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UNDERSTANDING NEW CALEDONIA

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New Caledonia, a *sui generis* Overseas collectivity governed by Heading XIII of the French Constitution of 4 October 1958, is characterized by complex legal pluralism where local rules, both written and oral, coexist with an increasingly reduced number of rules deriving from the French legal system. Excepting foreign laws which have jurisdiction under the rules of private international law, three differently-sourced categories of rules apply in New Caledonia, depending on the issue under consideration and/or the personal status of the person concerned. First, State law (*jus publicum*), having jurisdiction either by virtue of a principle of legislative identity for rules of immediate application, public order or territorial application, or by virtue of the principle of legislative speciality for matters of private law not falling within the above categories and not having been transferred to New Caledonia (e.g. criminal law). Next, New Caledonian written law for matters where regulatory jurisdiction has been transferred from France to New Caledonia and which are governed by Country Laws passed by the Congress and resolutions adopted by the Congress and the Provincial Assemblies (e.g. civil, commercial, labour laws). Finally, Kanak custom, which has jurisdiction in matters of civil law as regards individuals with Kanak customary status.

The coexistence of different personal statuses represents one of New Caledonia's particularities, a distinction shared, within the French Republic, with Wallis and Futuna and now, to a very limited extent, with Mayotte. In pursuance of Article 75 of the (French) Constitution and of the Noumea Accord of 5 May 1998, the Kanak may retain or even claim a special personal status: Kanak customary status. They are not assimilated to the common law personal status linked to French citizenship, even though they are French citizens. Kanak identity is a key theme and even the principal *leitmotif* running through the Noumea Accord. Customary status is an expression of this, grounded in the respect accorded to the innate cultural identity of a group of people, considered as having greater importance than the common identity which this group shares with the rest of the French population. As reaffirmed by the Noumea Accord, this group qualifies, on these grounds, for a special system less restrictive than the classic provisions set out in Article 75 of the Constitution regarding special personal statuses.

Kanak custom has regulatory authority over the civil relations of Kanak with customary personal status and over customary lands; it is an integral part of New Caledonia's legal pluralism¹, in the same way as written law, French law or New Caledonian law (II). Before defining the legal scope of custom, an understanding of the sources of customary law is necessary (I).

1 É. Cornut, P. Deumier, *La coutume kanak dans le pluralisme juridique calédonien*, publ. PUNC, coll. Larje, 2018, p. 331 ff., freely available <https://unc.nc/la-coutume-kanak-dans-le-pluralisme-juridique-caledonien/>

I. THE SOURCES OF CUSTOMARY LAW

Many stakeholders play a role in reviewing, understanding, implementing, interpreting and applying customary law: authorities (clan, chiefdom) and customary institutions (customary councils, Customary Senate), New Caledonia (Directorate General for the Regulation of Customary Affairs, customary public officials, customary registry of births, marriages and deaths), the French government (customary hearings and courts, Rural and Land Development Agency). This sometimes gives rise to legal contradictions or oppositions. Traditional oral custom as practised by clans and families is not written custom as defined by the Kanak People's Charter, by customary laws and as interpreted by customary councils (1). Nor is it custom as interpreted by the customary courts responsible for applying it (2). Even less is it custom as construed by regulative written sources issued by New Caledonia's deliberative authorities, Congress and Provincial Assemblies (3).

A. Customary sources

Custom is first and foremost an oral tradition (a), even though there is now a move towards writing it down (b).

1. Kanak oral custom

Custom is integral to customary society itself. Several definitions have been put forward. The Kanak People's Charter defines it *through* the concept of "Parole" (the Word as a sacred concept) (Article 36): "The power of orality in custom stems from the constant and repeated pronouncement of customary speeches at ceremonies, as well as tales, lullabies, "Aé, Aé" songs and dances. Orality plays an important role in customary rituals, which perpetually shape ways of thinking and practices from generation to generation". The Customary Council of the Territory of New Caledonia (forerunner to the current Customary Senate) defined it as "rules of social organization, of mythical origin, of various purposes, passed from father to son within a clan".² According to the Customary Senate, "custom means customary practices (principles, procedure, and terms) whose purpose is to be self-perpetuating and to be constantly reformulated, with the Kanak People's Charter as their foundation".³ Finally, in the words of J.-M. Tjibaou: "Custom is less an interpersonal relationship than a relationship between groups, communities. [...] Custom, for us, is the gesture which, at every moment, at every meeting, brings this relationship to mind. [...] For us, the generic term "custom" really means the law, the way we live, all of the institutions which govern us".⁴

These are broad definitions and, wherever Organic Law No. 99-209 of 19 March 1999 gives legal effect or makes reference to custom, the successive terms used are "custom"⁵, "customs", "practices recognized by custom", or "customary practices".⁵

² Customary Council of the Territory of New Caledonia, "Les règles coutumières en Nouvelle-Calédonie", in P. de Deckker (ed.), 1995, *Coutume autochtone en évolution du droit dans le Pacifique sud*, publ. L'Harmattan, p. 80.

³ "Exposé sur la philosophie juridique de l'approche du Sénat coutumier", address given by the Customary Senate before the Plenary Committee of the Congress of New Caledonia, 12 October 2015, unpublished.

⁴ "Jean-Marie Tjibaou, une parole qui voyage", *MWA VÊÊ - Revue culturelle kanak*, ADCK, no. 64, June 2009, p. 6.

⁵ Art. 18. - Art. 7 & 189 II - Art. 137 - Art. 46 al. 2.

These definitions testify to a reality: in addition to its oral nature, its diversity, the fact that it is part of the customary communities themselves, Kanak custom has a much greater compass than that given it by the Organic Law. Custom is a whole, whereas the Organic Law limits its legal status to “civil law” (taken as deriving from common law) aspects of custom.

Kanak custom cannot be reduced to the meaning accorded to custom by the general theory of sources of law. It cannot be defined as a single protracted practice which has acquired binding power in the minds of the community or in the territory where it is rooted, the legal status of which would be an inherent component. Kanak custom is something else. While it may share with legal practice the fact of being a usage repeated over time by a community or in a territory, not only can it not be reduced to this aspect alone, but neither does it need to be granted legal status to qualify as custom. From this viewpoint, Kanak custom is not always law, but it is also law.

