chiefs and all the other customary people who have the authority to say whether the adoption is allowed by custom, have given their agreement. In such a case the common law child is given particular law status.

According to the First President, these two decisions, which date from 1991, distinctly confirm this principal. It is also clear, from what he said, and in light of the fact that the *Cour de Cassation* has not passed any

comments on the issue, that he cannot guarantee that the solution would be recognised by the Cour de Cassation. The solution does exist and in terms of common law it is in perfect harmony with what plenary adoption entails: a break with the biological family to enter fully into the adoptive family. None of this contradicts our general principles of law as long as customary law allows for a common law child to be fully adopted and to have particular legal status. There should be no problems in principle, but First President Aimot specified that all his answers are still academic at this stage.

# Second debate

Louise Peltzer, Chair

Jean Guiart would like to take the opportunity presented by this discussion first state how much he has appreciated the nuances which have been gradually been incorporated into legal practice, which is reassuring for the future. But he would also like to point out that the two concepts that have been explored today pose a serious inconvenience, that of being discussed in French. None of the words used to analyse Oceanic societies, whether it be in French or English; properly translate vernacular concepts. Indeed, the vernacular concepts are quite distant from terms like tribe, clan, property, chief, king, that we have used a lot here. This poses a problem—why is it that when Pacific Islanders themselves have spoken, they too have used these terms?

Last century they had little choice in the matter as our words were imposed upon them every time there was a need to describe, resolve, or comprehend a situation in their society. He also says that he appreciated the fact that *Monsieur le Procureur Générale* (Chief Justice, Attorney-General) spoke of Melanesian civilization, because it is only recently that the word civilisation has been utilised in this context. Civilisation is a much more interesting term than custom in so far as custom stands for a set of rules in our civilization, whereas Kanak civilization is a totality within which there are institutions, behaviours and procedures.

The president of the customary council, who spoke very nicely but also firmly at times, utilised certain words and then specified that they did not correspond to actual situations, in particular the words 'chief' and 'subject'. We have known for a long time that they do not correspond at all to Melanesian tradition, nor do they reflect the Polynesian context. The

relations between individuals are not of the hierarchical order that has been imagined and that Ulysse de la Hautière, Secretary to Governor Guillaïn, imagined when he said that in Canala there was a chiefly system and a council of elders and that the chiefs had rights of life and death over their subjects. This is the kind of idea that has resulted in what has sometimes been a total misunderstanding by the representatives of the western world. These chiefly entities were transformed by missionaries into a kind of Christian royalty that they set up everywhere. Through the unfolding of history they controlled these areas either directly or indirectly, and when it was indirectly they did so by maintaining their own legal tradition. People who come from these societies, and who live out their own civilization and their own religion, have reinstated certain ancient religious concepts and practices in the last few decades and these have their own political and social strategies. To succeed in doing this they end up having to use the cards that have been dealt to them, sometimes innocently, by the western society that has installed itself in the region.

We need to explore how the concepts we apply to Oceanic societies have developed over a century. The word 'tribe' for example, has a Latin origin and was applied by Julius Caesar to Gaul to explain that the Gallic tribes were constantly quarrelling amongst themselves, and from this it was transposed everywhere last century. But how does it survive in the region today? In Fiji, it has been totally abandoned and is no longer used in reference to Indigenous Fijians. It has also been abandoned in Papua New Guinea, where one could not imagine speaking of tribes in so far as this could provoke dramas. It is, however, still used in two places—New Caledonia and New Zealand.

In New Zealand, the Maoris superimposed onto the term tribe the concept of the descendants of canoe crews who were said to have come to Polynesia in the eighth century A.D. In New Caledonia, Melanesians have practically imposed their point of view on how the word tribe is used, and interestingly, we can see through texts how it has evolved over the century. For Melanesians, the tribe is a locality, or place (*lieu-dit*). We were told quite clearly this morning that it is a locality where there is a habitat, and that the tribe is only that, which all has interesting advantages for Melanesians. If tribes were spoken of as entities recognised as moral persons in the middle of last century, it was mainly to justify collective

punishments and not quite with charitable intentions. Once the word 'tribe' is used only to cover a locality where there are houses, it is not quite the same thing and we are protected from the first type of interpretation.

In talking about chiefs the elder-brother was mentioned this morning, but that is something else. We find ourselves with a problem that has already been posed by Maurice Leenhardt and was illustrated by a text of the Caledonian writer, Jean Mariotti. Mariotti reflects on the opposition between a true chief and a false chief, meaning that the true chief would efface himself by putting someone else forward whose nomination as chief was acceptable to the administration and did this because he considered it beneath his moral authority and prestige to be in the service of the colonial administration. Sometimes the administration would impose someone because they spoke better French and would try to make people accept that person in the role of a traditional chief. If we examine things in detail, over the whole of the territory, we see that there are in fact no true or false chiefs, only people recognised by the French administration. Nevertheless, those who were recognised did not necessarily correspond to what the administration thought they were. To resolve the problem represented here, we cannot sweep out the false chiefs and leave only authentic chiefs. Each person who received official recognition by the system imposed during the colonial era, nevertheless had some sort of status or authority. They could have been the head of a lineage and thus benefit from a real authority from the local perspective, but that might have been for an area next to, or extending beyond, the circumscriptions for which they had been invested with official authority. Changes, some very interesting, occurred in these circumscriptions last century, because there were blatant misunderstandings based on poorly documented reports. Even today, we continue to encounter problems in relation to chiefly systems (*chefferies*) in as far as we do not really know what their limits are and what their function on an administrative level is.

If we consider the term 'clan', there is a whole set of other issues and this is the subject I would like to emphasise here. The word clan was introduced to New Caledonia by Maurice Leenhardt, and I myself have used it for a long time, but do so much less now because it has serious inconveniences. It was adopted by Melanesians who then sent it back to us having invested it with the meanings they wanted it to hold. Today we

don't really know what a clan is, we don't really know when we are speaking about one, and we don't really know what it consists of. This was made very clear in the presentation by the President of the Customary Council (Chapter 3, Annex). Does it mean the small local group, which includes 25–30 people or more, and relate to an entity that has a specific name within a specific village, or does it refer to the series of local groups who claim a common origin and which, according to the case, could include 300–3,000 people? What about the clan organising the report of a palaver to give a ruling on a property in town? It is something that is as extraordinary on a legal level as it is on the level of Kanak tradition. It was clearly explained today that tradition is based on residence, that individuals retain rights according to residence, and that this was a constant in the Pacific. When one is no longer a resident, one loses one's rights. This residence corresponded to specific places in space, and was not exercised beyond those specific places. Today, as the high commissioner mentioned in his introductory speech, we find ourselves in a situation which reflects a real strategy for the reappropriation of space, and urban space in particular. At the same time, however, it is in contradiction with Melanesian tradition itself, in that it could not be applied to places in space other than those where families and lineages resided. French legal tradition is getting mixed up in this affair. It would be inappropriate to maintain that the entire history of the application of legal or pseudo-legal concepts in Oceania is a history which consists only of a dominant group, or people in a position of force, and a dominated group, or people in a position of weakness, and that this was permanent. We must pay attention to the analyses that Melanesian and Polynesian indigenous societies make of western concepts and the ways in which they seek to utilise those concepts for their own benefit.<sup>1</sup>

*Wassisi Iopue is wondering what happened to the traditional landowners of the Moruroa atoll? Do they still have customary rights? If they have lost them, what was the legal instrument that allowed them to be abolished?*

René Calinaud answers by pointing out that, in his opinion, according to the legal system as it exists in French Polynesia, if the inhabitants of Moruroa had customary rights of land tenure, then from 1888 onwards they would have been able to have had them written down. However, he himself is not aware whether they had had them inscribed or not. If they

had not had their rights of land ownership inscribed, then they lost them both by virtue of French law, (through a decree of 1887) and by virtue of the Oceanic customary practice we have just discussed, because, from that point onwards, they have not resided on that land. Otherwise, they did register their rights of land ownership, in which case they and their descendants remain titular holders of ownership rights, unless their ancestors sold those rights. If the issue has not been brought to the courts, it is simply because everybody knows that the Territorial Assembly, which consists of people who have been democratically elected by the population of the Territory, leased the atoll to the French State. That means that the Territorial Assembly thought, either correctly or incorrectly (and René Calinaud says he has no idea which is the case), that the atoll belonged to the Territory. In any case, if people have the opportunity to bring them to the courts to try and make them legally valid and binding. If they have rights of ownership, the courts will recognise these.

Paul de Deckker adds that, according to the oldest texts about Murorua, from the 1820s, the island was uninhabited. This was taken into account when, on a political level, France was trying to obtain Murorua and Fangataufa democratically. Research was undertaken into the possibility of land claims and, apparently, it was no longer possible to find a genealogical connection to a human settlement on Murorua.