2. Written representations of custom

A written approach to traditional custom has been developing over the last few years and takes two forms.

The first is the Customary Public Act, provided for in the Country Law of 15 January 2007, drafted by the customary public officials as from 1st September 2008. The Customary Act is defined by law as a “contractual juridical act characterized by a concurrence of interdependent wills which determine the elements and effects thereof. It may be individual or collective in scope” (art. 3 para. 1). It transcribes the customary decision adopted following a customary debate, defined as a “discussion organized in accordance with the practices of Kanak custom” (art. 1), under the authority of the clan chief, the chief of the tribe or the great chief or, failing that, the president of the council of clan chiefs (art. 2). Recourse to the Customary Act is optional or rendered compulsory by law⁶ or by the judge pursuant to the customary prerequisite⁷. Over ten thousand acts have been drafted, dealing with matters ranging from entirely anecdotal and everyday to highly significant in terms of customary and/or economic issues. They go to the very heart of Kanak identity, covering the whole gamut of individual or family, clan and customary land issues. The decisions and exchanges of words recorded in the Customary Act can provide a revelation of custom as it is lived and experienced. However, reference to the reasons behind the decision recorded in the Customary Act is not required under penalty of nullity⁸. Consequently, customary acts often disclose only the decision taken without disclosing the substance of the custom underpinning such decision. This absence of rationale for the decision may appear surprising but springs from the oral nature of custom: spoken by customary sages, custom is not to be made known to outsiders. It can then remain secret. Custom is, above all, spoken, it requires no explanation or justification. The customary solution is an expression of a given. Nevertheless, although the reasons (for a decision) can be transcribed or obtained through an appeal for interpretation of the act brought before

⁶ This is true, for example, in the case of the Country Law of 2018 relating to customary inheritance.

⁷ Thus, legal proceedings to dissolve a customary marriage are admissible only if there is a Customary Act stating that the clans agree, disagree or refuse to meet. The issue is one of an absolute bar to proceedings: CA Noumea, 30 October 2014, RG no. 2013/225.

⁸ Art. 7 & 8 of the Country Law of 15 January 2007.

the Customary Council of the area concerned, it remains clear that rendering compulsory a statement of the rationale would pave the way to better knowledge and understanding of custom and, as a result, would facilitate its integration. This is indeed the aim of a reform of the Country Law proposed by the Customary Senate⁹.

The second representation of written custom is more direct and fundamental and involves setting down customs, more or less accurately, in written form. The principal document is the Kanak People's Charter, proclaimed on 26 April 2014 by the Kanak People's Assembly (comprising the eight customary areas) under the aegis of the Customary Senate¹⁰. The Charter, which has no legal force as such, lays out a common set of Kanak values and principles, a "foundation" for the diverse customs followed and performed by clans and in customary areas. The Charter sets out a series of values in the form of articles which reveal shared customary principles on a wide range of issues fundamental to clan and family identity, relationships, and customary words and gestures. The values set out are sometimes very precise, almost tangible. Although the Charter itself has no legal regulatory value, it does possess an undeniable moral value, and customary courts have no qualms about using it as a potentially authoritative guide to the interpretation of customary rules¹¹.

Should we go further and codify custom or customs? Although the issue of committing customs to written form has long been debated, even within customary institutions, and although attempts have been made, there is no doubt that any such move to create a written version of customs would be inappropriate. It would be so for several reasons to do with when the writing is done, who does it, the method used and the nature of the custom, given that it will necessarily be rewritten and not simply transcribed, and that customs will disappear; and to do with the consequences of writing customs down. This will inevitably spell the end of the customary courts and thereafter the end of traditional custom insofar as it possesses legal force¹². Nonetheless, written rules do exist but they are no longer customary.

B. Regulatory sources

Article 99, 5° of Law no. 99-209 provides that Congress may pass Country Laws relating to "customary personal status, customary land tenure and customary debates". Only three such Country Laws have been adopted: one in 2007 on customary laws, two in 2018 on customary inheritance and on leave (from work) to carry out customary responsibilities. However, these are not standards for substantive customary law. Country Laws cannot intervene in the customary sphere to say what custom is. Rather, this is a question of "customary law", namely a set of rules relating to power and distribution, like so-called "secondary" rules in general law theory, which do not provide a structural response to a given problem but are designed to determine in which cases custom should apply or the customary practices taken into account, and the conditions ruling such taking into account. This is true, for example, of the Country

9 Resolution no. 07-2015/SC of 30 June 2015 proposing a Country Law amending the Country Law no. 2006-15 of 15 January 2007, JONG of 4 August 2015, p. 6831.

10 Resolution no. 06-2014/SC of 15 July 2014, JONG of 5 August 2014, p. 6815 ff.

11 D. Rodriguez, "Juger en Kanaky", in *La coutume kanak dans le pluralisme juridique calédonien*, op. cit., p. 331 ff.

12 É. Cornut, "La non-codification de la coutume kanak", in C. David & N. Meyer (ed.), *L'intégration de la coutume dans l'élaboration de la norme environnementale*, publ. Bruylant, 2012, p. 137 ff.

Law relating to customary acts, which merely defines the extent to which the customary decision resulting from a customary debate would give rise to guaranteed and enforceable rights. Similarly, the Country Law on customary inheritance does not establish who the heirs are, nor does it determine their respective shares in the inheritance. It merely provides a framework, a procedure and a timeframe for the settlement of customary inheritance issues, and sets up the customary act of inheritance as an indispensable factor in such settlement. The same is true of resolutions taken by the Provincial Assemblies, like the three provincial environmental codes which include provisions designed to take custom into account but having no power to transform it.

C. Sources of judicial precedent

The civil customary courts, responsible for the application of custom, add a litigation and legal process-based dimension thereto. This “judicial custom”¹³, now both widely accessible¹⁴ and consistent, reveals a structured “customary law” providing a legal picture of Kanak custom even if, seen in the light of legal disputes, the picture is somewhat distorted. There follows an overview of these courts (a) and the way in which this source of judicial precedent for custom is being shaped (b).

1. Customary courts

Article 19 paragraph 1 of Law no. 99-209 provides that “the civil court of common law shall have sole jurisdiction for the hearing of disputes and claims relating to customary civil status or customary lands. The court is then supplemented by customary assessors under the conditions laid down by law”. When all the conditions of Article 7 of this Law are met, i.e. the parties have Kanak customary status and the matter is covered by civil law, custom and not civil law applies in regulating the legal relationship in question. Customary assessors assist the professional judge in the precise disclosure and interpretation of such custom, the application of which is mandatory.

Customary assessors were introduced by Order no. 82-877 of 15 October 1982 but were not really set in place until 1990, following the establishment of detached branches of the Noumea District Court, in Koné and Wé, right in the heart of Kanak majority areas. Custom had long been relegated to the sidelines of New Caledonia’s legal system. The judges refused to give rulings, declaring they had no jurisdiction where all parties possessed special status and referring such parties to the customary authorities. The Court of Cassation twice acted to resolve the issue and to remind judges of the obligation to bring in customary assessors¹⁵. Article 19 of Law no. 99-209 now sets out this obligation as possessing exclusive jurisdiction. The implementation thereof is provided for in Articles L. 562-19 to L. 562-24 of the Code de l’organisation judiciaire (Judicial system code – COJ).

13 R. Lafargue, *La coutume face à son destin. Réflexions sur la coutume judiciaire en Nouvelle-Calédonie et la résilience des ordres juridiques infra-étatiques*, LGDJ, 2010.

14 Thanks to the “Droit coutumier en Nouvelle-Calédonie” website, hosted by the University of New Caledonia: <http://coutumier.univ-nc.nc/>

15 Cass. civ. 2nd, 6 February 1991, Bull. civ. II, no. 44; Cass. civ. 1st, 13 October 1992, Bull. civ. I, no. 248.

Customary assessors are citizens having customary status, aged at least 25 and possessed of guarantees of competence and impartiality; they are proposed by the customary areas and appointed by the General Assembly of the Court of Appeal for a period of two years (renewable) and are entitled to vote in the same way as the professional magistrate. Before taking office, they are sworn in on the same terms as magistrates. Assessors are selected, in even numbers, to take part in the composition of the court to ensure representation of the customary area of each of the parties. A customary court composition can sit in all district and appeal civil courts but only in these courts (not in commercial, social, criminal or administrative courts), and only in district and appeal civil courts located within the territory of New Caledonia (not in such courts located in France or the other French Overseas territories or departments), even if a legal relationship directly or indirectly involving custom is brought before such courts¹⁶.

However, the parties may waive their right to have customary assessors present and request the court to rule in common law composition; this only applies to proceedings in district courts¹⁷. Since 2013, for the purpose of re-establishing the unity of criminal and civil proceedings as regards civil issues, Article 19 paragraph 2 of Law no. 99-209 authorizes criminal courts to rule on civil issues when all parties have customary status, provided that no party objects to this. In both cases, the common law court must nevertheless act in application of custom, as the Constitutional Council has rightly pointed out¹⁸.

2. A dialogue between judges and customary representatives, between law and custom

This associating of a professional magistrate trained in French law with customary assessors paints a picture of a “bi-cultural court system” paving the way for a “process establishing customary law, resulting from a dialogue undertaken within an inter-ethnic court system”¹⁹. This, actually many-sided, dialogue also stems from a flexible procedure. Given that custom is oral, that it is mastered neither by the parties nor by their legal advisors, it is when a ruling must be reached that the customary assessors will reveal to the judge which customary rule should be applied. To resolve this problem, a specific two-step judicial procedure has been developed.

The first phase is about throwing light on and explaining the applicable rule. The customary assessors indicate the custom applicable to the case submitted to the judge, the customary procedure to be complied with (such as organizing a debate, obtaining the advice of the clan or such and such a customary authority). The judge renders an interlocutory decision designed to clarify, in terms of form and substance, the gist of the customary principles which will govern the case brought before him/her. The second phase is classic: like the public prosecutor, each party can put forward his/her arguments in fact and law when the matters of the case are set against custom. This phase leads to a final judgement on the merits. Other arrangements also contribute to this dialogue, such as the customary parenthesis or the presence of more than two customary assessors (not disallowed by law).

16 For example, the administrative court has jurisdiction for all litigation relating to the appointment of customary authorities.

17 Art. L. 562-24 of the COJ. (Legal Organizational Code)

18 Cons. Constit., 14 November 2013 no. 2013-678 DC (consid. no. 37).

19 R. Lafargue, *La « voie » néo-calédonienne pour sortir de « l'enchevêtrement normatif » : jeu d'ombres et de lumière sur la Coutume*, in *Mondes océaniques, Études en l'honneur de P. de Deckker, L'Harmattan, 2010*, p. 57 ff., esp. p. 66.

These procedural arrangements enable a dialogue between several spheres: judge/assessors; civil law/custom; custom/custom; court system/customary authorities. Their impact in legitimizing customary courts both vis-à-vis people seeking justice – therefore more inclined to take issues to the court rather than the customary chief – and the customary authorities themselves – more willing to work in tandem with the court – thereby establishing a justice system which fosters social bonding, gives them even more significance. “Inherent in this concept of justice is the idea not of something external and imposed upon the parties, but a therapy wished for and accepted by them. It is less a question of who is right or wrong, by virtue of higher rule, but rather a question of “putting things back together” and bringing concordance, less for the parties themselves than for their home environment which should be spared injury by their squabbles”.²⁰ Operating in this way, the customary court is a vector for social harmony and cohesion, in the same sense as the founding basis of customary society: exchanges and the maintaining or consolidation of customary ties and, when such ties are broken, a means of seeking customary forgiveness. Finally, such dialogues encourage the emergence of a customary legal system which, while no longer quite being custom as such, is directly inspired by custom, albeit necessarily transformed by and through the lens of litigation and the take a court has on this oral tradition.