*Jean-Yves Faberon wonders about the interface of customary law and penal law in New Caledonia. Starting from the idea that the problems posed by custom are the most apparent and the most real in New Caledonia, he would like to ask the highest authorities of the court sitting in Noumea present in the auditorium today, what their opinion is on the pertinence of setting up a procedure which leads to a punishment when it deals with actions that have already been the focus of customary sanctioning, even if this was a customary pardon. Of course, he specifies, the public service is set in motion by the users when they lodge a complaint. But the representative of the Consulting Customary Council pointed out that it was surprising for many to note that those who had inflicted a punishment, and therefore appear to be judges, were being attacked in the courts by those who had received the punishment. He would like to ask what they feel about such a state of affairs?*

Bernard de Gouttes, Attorney-General of Noumea, said that his own personal feeling is that there are only real institutions in so far as people

adhere to those institutions. The example given is an one of how the customary institution functions, but in this case there is no adherence as the punished person decided to lodge a complaint. And for him, that is the criterion to follow. If there is consensus for social regulation by the customary authorities, then that social regulation should proceed autonomously, although there needs to be some nuance. If on the other hand, acquiescence turns into protest, then the magistrates are duty-bound to answer that protest. Otherwise there is a denial of justice. When someone appeals to the French Republic's justice system, the court judge is duty-bound to respond to that appeal. The judiciary works through the *Procureur de la République*, because it is a matter of penal law, and it is up to him or her to decide on the possibility and validity of such an act.

A second hypothesis exists—if there was an acceptance of the customary punishment, but the punishment severely infringed on the person's human rights. Once more, we need to take a pragmatic approach. We need to know if the facts have been properly revealed, not by the customary authorities or the victim, but by other voices. Here too, we need a very pragmatic attitude based on the proportional relation between the fault committed against custom and the punishment set out by custom. This seems to me to be the approach required in New Caledonia.

Olivier Aimot, first president of the Noumea Court of Appeal, would like to point out that this is precisely the approach that was achieved for Wallis and Futuna and continues today. The difference is that 15 years ago the judge for the section of the Mata-Utu court, who held the powers of prosecution and judgement, rigorously applied the same approach, and the same questions, that have just been discussed here today.

*High Chief August Parawi-Reybas has a question, which is not meant to be a criticism—he wonders whether we have not talked too much about Wallis and Futuna at the expense of the problems of the Kanaks, the original inhabitants of New Caledonia.*

*On 12 October 1992, he submitted a proposal to the follow-up committee of the Matignon Accords, and the Minister of the DOM-TOM (overseas departments and territories), to instruct the government delegate to set up a committee responsible for studying the problems of particular status and local law in New Caledonia. Where is this at today?*



In 1914–18, Kanaks went to France to defend the French flag, which was not their own, and their opinion was not sought. In 1939–45 the situation was the same, and he himself with his brothers answered the calls of General de Gaulle. But he would like to specify that they are not French, but Kanak with their local law particular status.

In 1948, the National Assembly abolished the indigenous law of forced labour, which he himself had endured: working on the stations for six francs a day so that he could pay the head tax. In his opinion, the Kanak situation today in 1994, has not really improved.

He thinks that many people were surprised by the reaction of the Kanak population in 1984–85, but wonders who pushed the Kanaks to claim their land, if it wasn't Giscard's minister, Dijoud, who came to New Caledonia and recommended to the Kanaks to 'find your clan land'. But where were these clan lands situated? They were the private properties of New Caledonia. It was not the Kanaks, but a minister, who encouraged us to claim them. Then, in 1983, at Nainville-les-Roches, he [High Chief August Parawi-Reybas] participated in the elaboration of the law that was followed by all the statutory laws that were applied until they were abolished when the regions were set up in New Caledonia. Today, it is the law of the referendum act that is applied, and Mr Parawi-Reybas would like to see the Kanak problems of this country finally being taken into consideration. For that, he would like to see, as the follow-up committee suggested, the rights of women, the rights of children, and those of Kanak property, being properly addressed. When a Kanak gets married in custom, he or she is not married in civil law. So, to what extent can we in fact not recognise the rights of women, children, as well as those of goods?

It is high time, he adds, to do something concrete for the Kanak population of this country. This is his deepest wish, because the Minister instructed the government delegate to set up committees on putting particular status local law into place. This is why he wants to thank Jean Guiart for attending, as his comments have clarified the problems of terminology and concepts in New Caledonia. Mr Parawi-Reybas stated that it is time for all parties to start working because the year 2000 is only six years away, after 150 years of French presence in New Caledonia, and 50 years of French presence in Wallis and Futuna. We cannot continue

waiting and doing nothing. We have to set up something to resolve the problems of the Kanak people, the first inhabitants of this land.

The audience applauds. Louise Peltzer, session president, thanks Mr Parawi for his input and says that she feels convinced that the participants of the symposium are ready to assist him, as he wishes, within the working group which was instigated by the Minister for the DOM-TOM.

### Notes

- 1 Jean Guiart (1994) has since published a most interesting article on the questions of terminology that he brought up in the debates: 'Une dérive de la coutume?', *Etudes Mélanésiennes*, No. 29, Noumea:57-71.