II. THE LEGAL SCOPE OF KANAK CUSTOM

Unlike French law, which on principle applies to the whole territory and to the whole New Caledonian population, Kanak custom, with the status of a specific rule or standard, has a necessarily more limited scope. Several articles of Organic Law No. 99-209 define the legal status of custom. Article 7 sets out the general framework for its scope of application. According to this article, “persons whose personal status, within the meaning of Article 75 of the Constitution, is the Kanak customary civil status as defined by this Law shall be governed, in civil law matters, by their customs”. Regarding customary lands, Article 18, paragraph 1 provides that “customary lands and property thereon belonging to persons with customary civil status shall be governed by custom”. Based on these articles, it is evident that Kanak custom applies only to persons having “customary civil status” and to customary lands. Three criteria are set out: a personal criterion based on the fact of having customary civil status (1); a spatial criterion delineating customary lands (2); and a material criterion defining the issues subject to custom (3).

A. Personal scope

According to Article 7 of Law no. 99-209, custom applies to persons having “Kanak customary civil status”. Firstly, such persons should be clearly identified (a) and, secondly, the legal relationship between persons having different personal statuses should be made plain (b).

1. Kanak personal customary status

Personal status as set out by Article 75 of the Constitution, by the Noumea Accord and by the Organic Law, only concerns natural persons. However, the issue of legal persons also arises.

20 R. Lafargue, *La coutume face à son destin*, *op. cit.*, p. 319.

Natural persons – While custom has its origin in the existence and recognition of the Kanak people within the French Republic, of an “overseas population” (Constit., art. 72-3 para. 1), the criterion used is not based on ethnicity: custom does not apply to a person belonging to the Kanak community because he or she is a member of that community, it applies to a person having “Kanak customary civil status”. The reasoning behind this is the difficulty of defining the scope of a criterion based on ethnicity: apart from posing the potential risk of differentiation within New Caledonian society by setting up separate communities, there is also the issue of the rightful place of people of mixed-heritage. This specific personal status, established by article 75 of the Constitution, does not concern only New Caledonia but also Wallis and Futuna and Mayotte. It is a constant of colonial law, providing for a legal distinction between settlers and indigenous peoples, with a view to ensuring that each community is governed by its own set of laws.

The civil status of a person who is, by definition, French should therefore be determined. This is relatively easy as regards Kanak customary status, the conditions for granting and acceding to such status being precisely defined by Law no. 99-209 in articles 10 to 16 thereof. Proof of status should be provided by a customary civil status record (art. 8). The Organic Law lays down the principle that a person has customary status if both his or her parents have such status (art. 10), thereby attributing civil law status to children born to a mixed-ethnicity couple. Notwithstanding Article 75 of the Constitution which unilaterally permits a person to renounce specific personal status to take on common law status, irrevocably and with no possibility of reversing the decision, Law no. 99-209, in Articles 12 and 13 thereof, provides for several cases in which personal status may be changed by acceding, after birth, to customary status. However, the conditions include provisos, including the stipulation that the person concerned must be related to at least one person having customary status and meet conditions in terms of age and being part of a customary community. Overriding these restrictions laid down by law, an action to establish claim to customary status has nevertheless been instituted on the basis of case law, under Article 15 of Law no. 99-209, on the sole criterion of possessing customary identity, i.e. Kanak identity personally vouched for by the person concerned and collectively acknowledged by the clan by naming such person²¹. Acceding to customary status is possible provided that the person making the request “possesses a customary identity” which “is inferred from a single key fact, which in fact encompasses and summarizes all others: the fact of belonging to a clan, which infers clan ancestry, and above all an identity reflecting a social reality”²². This action could, if admitted by custom, allow a non-Kanak person, i.e. someone without any Kanak ancestry, to accede to customary status. For example, acceding to customary status by marriage could become possible.

Legal entities – two entities are concerned here: clans and Local Private Law Groups (Groupements de Droit Particulier Local - GDPL).

Clans represent the traditional customary authority, recognized as such by the Kanak People’s Charter and judicial custom. A clan “encompasses all lineages claiming a common ancestor

21 Cass. civ. 1st, 26 June 2013, no. 12-30.154: JCP G. 2013, 986, note É. Cornut; JDI 2014, comm. 8, note S. Sana-Chaillé de Néré.

22 CA Noumea, 19 April 2012, RG no. 11/384: *RJPENC* 2012/2, no. 20, p. 80, 2nd esp., obs. É. Cornut.

spirit” (Charter, art. 28), under the authority of a clan chief (chief). New Caledonia is believed to have about 2,400 clans. Although Kanak clans are central to every customary decision, existing legislation does not recognize them as having a legal personality. Legal recognition of the clan – the mainstay of customary society – has long been a subject of dispute but, in recent years, decisive progress was made when the Noumea Court recognized that the clan has a legal personality, and therefore full legal capacity.²³ Recognizing the legal personality of a customary authority that had no such legal personality under the law represents a form of recognition of indigenous society. Such personality establishes entitlement to ancestral land rights. It also means, for example, that a customary authority can bring court proceedings to seek damages in pursuance of custom, invoking specific harm to community values²⁴. Going further in the recognition of Kanak identity, a clan could, in the same way as a Local Private Law Group (GDPL), be deemed to be a legal person of customary status within the meaning of Article 7 of Law no. 99-209, even though it cannot be equated with the “citizen” provided for by such Article. As a result of such recognition, a clan would be legally governed by custom in civil matters regarding relationships with another clan, a Local Private Law Group or a natural person having customary status.

A Local Private Law Group – GDPL, established by Order no. 82-880 of 15 October 1982, now repealed, is a legal entity whose legal personality is recognized by Article 95 of Law no. 88-1028 of 9 November 1988, which remains in force²⁵. Many and diverse GDPLs exist, set up by one or more clans with the aim of developing economic activities, possibly on customary land. GDPLs were originally intended to compensate for the fact that clans could claim no legal personality. Although clans have now acquired a legal personality, GDPLs continue to be useful, in the same way as a company, in building an asset base specific to the activity concerned. However, there is a lack of regulations covering GDPLs. For a long time, GDPLs were only seen as private legal entities, accorded no customary personality since under Article 75 of the Constitution, “customary civil status applies only to natural persons and a group, even of a customary nature, cannot lay claim to it”²⁶. Notwithstanding, GDPLs are made up of customary representatives, individuals with customary status linked by family ties within a clan, tribe or several clans. The purpose of a GDPL is to provide a way to acquire ownership of customary land in order to develop an economic project on such land. Based on this, the Noumea Court of Appeal recognized that a GDPL possesses all the attributes of a customary legal personality and that “is therefore answerable to the common law which subjects persons having Kanak customary status to customary law in cases of legal dispute with other persons having Kanak customary status”.²⁷ Over and above the internal functioning of a GDPL, it follows that legal relations established by a GDPL fall within the purview of custom and customary courts in the same way as legal relations between natural persons.

23 CA Noumea, 22 August 2011, RG no. 10/531 & no. 10/532.

24 CA Noumea, 26 March 2015, RG no. 14/24. On this issue, see É. Cornut, “Un contentieux coutumier émergent : les intérêts civils », in *La coutume dans le pluralisme juridique calédonien, op. cit.*, p. 144 ff., esp. p. 178 ff.

25 Art. 233, 5° of the Organic Law of 19 March 1999.

26 CA Noumea, 21 May 2008, Order no. 07/476.

27 CA Noumea, 13 August 2012, RG no. 12/242.

2. Internal conflicts, mixed relationships

While custom applies to disputes between parties having customary status, what happens if the parties do not have the same personal status? Article 9 of Law no. 99-209 resolves such mixed legal relationships by according jurisdiction to civil law rather than customary law. As a result, to cite an example, conditions and outcomes such as the dissolution of a marriage between a person having customary status and another having civil status, are governed by civil law and not by customary law. The same applies to marriages between two persons with different special statuses (between a Kanak and someone from Wallis and Futuna), unless, in this instance, the individuals concerned “expressly provide otherwise” (Art. 9 para. 2), which is unlikely. Similarly, civil law, not customary law, will apply in matters of civil liability, and a common law court will have sole jurisdiction in cases where one of the parties – offender or victim – does not have customary status.

The thinking behind existing legislation in this area is one of assimilation, deriving from historic colonial law, according ascendancy to civil status on the one hand, and to civil law on the other. Similarly influenced legislation is also in force in Mayotte and Wallis and Futuna. In any event, such rules “do not constitute a real solution to the interpersonal conflict of laws, but seem instead to shy away from any attempt at resolving it”.²⁸ They comply neither with the Noumea Accord, which acknowledges equality between common and customary personal status, nor with the legal force of Kanak custom. Customary courts sometimes attempt to curtail the effect of such rules by a division of the dispute before the court. Where the civil liability of a person with customary status vis-à-vis a victim with the same status is at issue in legal proceedings, and where a victim support association subject to civil law has joined the proceedings as a plaintiff, there is a possibility of separating judgement of the case between the parties of customary status – subject to a customary court and custom – from the case between the offender with customary status and the plaintiff with civil status – subject to a common law court and civil law – without breaching Article 9 of Law no. 99-209, provided that the dispute is by nature divisible.²⁹

This process is based on a distributive application of rules, respectful of the nature of the legal relationship concerned, the identity of the parties and their personal status. It is the primary procedure used in private international law which should be that adopted in any development of the rules governing internal conflicts of legal standards. Such development, made necessary by the increase in transfers of legislative powers, must be rooted in a more distributive rationale, based on the equality of identities, and on the personal statuses and rights which are the expression of such identities.³⁰ Though this equality cannot be advanced as dogma insofar as, firstly, written law is intended to set the legal principle and, secondly, custom in particular cannot, for reasons relating to its very nature and its rules, always apply to people who might not be Kanak; it remains nevertheless true that “this application of civil law must be held as an exception and not a principle. Aspects inherent in custom itself – and

28 V. Parisot, *Les conflits internes de lois*, IRJS, 2013, no. 747.

29 CA Noumea, 18 June 2013, RG no. 13/38, appeal dismissed by the Court of Cassation (criminal division), 3 September 2014, no. 13-85031. Regarding this issue, see É. Cornut, “Un contentieux coutumier émergent : les intérêts civils”, see above, p. 154 ff.

30 On these issues, see É. Cornut, “Intégration directe ou indirecte de la coutume dans le corpus normatif de la Nouvelle-Calédonie”, in *La coutume kanak dans le pluralisme juridique calédonien*, op. cit., p. 536 and refs. cited.

not any congenital inferiority – are the factors which prevent custom from being designated as an applicable legal standard.”³¹

B. Customary territories

Custom holds sway not only over persons having customary status but also over customary lands (a). Although custom logically extends over the territory of New Caledonia and over persons within that territory who have customary status, the applicability of custom does not depend on such persons being present in New Caledonia, raising the issue of the legal status of custom beyond the borders of New Caledonia (b).

1. Customary territories in New Caledonia

Representing over 27% New Caledonia’s surface area, i.e. around 500,000 hectares, customary lands are “made up of reservations, lands allocated to Local Private Law Groups, and lands which were or are allocated by territorial authorities or public land agencies, in response to demands made under and by virtue of ties to the land.” (Art. 18 of Law no. 99-209). First and foremost, customary lands are based on geographical demarcation. This concerns lands established as reservations during the colonial period (including all of the Loyalty Islands, Bélep and the Isle of Pines), and then in 1970 and 1978, extensions of reservation lands³². These lands represent an area of around 395,000 hectares, i.e. 77.2% of customary lands. Private or public land may also become customary land, depending on the competency of the allottee thereof. Since the Rural and Land Development Agency (Agence de développement rural et d’aménagement foncier – ADRAF) was set up in 1988, and in line with the Noumea Accord, customary land has gradually expanded as a result of lands being allocated, through ADRAF and its “land stocks”, to clans asserting “ties to the land” or to clan or inter-clan GDPLs as part of economic development projects. Approximately 100,000 hectares of land have already been allocated in this way.

Customary lands are subject to a special legal regime set out in Article 18, paragraph 2, of Law no. 99-209: they are “inalienable, non-negotiable, non-transferable and unseizable” (*inaliénables, incessibles, incommutables et insaisissables*). This “4 i” rule ensures that customary land is “res extra commercium”: such lands cannot be sold, gifted, or transferred by inheritance. This status, envisaged during the colonial era as a way of depriving Kanak of their rights to the reservations of which they were the “owners”, now appears as a route towards conserving these lands. While this status is sometimes perceived as obstructing economic development (for example, by preventing a mortgage from being taken out on customary land as surety against a loan), in fact the opposite is true: a lot of projects are being set in train on such land with the help of appropriate legal instruments like long-term leases and *ad hoc* guarantee funds.

31 V. Parisot, S. Sana-Chaillé de Néré, “La méthode conflictuelle, une méthode de résolution du conflit de normes adaptée à l’intégration de la coutume dans le corpus juridique calédonien”, in *La coutume kanak dans le pluralisme juridique calédonien*, *op. cit.*, p. 484.

32 Documents and maps relating to customary lands can be consulted on the website of the Agence de développement rural et d’aménagement foncier (Rural and Land Development Agency): www.adraf.nc

This is why the term “customary property” used by Law no. 99-209 does not adequately describe the ties between rights holders and customary lands. It would be more fitting to speak of a “guardian” and a trust relationship: the clan, as true holder of customary land rights, is not the owner of the land as defined by civil property law. It is the guardian of a place of memory, of a human, social, cultural and intangible heritage, which it holds on behalf of the ancestors and which it must preserve in order to pass these tangible and intangible riches on to future generations. The tie to the land may not be an “actual” right but it reflects a personal and interpersonal tie between a natural space (not necessarily on the surface, see below), the location of the clan’s ancestral “mound”, the place where ties are formed within the clan and with other clans. As Régis Lafargue writes: “according to Kanak custom, the “tie-to-the-land” invoked by the clans determines clan organization, family relationships, and the status of people, including children’s status. Custom thus charts a triangular land/clans/individuals relationship within which a man is “invested” with an identity, then a status and a social role linked to this Land – he identifies with the land rather than owning it.”³³ This is the concept of ownership found throughout Oceania: “the Oceanian concept of ownership does not derive, in principle, from possession – something which legitimizes nothing since it only recognizes ownership of tangible property – but from an identity-conferring “relationship”. In Oceania, talking about individual or family identity is tantamount to talking about the Land. He who has no land has neither ancestor nor totem. He knows neither from whence he comes nor who he is. He is no-one”.³⁴

This also explains why customary land, in the customary sense of the term, is not confined to land masses. While the legal definition of customary lands is that set out in Article 6 of Law no. 99-209 which designates this (emerged) land mass, in customary eyes, customary lands also stretch into the sea and the submerged areas of the territory, extending customary lands actually on dry land. From a customary viewpoint, the “customary sphere of influence” stretches further than that defined by the Organic Law and New Caledonia’s written rules and regulations³⁵. Importantly, this concept provides the basis for tie-to-the-land claims made by the coastal clans, who deem marine areas to be dry land covered by water. More generally, this concept of customary land, which goes beyond the more limited one given by Law no. 99-209, raises the issue of the preservation of Kanak land rights over their ancestral lands, and thus their claim to such lands.³⁶

2. Customary territories outside New Caledonia

While custom applies in civil matters throughout the territory of New Caledonia to persons with customary status, conversely it is unlikely that customary law would be applied by

33 R. Lafargue, “La « terre-personne » en Océanie : Le Droit de la Terre analysé comme un droit moral et un devoir fiduciaire sur un patrimoine transgénérationnel”, in S. Vanuxem & C. Guibet Lafaye (ed.), *Repenser la propriété, un essai de politique écologique*, PUAM, 2015, p. 23.

34 *Ibid.* p. 23. Adde on the concept of “property” in Oceania: S. Farran & D. Paterson (ed.), *South Pacific Land Systems*, USP Press, 2013.

35 Kanak People’s Charter, pt. 81 and pt. 101.

36 On the issue under discussion, see R. Lafargue, “Terres de mémoires : Les Terres coutumières, une question d’identité et d’obligations fiduciaires”, in *La coutume kanak dans le pluralisme juridique calédonien*, *op. cit.*, p. 104 ff.; G. Otis, “On a oublié les promesses premières”: les droits des kanak sur la terre ancestrale: *Revue de la Recherche Juridique*, no. 2018-3, p. 1352 ff.; A. Leca, “Souviens-toi d’oublier”. Reply to a recent article by Prof. G. Otis on the theory of the Kanak “ancestral right” outside customary lands in New Caledonia: *Revue de la Recherche Juridique*, no. 2019-2, p. 497 ff.; G. Murphy, M. Chauchat, É. Cornut, P. Godin, *La délimitation des territoires des tribus kanak*, report for the Customary Senate, August 2019.

a French court outside New Caledonia if a civil law dispute concerning two Kanak with customary status was brought before such court. Nevertheless, customary law should be applied by that court. There is in fact a direct link between the Kanak customary legal system outside New Caledonia and the personal or territorial nature of the statuses as set out in article 75 of the Constitution. Although there is an undeniable link between the special status and the territory from which the special status-holding community springs, no legal text makes the residence of an individual in that territory a condition for the application of customary law to that individual. From this point of view, while there is an undeniable link between special personal status and territory, this is only a link based on origin: the special personal status is recognized because this territory is home to a group of people the survival of whose ancestral social and cultural identity is acknowledged and accepted by the French government. Insofar as the recognition of customary status is enshrined in Article 75 of the Constitution, the nature of such status is personal and not solely territorial. Like common law personal status, it is universal in intent: this status follows an individual wherever he or she travels, at the very least when he or she is in a part of the territory of the State which recognizes that status.

This is what is provided for in Article 9 paragraph 2 of Law no. 99-209 when it authorizes parties with different special personal statuses to bring their legal relationship before a law other than civil law. This other law can only be a customary law, in particular Kanak or Wallisian-Futunan, the latter being therefore directly recognized as applicable in New Caledonia, i.e. beyond its natural territorial limits. Consequently, Kanak with customary status retain this status in all French territories, mainland France as well as all Overseas territories and therefore remain subject everywhere to custom in civil law matters³⁷. The identity underlying the holding of customary personal status transcends the boundaries of the place from which it sprang.

Be that as it may, a judge sitting in a French court outside New Caledonia has no customary assessors to assist in the application of Kanak custom. The judge cannot give a ruling before a customary court composition, since there is no provision for this type of court hearing outside New Caledonia. Nonetheless, as a full-fledged rule, custom is automatically applicable; like any judge in New Caledonia, the judge must elicit the content thereof and may have no secondary or additional recourse to civil law. One solution would be to raise a “question for preliminary customary ruling”.³⁸ Customary courts have exclusive jurisdiction, both by attribution and territorially, to rule on civil law disputes concerning persons having customary status (Art. 19 para. 1 of Law no. 99- 209). In such instances, French judges would be empowered to decide whether the case before the court is or is not a customary matter. Such competency in no way implies implementation of substantive law, simply the recognition that all parties have customary status and that the case concerned is one of civil law. The role of a customary court would be to rule, as rapidly as possible, on the substance of the matter through the application of customary rules, and to communicate such ruling to the French court directly from court registry to court registry. The French court would then

37 On this issue as a whole, see esp. É. Cornut, “Le conflit de normes internes en Nouvelle-Calédonie – Perspectives et enjeux du pluralisme juridique calédonien ouverts par le transfert de la compétence normative du droit civil”, *JDI* 2014, doctr. 3, p. 51 ff.; C. Bidaud, “Le statut coutumier kanak au-delà du territoire de la Nouvelle-Calédonie”, in G. Giraudeau (ed.), 2021, *Les enjeux territoriaux du pacifique*, Presses Universitaires de la Nouvelle-Calédonie, PUNC.

38 É. Cornut, prev. art. no. 93 ff.

be bound by the customary ruling and precluded from dismissing it, unless there is just cause for throwing out application of such customary ruling outside New Caledonia.

C. Scope of disciplinary action

Article 7 of Law no. 99-299 provides that custom governs legal relationships between persons of customary status “in civil matters” (a). While customary law encompasses all civil law, it does not, in theory, apply to issues which are not covered by civil law (b).

1. The application of customary rules to the entire body of civil law

Customary jurisdiction to rule on civil law matters is now accepted and well established. Despite long being a subject of dispute and restricted to personal and family law, the Court of Cassation intervened to state that it “is set out in Article 7 of Organic Law No. 99-209 of 19 March 1999 that persons having Kanak customary civil status are governed, *as regards the entire body of civil law*, by their customs”.³⁹ Despite a few years of resistance regarding the issue of civil interests, an issue now resolved, the jurisdiction of Kanak custom no longer appears open to dispute. Both the Court of Cassation and the Constitutional Council oversee compliance with the scope of customary applicability.⁴⁰ In fact, rulings given by customary courts cover the entire field of civil law, both typical legal proceedings concerning family issues (marriage and dissolution of marriage, kinship/lineage, parental authority, maintenance obligations) and customary property, and more recent litigation cases regarding civil interests.⁴¹ Such rulings show that custom offers solutions which, while being at times out of step with those of civil law, are both inherently consistent and consistent with other customary sources, particularly the Kanak People’s Charter. Two examples amongst others may be cited.

Marriage between individuals having customary status, and the conditions and effects thereof, falls within the scope of civil matters and is governed by custom. Similarly, the dissolution of marriages also falls within the scope of civil matters, as regards both the causes and conditions thereof, and also all related consequences and procedural terms and conditions. The clans who contracted the marriage have sole jurisdiction to dissolve it and determine the consequences thereof, as pertaining to the clans, the spouses and any children born of the union. Dissolution of the marriage is removed from the legal realm, and requires only to be recorded in a customary act by a customary public official and then to be declared to the customary registrar. Nevertheless, neither opposition by the clans to dissolving the interpersonal relationship, nor the indissoluble nature of the inter-clan relationship, prevents one or both spouses from appealing to the judge to rule on the application to dissolve the marriage.⁴²

Secondly, the issue of civil interests bears witness to efficient interaction between civil law and customary rules. Although research and recommendations concluded that it was

39 Notice of 16 December 2005, BICC, no. 637 of 1st April 2006.

40 For example, see. Cons. Constit., 14 November 2013 no. 2013-678 DC (consid. no. 37).

41 On all of these issues, see R. Lafargue, *La coutume face à son destin*, *op. cit.*; É. Cornut, P. Deumier (ed.), *La coutume kanak dans le pluralisme juridique calédonien*, *op. cit.*, first part of the work; A. Leca, *Précis de droit civil coutumier kanak*, 4th ed., PUAM-PUNC, 2020.

42 Regarding the issue as a whole, see É. Cornut, “La dissolution du mariage coutumier kanak”, in V. Egea (dir.), ed. Mare & Martin, to be published.

difficult for custom to establish principles defining victim status, to determine concepts of offence and injury or to attribute individual compensation, case law, on the contrary, confirms that there has been a gradual development of valid legal provisions on customary liability, very considerably inspired by provisions covering civil liability, but restructured to take into account customary values and customary society. Although customary law recognizes individual reparation under almost the same conditions as civil law, penalizing all types of offence and provide reparation for all types of injury, this does not preclude basing the concepts of victim, offence and reparation on customary values. This approach means that the clan of the direct victim can be considered as an indirect victim possessing all corresponding rights, and that reparation can be awarded for collective injury to customary values. For example, in accordance with custom, a maternal uncle has a vested right to reparation for the loss of his nephew or niece over and above any consideration as to the existence of actual ties of affection; furthermore, the amount of such reparation is assessed as equal to compensation granted to the father and mother of the victim, whereas in civil law the amount of such reparation depends on existing ties of affection and, even if such ties are recognized, the amount is never equivalent to that granted to direct ascendants or descendants.⁴³

2. The influence of customary rules outside of civil law

By providing for customary jurisdiction only over “civil law”, by designating Kanak special personal status as “customary *civil* status”, Article 7 of the Organic Law in principle rules out any customary intervention in other legal matters. Such exclusion covers all non-civil private law. This applies to labour law litigation, the Court of Cassation having ruled that custom possesses no jurisdiction over an otherwise entirely customary relationship between a GDPL employing a person with customary status working on customary land⁴⁴. This also applies to all matters of criminal law, which remain under the primary jurisdiction of the French government (art. 21 II 5° LO 1999), even though New Caledonia has ancillary jurisdiction in this legal sphere. This exclusion of customary intervention is based on the unitary and territorial principles of criminal law, and on the fact that criminal matters are linked to the precept of French sovereignty having responsibility for protecting society and maintaining public order. French criminal law applies to all territories making up the French Republic, including New Caledonia, together with all persons present in such territories and committing offences in such territories. Whatever his/her status, customary or not, the perpetrator of an offence falls under the jurisdiction of France’s national courts and penal system.⁴⁵ It therefore follows, in principle, that custom is not recognized as a legal standard of criminal law empowered to establish an offence, as it is *a priori* not taken into consideration as regards the interpretation of criminal provisions. As a result, the customary authorities have no “jurisdiction to issue and impose sentences or damages, even on persons having customary civil status” and such customary authorities enjoy no judicial or regulatory immunity.⁴⁶

43 É. Cornut, “Un contentieux coutumier émergent : les intérêts civils”, *prev. art.*

44 Court of Cassation (Social Division), 10 February 2010, no. 08-70084, *Bull. civ.*, V, no. 37.

45 Court of Cassation (Criminal Division), 30 October 1995, no. 95-84322, unpublished.

46 Court of Cassation (Criminal Division), 10 October 2000, appeal no. 00-81.959, unpublished. *Adde*, regarding the customary dignitaries and royal families of Wallis and Futuna: TPI Mata’Utu, ch. corr., 25 August 2014, RG no. 2012/80.

But a division of this kind cannot reflect reality, and Kanak custom cannot function if it is restricted solely to civil law matters, nor can other fields of law ignore it entirely. The legal force of Kanak custom needs to be recognized in other spheres of private law because recognition and respect for the Kanak identity cannot be demonstrated by confining it to what French law – from a position outside custom – deems to fall within the category of civil law. Indeed, the basic principles of legal order – notions of open texture or contracts, for example – already allow for custom to be so considered –⁴⁷ in the areas of commercial law, labour law, or even criminal law. The identity of common destiny can, by law, officially open up this restricted legal sphere to custom and customary law.

In the area of labour law, this is what Country Law No. 2018-3 of 28 May 2018 does, in highly rudimentary fashion, by providing for leave (from work) to carry out customary responsibilities, but such provision could go further by designating custom as one of the rules governing an employment contract⁴⁸. In criminal law, which nonetheless concerns public order and requires strict interpretation, customary aspects could be taken into consideration in order, for example, to assess the elements constituting an offence (fault, gravity, causes of non responsibility) in relation to customary status and the customary context in which an offence was committed.⁴⁹ In characterizing a “faute simple d’imprudence” (unintentional failure to observe an obligation of due care or precaution), which implies assessment of an individual’s behaviour, it “is perfectly in keeping with the assessment required to establish such ‘faute’ to take into account the person’s customary status as an element of the context in which he or she committed such offence. Consequently, such behaviour, which might seem harmless and not involving fault from the viewpoint of common law, could be considered particularly serious in the light of customary obligations, and vice versa”.⁵⁰ A topical case would be the attempted murder of an elderly person by a young person, or setting fire to a traditional Kanak hut. Placing such actions in their customary context in order to assess their seriousness leads to a completely different reading of the offence than that arrived at through an analysis based solely on the tenets of common criminal law. The legal system appears, albeit cautiously, to be moving in this direction. The Code de la justice pénale des mineurs (French penal code for juveniles)⁵¹ allows the competent juvenile court to hear evidence, subject to conditions, “from any person representing customary law bodies [...] if their presence in court appears to be of use in reaching an understanding of the juvenile’s circumstances or his/her educational and social care” (art. L. 721-3) or “prior to issuing a reparation order or community service order” (art. L. 721-4). Similarly, approved customary institutions and tribes can now implement community sentences⁵². Taking custom into account in this way in criminal law matters is crucial, but we need to go even further and extend the substantive and even personal scope of customary status and custom. This is what New Caledonia’s legal pluralism is really all about.⁵³

47 É. Cornut, “Intégration directe ou indirecte de la coutume dans le corpus normatif de la Nouvelle-Calédonie”, cited above., p. 495 ff., and p. 517 ff.

48 N. Meyer, “Droit du travail et coutume kanak : vers une imprégnation réciproque”, in *La coutume dans le pluralisme juridique calédonien*, op. cit., p. 245 ff.

49 V. Malabat, “La prise en compte de la coutume kanak en droit pénal”, and É. Duraffour, “Pour que le châtement soit un honneur”, in *La coutume dans le pluralisme juridique calédonien*, op. cit., p. 214 ff., p. 235 ff.

50 V. Malabat, prev. art., p. 229.

51 This code, deriving from Order no. 2019-950 of 11 September 2019, comes into force on 31 March 2021.

52 Art. D. 712-9 of the Penal Code, deriving from Decree no. 2019-1217 of 21 November 2019.

53 Regarding this extension, see É. Cornut, P. Deumier (ed.), *La coutume dans le pluralisme juridique calédonien*, op. cit., particularly the second part and the general report.

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